72 FLRA No. 2

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
EL PASO, TEXAS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL BORDER PATROL COUNCIL
LOCAL 1929
(Union)

0-AR-5187
(70 FLRA 501 (2018))
(71 FLRA 49 (2019))

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DECISION AND ORDER
ON REMAND

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)

I. Statement of the Case

This case is before the Authority on remand from the U.S. Court of Appeals for the District of Columbia Circuit (the Court).[1] In *AFGE, AFL-CIO, Local 1929 v. FLRA*, the Court reversed the Authority's finding that the Arbitrator's award was contrary to law because the change implemented by the Agency did not constitute a change over which the Agency must bargain.[2] Accordingly, the Court remanded the case to the Authority for proceedings consistent with its opinion. After reviewing the record on remand, as it was interpreted by the Court,[3] we are constrained to conclude that the Agency was required to bargain. Accordingly, we uphold the award.

II. Background and Arbitrator's Award

The background is set forth more fully in *U.S. DHS, U.S. CBP, El Paso, Texas* (*El Paso*),[4] and is briefly summarized here.

Border patrol agents inspect individuals' immigration status[5] and vehicles trying to enter the United States. The agents conduct inspections using "primary" and "secondary" inspection areas.[6] The primary purpose of these inspections is to "apprehend illegal aliens and smugglers."[7] Based on discovered deficiencies in primary lane inspections, the Agency issued an inspection memorandum (memo) that directed the agents to perform vehicle inspections in the secondary area when certain criteria were met. The Arbitrator found that the inspection memo constituted a change to a condition of employment that was more than de minimis.[8] Specifically, the Arbitrator found that the inspection memo changed the practice of referring vehicles to secondary inspection because it required agents to refer certain vehicles to the secondary inspection area instead of referrals based solely on agents' suspicions,[9] changed the duties of primary inspection agents,[10] decreased the number of primary area inspections, and increased the duties in the secondary area.[11] Therefore, the Arbitrator found that the Agency violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (Statute) and Article 3 of the parties' collective bargaining agreement when it failed to provide the Union with notice and an opportunity to bargain over the inspection memo.[12]

In *El Paso*, the Authority found that the Arbitrator erred by finding that the Agency had a duty to bargain over the inspection memo because the inspection memo did not constitute a change to a condition of employment.[13] In reaching this conclusion, the Authority emphasized that "'[c]onditions of employment' are . . . 'personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, *affecting working conditions*.'"[14] As such, the Authority held that the inspection memo did not constitute a change

[1] *AFGE, AFL-CIO, Local 1929 v. FLRA*, 961 F.3d 452 (D.C. Cir. 2020) (*Local 1929*).
[2] *Id.* at 461.
[3] We note that the Court was constrained by the record before it – namely the Agency's failure to make the correct arguments and the Authority's failure to clearly articulate the definition of "working conditions."
[4] 70 FLRA 501, 502 (2018) (Member DuBester dissenting).
[5] Award at 24.
[6] *Id.* at 32.
[7] *Id.* at 25.
[8] *Id.* at 36-37.
[9] *Id.* at 32.
[10] *Id.*
[11] *Id.* at 37.
[12] *Id.*
[13] *El Paso*, 70 FLRA at 503-04.
[14] *Id.* at 502 (quoting 5 U.S.C. § 7103(a)(14)).

to a condition of employment because it did not affect working conditions.[15]

The Court affirmed that the Authority may depart from precedent and give a new definition to the term "working conditions."[16] However, the Court held that the Authority's decision, as written, was arbitrary and capricious because the Authority "fail[ed] to explain why these changes do not constitute a change in conditions of employment."[17] Specifically, the Court held that the inspection memo "plainly changed *something*," because it "change[d] how and where certain inspections are performed . . . , which results in different instructions for agents in the primary area, more cars in the secondary area and the potential of increased risk to secondary area agents."[18] Therefore, the Court remanded the case to the Authority.

III. Analysis and Conclusions

a. The award is not based on a nonfact.

The Agency argues that the Arbitrator's finding that the inspection memo led to a more than de minimis change to conditions of employment is based on numerous nonfacts.[19] The Authority has held that disagreement with an arbitrator's evaluation of evidence, including the weight to be accorded such evidence, does not provide a basis for finding that an award is based on a nonfact.[20] The Agency's nonfact exceptions merely constitute disagreement with the Arbitrator's evaluation of the evidence.[21] The Agency argues about the weight and value of evidence but fails to demonstrate that the Arbitrator's conclusions are based on nonfacts. Therefore, the exceptions fail to demonstrate how the Arbitrator's conclusions were based on nonfacts.[22] As such, we deny the Agency's nonfact exceptions.[23]

b. The award is not contrary to law.

The Agency argues that the award is contrary to law[24] because it is inconsistent with Authority precedent on conditions of employment. Specifically, the Agency argues the award is contrary to law because the

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[15] *Id.* at 503-04.
[16] *Local 1929*, 961 F.3d at 457.
[17] *Id.* at 461.
[18] *Id.*
[19] Exceptions Br. at 10-21. To establish that an award is based on a nonfact, the excepting party must establish that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *U.S. DHS, Citizenship & Immigration Servs., Dist. 18*, 71 FLRA 167, 167 (2019) (Member DuBester dissenting on other grounds) (citing *U.S. DOD, Def. Commissary Agency, Randolph Air Force Base, Tex.*, 65 FLRA 310, 311 (2010)).
[20] *AFGE, Local 12*, 70 FLRA 582, 583 (2018) (citing *U.S. Dep't of the Air Force, Whiteman Air Force Base, Mo.*, 68 FLRA 969, 971 (2015)).
[21] Exceptions Br. at 11-13 (arguing that Arbitrator's conclusion that the Agency's evidence regarding the length and number of secondary inspections was subjective was a nonfact); *id.* at 13-14 (arguing that the Arbitrator's conclusion that secondary agents were performing inspections not formerly performed in secondary is a nonfact by citing to witness testimony); *id.* at 14-17 (arguing that the Arbitrator's finding that the inspection memo created confusion and disorder was a nonfact because it relied on the Union's video); *id.* at 17-19 (arguing that the Arbitrator's conclusion that the impact of the inspection memo was indeterminable because neither party presented reliable evidence was based on a nonfact); *id.* at 19 (arguing that the Arbitrator's statement that the Agency should have considered additional staffing was a nonfact because the Agency's video showed otherwise); *id.* at 19-20 (arguing that the Arbitrator's conclusion that the inspection memo created safety concerns was based on her discounting of the Agency's video and consideration of the Union's video).
[22] Award at 33 (finding that "[t]he Agency never *manually* conducted counts or gathered information to determine what the impact would be at the checkpoints); *id.* (finding that "[a]lthough the Agency produced volumes of data entered into . . . Agency systems, because agents have not been referring the mandatory secondaries through the [agency system], such data does not portray an accurate number of how the checkpoints have been affected by the [inspection memo]"); *id.* (finding that the Union's video did not portray an accurate picture of how many vehicles were mandatorily referred in a typical shift); *id.* (finding that based on the Union's video the agents are not handling the additional secondary traffic as a result of the inspection memo in a safe and efficient manner); *id.* at 34 (finding that agents were previously not required to ask for a second form of identification at the secondary inspection area).
[23] *See AFGE, Local 2846*, 71 FLRA 535, 536-37 (2020) (denying nonfact exception because it constituted a disagreement with the arbitrator's evaluation of the evidence); *Fraternal Order of Police, Lodge No. 168*, 70 FLRA 788, 790 (2018) (denying nonfact exception challenging arbitrator's evaluation of the evidence); *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 70 FLRA 186, 187 (2017) (same).
[24] The Authority reviews questions of law de novo. *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In conducting a de novo review, the Authority determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party established that they are nonfacts. *NLRB Prof'l Ass'n*, 71 FLRA 737, 739 (2020) (citing *U.S. DOJ, Fed. BOP*, 68 FLRA 728, 731 (2015) (stating that in ULP cases, the Authority also defers to the arbitrator's factual findings)).

inspection memo was not a change to a condition of employment.[25]

Under the Statute, an agency is obligated to provide the Union with notice and an opportunity to bargain over a change to a condition of employment.[26] The Authority asks two questions to determine whether there was a change to a condition of employment: (1) whether there was an actual, agency-initiated change to a personnel policy, practice or matter, and (2) whether the change affected working conditions.[27]

Therefore, the first question is whether there was an actual, agency-initiated change to a personnel policy, practice, or matter. Here, the Arbitrator found that prior to the inspection memo, there was a "long-standing practice to refer vehicles to the secondary inspection area based upon suspicion," and that this past practice was part of the agents' training.[28] The Arbitrator also found that the inspection memo changed this past practice by removing the "subjective duty of suspicion from the agent in the primary [inspection area]."[29] As discussed above, the Agency does not demonstrate that these findings are nonfacts; therefore, we defer to these factual findings,[30] including that there was an actual change to a personnel practice.[31]

The next question is whether the change to a personnel policy, practice or matter affects working conditions. Congress used "working conditions" to define "conditions of employment" when it enacted the

[25] Exceptions Br. at 9-10. The Agency also argues that the award is contrary to law because it is inconsistent with the Fourth Amendment. *Id.* at 4-9 (arguing that the immigration inspections at issue do not violate the Fourth Amendment). However, we do not address this exception because the Arbitrator never found a violation of the Fourth Amendment, but only a violation of the parties' agreement and the Statute. Award at 37.

[26] *See U.S. Dep't of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr., Detachment 12, Kirtland Air Force Base, N.M.*, 64 FLRA 166, 173 (2009) (Member Beck concurring); *see generally* 5 U.S.C. § 7101.

[27] *U.S. Dep't of Educ. & USDA*, 71 FLRA 968, 970 (2020) (*Education*) (Member DuBester dissenting) (defining "conditions of employment" as "personnel policies, practices, or matters, whether established by rule, regulation, or otherwise, affecting working conditions" (citing 5 U.S.C. § 7103(a)(14))).

[28] Award at 31-32.

[29] *Id.* at 32.

[30] *See AFGE, Local 2338*, 71 FLRA 343, 344 (2019). Member Abbott notes that there are limits to the deference accorded arbitrators in federal sector arbitrations. *See U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Miami, Fla.*, 71 FLRA 660, 663-64 (2020) (Member Abbott concurring; Member DuBester dissenting). However, in this case, the Agency failed to make and support the arguments that would allow us to disturb the Arbitrator's findings. As such, we are constrained by the Arbitrator's findings.

[31] We note that this is consistent with the Court's finding in *Local 1929*. *See Local 1929*, 961 F.3d at 461 (finding that the inspection memo "plainly changed *something*," because it "change[d] how and where certain inspections are performed . . . , which results in different instructions for agents in the primary area, more cars in the secondary area and the potential of increased risk to secondary area agents").

Statute.[32] While the Statute defines "conditions of employment" as "personnel policies, practices, and matters . . . affecting working conditions,"[33] it does not provide a definition for "working conditions."[34] Because Congress left "working conditions" undefined in the Statute,[35] we find that Congress intended "working conditions" to have a definition consistent with case law developed by the Federal Labor Relations Council (the Council) under Executive Order No. 11,941.[36] This definition is also consistent with Authority precedent before 2009,[37] which is when the Authority erred in finding that "working conditions" and "conditions of employment" were synonymous.[38] Therefore, we find the term "working conditions" must be separately analyzed and we define "working conditions" as the circumstances or state of affairs attendant to one's performance of a job. Therefore, to determine whether the Agency had a duty to bargain, we must ask whether the change to a personnel policy, practice, or matter affects the circumstances or state of affairs attendant to one's performance of a job.

Here, the Arbitrator found that the inspection memo changed the practice of referring vehicles to secondary inspection based on suspicion to a practice of mandatory referrals of certain vehicles to the secondary inspection area,[39] changed the duties of the primary

[32] 5 U.S.C. § 7103(a)(14). Our dissenting colleague is content to continue interpreting the Statute in a manner that defies its plain wording. Rather than try to reconcile why Congress used the phrase "working conditions" to define "conditions of employment," the dissent would have the Authority preserve an interpretation that finds different terms "synonymous." Dissent at 12. This interpretation runs afoul of the surplusage canon, as it would render the definition in § 7103(a)(14) to be circular and meaningless and would fail to give independent meaning to all the terms used in that section. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 26 (2012) ("[C]ourts avoid a reading [of a statute] that renders some words altogether redundant."). Indeed, there is no indication from the Statute's text or legislative history that Congress intended these *different* phrases in the Statute to have *identical* meanings. In fact, the dissent itself acknowledges that Congress endorsed a distinction between the phrases "working conditions" and "conditions of employment" by "replac[ing] the term 'working conditions' from Executive Order No. 11,941 with the term 'conditions of employment'" in the Statute. Dissent at 11 (quoting *El Paso*, 70 FLRA at 506 (Dissenting Opinion of Member DuBester)). We recognize the difficulty in ascribing meaning to these statutory terms, but these are exactly the types of complex questions that the Authority is tasked with answering based on its "expert judgment." *NTEU v. FLRA*, 745 F.3d 1219, 1224 (D.C. Cir. 2014) (quoting *FDIC v. FLRA*, 977 F.2d 1493, 1496 (D.C. Cir. 1992)); *see also AFGE, AFL-CIO, Council of Locals No. 214 v. FLRA*, 798 F.2d 1525, 1528 (D.C. Cir. 1986) ("Congress has entrusted the FLRA with the primary *responsibility* for administering and *interpreting* the [Statute]." (emphasis added)); *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983) ("[T]he FLRA was intended to develop specialized expertise in its field of labor relations and to *use that expertise* to give content to the [Statute's] principles and goals." (emphasis added)). The dissent's failure to even endeavor to give independent meaning to these "critically important term[s]" is conspicuous. *See* H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 41 (1978).

[33] 5 U.S.C. § 7103(a)(14).

[34] *Id.* We also note that Authority precedent stating that there is no substantive difference between "conditions of employment" and "working conditions" only dates back to 2009. *See U.S. Dep't of the Air Force, 355th MSG/CC, Davis-Monthan Air Force Base, Ariz.*, 64 FLRA 85, 90 (2009) (citations omitted) ("Although courts and the Authority have not defined 'working conditions,' when faced with issues involving 'working conditions,' they have accorded the term a broad interpretation that encapsulates a wide range of subjects that is effectively synonymous with 'conditions of employment.'"). The fact that the courts and Authority accorded "working conditions" a broad interpretation, does not justify a conclusion that the terms are synonymous. Therefore, we find the Authority in 2009 erred in concluding that "conditions of employment" and "working conditions" were synonymous.

[35] While not addressed in this decision, we believe that it is time for the Authority to reexamine *Antilles Consolidated Education Ass'n*, 22 FLRA 235, 236-37 (1986) (articulating a test for determining whether a matter concerns a change to conditions of employment).

[36] *Compare IAMAW, Local Lodge 1859*, 6 FLRC 254, 261 (1978) ("Clearly, the area of consideration, i.e., the area in which an intensive search for eligible candidates for unit positions is to be made, as well as procedures to extend that area and to determine the framework within which unit employees would have to compete with outside applicants for unit positions fall squarely within the ambit of agency personnel policies and practices and matters affecting working conditions of bargaining unit employees."), *Phila. Metal Trades Council, AFL-CIO*, 1 FLRC 457, 461 (1973) (finding that a proposal concerning overtime assignments affected the working conditions of employees), *and AFGE, Local 2595*, 1 FLRC 72, 74-75 (finding a proposal concerning the maintenance of roads used by employees in the course of performing their jobs affected the working conditions of employees), *with Fed. Emps. Metal Trades Council of Charleston*, 1 FLRC 416, 417 (1973) (finding that a proposal concerning who provides food service to employees did not affect the employees' working conditions).

[37] *E.g.*, *AFGE, Local 1812*, 59 FLRA 447, 448 (2003) (Chairman Cabaniss concurring) (finding that a proposal requiring the tours given by the agency to include a stop to view the radio broadcast studios did not concern a matter pertaining to conditions of employment because there was no evidence that "the proposal would result in any changes in the work being done, or the circumstances in which work [was] done").

[38] *Supra* note 34.

[39] Award at 32 ("Although an agent can continue to refer vehicles to the secondary inspection area based upon mere suspicion, such instances are reduced by the [inspection memo]."); *id.* ("a primary lane agent's impression, feeling or intuition regarding the legality of the vehicle, its contents, or passengers, may be impeded, or simply become irrelevant").

inspection agents,[40] decreased the number of primary area inspections, and increased the duties in the secondary area.[41] As discussed above, the Agency does not demonstrate that these findings are nonfacts. Based on the Arbitrator's undisturbed findings that the inspection memo changed personnel practices, policies, or matters, and in light of the Court's findings about the effect of the inspection memo,[42] we find that the Agency made a change that affected the working conditions of the border patrol agents – i.e. the circumstances or state of affairs attendant to the performance of their duties. Thus, we are constrained to find that the inspection memo was a change to a condition of employment.[43]

While the conclusion reached above is constrained by the law of this case, we take this opportunity to expand on the analysis for the benefit of the federal labor relations community and to give the appropriate meaning to "working conditions" moving forward. The Agency failed to argue that the award was contrary to law because the change was less than de minimis.[44] As such, we were not able to reach that question.[45] Were we able to do so, we would have concluded that the Agency did not have a duty to bargain. The inspection memo was simply a supervisory exercise of the prerogative to provide additional instruction to employees regarding their job duties.[46] Such a change is minimal, and therefore, not sufficiently significant to trigger bargaining obligations.[47] This conclusion is also supported by the fact that the Statute requires all provisions to "be interpreted in a manner consistent with the requirement of an effective and efficient Government."[48] It is a fundamental notion that a supervisor must be able to modify instructions based on changing circumstances, of which employees may or may not be aware, without a requirement to notify and engage in bargaining.

IV. Order

We deny the Agency's exceptions.

[40] *Id.* ("the primary [inspection] agent must now determine when the secondary [inspection area] is too backed up to send more vehicles as required by the [inspection memo], then choose to either conduct the secondary inspection at the primary [inspection area] or waive the vehicle through").
[41] *Id.* at 37.
[42] *Local 1929*, 961 F.3d at 460 ("[T]he [m]emo changed the inspection procedure in the primary and secondary areas – . . . agents were required to conduct inspections in the primary and secondary areas in ways different from those used before the [m]emo's issuance."); *id.* at 461 ("On its face, the [m]emo changes how and where certain inspections are performed at border checkpoints, which results in different instructions for agents in the primary area, more cars in the secondary area and the potential of increased risk to secondary area agents.")
[43] We note that the Agency did not argue in its exceptions that the award was contrary to law because the change was less than de minimis. Exceptions Br. at 9-10. *But see id.* at 10-11 (Agency arguing that the Arbitrator's conclusion that the change was more than de minimis was based on nonfacts). Therefore, we stop our analysis at whether the inspection memo was a change to a condition of employment. We further note that *Education*, which was not in effect at the time the Court made its decision, requires that a change must have a "substantial impact" to require bargaining. *Education*, 71 FLRA at 971. Consequently, if the Agency had argued that the award was contrary to law because the changes were not sufficiently significant to trigger its bargaining obligations, then the Authority would have conducted the substantial-impact analysis that appears at the end of Part III. *See id.*
[44] Exceptions Br. at 9-10. *But see id.* at 10-11.
[45] *Supra* note 43.
[46] This appears to be the method in which supervisors provide instructions to employees at the Agency. *See* Exceptions, Ex. 8, Agency Exs. 3-6; Exceptions, Ex. 9, Union Exs. 1, 4, 6, and 8.
[47] *See Education*, 71 FLRA at 971 ("[A]n agency will not be required to bargain over a change to a condition of employment unless the change is determined to have a substantial impact on a condition of employment.").
[48] 5 U.S.C. § 7101(b).

Member DuBester, dissenting in part:

I agree that the Agency's exceptions are properly denied. However, I disagree with every other aspect of today's decision. Remarkably, in its haste to replace decades of Authority precedent governing whether an agency-initiated change to conditions of employment is subject to the duty to bargain, the majority's decision repeats, and compounds, the mistakes that led the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) to vacate our initial decision in this case.

To understand why this is true, it is necessary to review how we got here. In its initial decision – *U.S. DHS, U.S. CBP, El Paso, Texas* (*El Paso*)[1] – the majority concluded that the terms "conditions of employment" and "working conditions" are "related, but they are not synonymous."[2] Purporting to rely upon the U.S. Supreme Court's decision in *Fort Stewart Schools v. FLRA*,[3] the majority then determined that the term "working conditions," as used in § 7103(a)(14) of the Federal Service Labor-Management Relations Statute (Statute), "'more naturally refers . . . *only* to the 'circumstances' or 'state of affairs' attendant to one's *performance* of a job.'"[4] And applying this new standard, the majority found that the Agency was not required to bargain over a memorandum that implemented changes to the manner in which its border patrol agents conducted immigration inspections because the memorandum "did not change the *nature of* or the *type of* duties the officers performed."[5]

The D.C. Circuit vacated *El Paso* because it was not the product of "reasoned decisionmaking."[6] The court identified numerous flaws in the majority's analysis. But most fundamentally – and most importantly for purposes of today's decision – the court concluded that *El Paso* "define[d] working conditions based on a misreading of *Fort Stewart*."[7]

Specifically, the court noted that *El Paso* quoted *Fort Stewart* "for the proposition that 'while the term 'conditions of employment' is susceptible to multiple interpretations, the term 'working conditions,' as used in § 7103(a)(14), 'more naturally refers . . . only to the 'circumstances' or 'state of affairs' attendant to one's performance of a job.'"[8] But the court found that this conclusion misconstrued *Fort Stewart* because that decision, in determining whether an employer was required to bargain over wages and benefits, "explained that 'working conditions' in § 7103(a)(14) 'more naturally refers, *in isolation*, only to the 'circumstances' or 'state of affairs' attendant' to one's job performance."[9]

And, significantly, the court instructed that in *Fort Stewart* the term "working conditions" "is not in isolation, but forms part of a paragraph whose structure, as a whole, lends support to the Authority's broader reading."[10] Therefore, the court concluded that *El Paso* – "[b]y omitting the phrase 'in isolation' and the High Court's subsequent clarification" – "misreads *Fort Stewart* to imply that 'working conditions' has a free-standing definition when, in fact, the point being made in *Fort Stewart* is the opposite."[11] And on this basis, the court rejected *El Paso*'s "depart[ure] from [Authority] precedent" because it was "based on a misreading of case law."[12]

Against this background, the majority's decision today simply defies explanation. While finding that it is "constrained" by the court's decision to find that the memorandum was a change to a condition of employment,[13] the majority, once again, asserts that the term "working conditions" must be "separately analyzed" and defined.[14] And, remarkably, it once again defines the term to mean "the circumstances or state of affairs attendant to one's performance of a job."[15]

Perhaps the majority believes that its second bite at this apple will fare better than its first simply because it has omitted any reference to *Fort Stewart*. But the majority has replaced that faulty rationale with reasoning that is equally infirm.

Citing our decision in *U.S. Department of the Air Force, 355th MSG/CC, Davis-Monthan Air Force Base, Arizona*,[16] the majority finds that "the Authority in 2009 erred in concluding that 'conditions of employment' and 'working conditions' were synonymous."[17] But the majority does not explain how the Authority erred in this respect. Instead, it provides a wholly conclusory, and arguably meaningless, rationale for discarding this Authority precedent – namely, that "[t]he fact that the

[1] 70 FLRA 501 (2018) (Member DuBester dissenting).
[2] *Id.* at 503.
[3] 495 U.S. 641 (1990) (*Fort Stewart*).
[4] *El Paso*, 70 FLRA at 503 (quoting *Fort Stewart*, 495 U.S. at 645) (ellipses in original) (emphasis in original).
[5] *Id.* (emphasis in original).
[6] *AFGE, AFL-CIO, Local 1929 v. FLRA*, 961 F.3d 452, 461 (D.C. Cir. 2020) (*Local 1929*) (quoting *Tramont Mfg., LLC v. NLRB*, 890 F.3d 1114, 1119 (D.C. Cir. 2018)).
[7] *Id.* at 459.
[8] *Id.* at 458 (quoting *El Paso*, 70 FLRA at 503).
[9] *Id.* (quoting *Fort Stewart*, 495 U.S. at 645).
[10] *Id.* (quoting *Fort Stewart*, 495 U.S. at 646).
[11] *Id.* at 459.
[12] *Id.*
[13] Majority at 7.
[14] *Id.* at 6.
[15] *Id.*
[16] 64 FLRA 85 (2009) (*Davis-Monthan AFB*).
[17] Majority at 6 n.34.

courts and Authority accorded 'working conditions' a broad interpretation, does not justify a conclusion that the terms are synonymous."[18]

The majority also asserts that its definition of "working conditions" is "consistent with case law developed by the Federal Labor Relations Council (the Council) under Executive Order No. [(EO)] 11,941[, and] consistent with Authority precedent before 2009."[19] But it similarly fails to explain how these decisions are "consistent with" its definition, and it does not even hint at how these decisions support its reversal of Authority precedent governing this matter.

Nor is this at all apparent from the decisions themselves. For instance, in *AFGE, Local 1812* (*Local 1812*),[20] the Authority concluded that a proposal that would dictate how the agency conducts public tours of its facilities did not concern unit employees' conditions of employment. Significantly, the Authority reached this conclusion by applying the well-established test set forth in *Antilles Consolidated Education Ass'n* (*Antilles*),[21] which considers "'whether the record establishes that there is a direct connection between the proposal and the work situation or employment relationship of bargaining unit employees.'"[22] It is entirely unclear – and unexplained by the majority – how *Local 1812*'s application of the *Antilles* standard supports its decision to redefine "working conditions" in a significantly more restrictive manner.

The four Council decisions upon which the majority relies are no more helpful to its position. While these decisions certainly involved Council determinations regarding whether particular proposals fell within the ambit of matters over which the parties were required to bargain under EO 11,941, nothing in these decisions suggests that the Council adopted, or even contemplated, the majority's constricted definition of "working conditions."

And to the extent that the majority posits that the Council's interpretations of EO 11,941 more generally support its restrictive definition of the term "working conditions," in fact the *opposite* premise is true. As I noted in my dissenting opinion in *El Paso*, Congress replaced the term "working conditions" from EO 11,941 with the term "conditions of employment" to signify an *expansion* to the scope of bargaining under the Statute as compared to the EO.[23] It therefore turns logic on its head for the majority to rely upon these Council decisions to justify its more restrictive interpretation of working conditions under the Statute.

The Authority has been repeatedly warned that it "must either follow its own precedent or 'provide a reasoned explanation for' its decision to depart from that precedent."[24] Indeed, in vacating *El Paso*, the D.C. Circuit chided the Authority for "fail[ing] to reasonably explain its departure from precedent," and for "fail[ing] to explain how its decision comports with the express language of [§] 7103(a)(14) [of the Statute]."[25]

Undeterred, the majority now promulgates the *same definition* of "working conditions" that was rejected by the D.C. Circuit in *El Paso*. And apart from omitting its "misstated" reliance upon *Fort Stewart*, the majority has done nothing in today's decision to cure the flaws that were fatal to its initial decision. It certainly has *not* provided a plausible reason for abandoning Authority precedent broadly defining "conditions of employment" in favor of a standard that will, in all likelihood, significantly restrict the scope of bargaining under the Statute. This failure is particularly noteworthy because the Authority's "broad interpretation" of "working conditions" to "encapsulate[] a wide range of subjects that is effectively synonymous with 'conditions of employment'" has been found to be reasonable under the Statute.[26]

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[18] *Id.*

[19] *Id.* at 5-6 & n.36 (citing *AFGE, Local 1812*, 59 FLRA 447, 448 (2003); *IAMAW, Local Lodge 1859*, 6 FLRC 254, 261 (1978); *Phila. Metal Trades Council, AFL-CIO*, 1 FLRC 457, 461 (1973); *AFGE, Local 2595*, 1 FLRC 72, 74-75 (1973); *Fed. Emps. Metal Trades Council of Charleston*, 1 FLRC 416, 418 (1973)).

[20] 59 FLRA 447 (2003) (Chairman Cabaniss concurring).

[21] 22 FLRA 235 (1986).

[22] *Local 1812*, 59 FLRA at 448 (quoting *Antilles*, 22 FLRA at 237).

[23] *El Paso*, 70 FLRA at 506 (citing *GSA, E. Distrib. Ctr., Burlington, N.J.*, 68 FLRA 70, 76 (2014) (*GSA*) (Member Pizzella dissenting)); *GSA*, 68 FLRA at 76 (noting portions of the Statute's legislative history indicating that Congress was dissatisfied with the Council's narrow interpretation of "working conditions"); *see also Library of Cong. v. FLRA*, 699 F.2d 1280, 1286 (D.C. Cir. 1983) (concluding from the Statute's legislative history that "Congress intended the bargaining obligation to be construed broadly").

[24] *NFFE, FD-1, IAMAW, Local 951 v. FLRA*, 412 F.3d 119, 124 (D.C. Cir. 2005) (quoting *Local 32, AFGE, AFL-CIO v. FLRA*, 774 F.2d 498, 502 (D.C. Cir. 1985)); *see also AFGE, Local 32, AFL-CIO v. FLRA*, 853 F.2d 986, 992 (D.C. Cir. 1988) (*Local 32*) (concluding that the Authority's did not set forth a "reasoned analysis" where it was "offered only [as a] bare conclusion").

[25] *Local 1929*, 961 F.3d at 457.

[26] *U.S. DHS, CBP v. FLRA*, 647 F.3d 359, 365 (D.C. Cir. 2011) (quoting *Davis-Monthan AFB*, 64 FLRA at 90)). Perhaps hoping to draw attention from its flawed analysis, the majority claims that my "failure to even endeavor to give independent meaning" to these terms is "conspicuous." Majority at 6 n.32. Of course, what is truly "conspicuous" is that the majority would endeavor to restrict the scope of collective bargaining in a manner that is so obviously – and fundamentally – contrary to Congress' purpose in enacting the Statute.

To make matters worse, the majority takes today's decision a step further by deciding a question that was not even submitted for our review. While acknowledging that the Agency failed to argue that the award was contrary to law because the change was less than de minimis – and, as such, it was "not able to reach that question" – the majority nevertheless *reaches* that question.[27] And applying its newly-minted "substantial impact" standard, the majority concludes that the Agency did not have a duty to bargain because "[t]he inspection memo was simply a supervisory exercise of the prerogative to provide additional instruction to employees regarding their job duties."[28]

I have repeatedly cautioned the majority that it should not render decisions on exceptions that were not raised by the excepting party.[29] Moreover, based upon the majority's own acknowledgement,[30] it is apparent that its decision on this issue constitutes the type of "advisory opinion" that the Authority is explicitly prohibited from rendering.[31] And it is *entirely improper* for the majority to address *any* issue in what can only be described as an advocacy role on behalf of a party before us.[32]

Even looking beyond these problems, the majority's characterization of the Agency's memorandum is at odds with both the factual record and the D.C. Circuit's findings based upon that record.[33] And the majority does not even attempt to explain how a memorandum which changed how agents in an entire sector of the Agency's jurisdiction should perform their inspection duties was "not sufficiently significant" to trigger a bargaining obligation.[34] Instead, it justifies its conclusion upon "the fact that the Statute requires all provisions to 'be interpreted in a manner consistent with the requirement of an effective and efficient Government.'"[35]

It is precisely this type of shoddy and conclusory reasoning that has led the D.C. Circuit to reverse previous Authority decisions.[36] And the majority's purported rationale blithely disregards the court's admonishment that it "is not enough" for the Authority "to refer in Delphic tones to inherent authority, or to rely vaguely on the Authority's general duty to interpret the [S]tatute with government efficiency in mind."[37]

I dissented from *El Paso* because the majority "fail[ed] to identify any textual, judicial, or logical basis" for reversing Authority precedent governing how we interpret § 7103(a)(14).[38] And noting the fundamental importance of this precedent to the Statute's core principles, I determined that the "[t]he only 'commonsense' conclusion that remains is that the majority's sole imperative here is to limit the scope of bargaining."[39] Sadly, today's decision, which is equally devoid of any textual, judicial, or logical basis – and which arguably limits the scope of bargaining to an even greater extent – simply confirms my conclusion.

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[27] Majority at 7.

[28] *Id.* (applying *U.S. Dep't of Educ. & USDA*, 71 FLRA 968, 971 (2020) (Member DuBester dissenting)).

[29] *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 71 FLRA 815, 817 (2020) (Dissenting Opinion of Member DuBester); *Dep't of the Air Force, 673rd Air Base Wing, Joint Base Elmendorf-Richardson, Ala.*, 71 FLRA 781, 784 (2020) (Dissenting Opinion of Member DuBester).

[30] *See* Majority at 7 ("Were we able to [reach this question], we *would have concluded* that the Agency did not have a duty to bargain." (emphasis added)).

[31] 5 C.F.R. § 2429.10 ("The Authority . . . will not issue advisory opinions.").

[32] *See, e.g.*, Majority at 2 n.3 (noting that the D.C. Circuit "was constrained by the record before it – namely, the Agency's failure to make the *correct* arguments") (emphasis added); *see also id.* at 5 n.30 ("However, in this case, the Agency failed to make and support the arguments that would *allow us to disturb* the Arbitrator's findings." (emphasis added)).

[33] *See, e.g.*, *Local 1929*, 961 F.3d at 461 ("On its face, the [memorandum] changes how and where certain inspections are performed at border checkpoints, which results in different instructions for agents in the primary area, more cars in the secondary area and the potential of increased risk to secondary area agents."); *id.* at 460 n.4 (finding that the memorandum "changed *how* agents conduct border inspections – i.e. their *practice* – in the primary and secondary areas, including how and where agents direct certain vehicles").

[34] Majority at 7.

[35] *Id.* (quoting 5 U.S.C. § 7101(b)).

[36] *See, e.g.*, *Local 32*, 853 F.2d at 992 (rejecting Authority's decision because it fails to show that the Authority "has a clear vision of the standard it is purporting to follow," and because the decision's "style of unelaborated assertion cannot bring rationality or security to the bargaining process").

[37] *Id.* at 993.

[38] *El Paso*, 70 FLRA at 506 (Dissenting Opinion of Member DuBester).

[39] *Id.*