72 FLRA No. 48

NATIONAL LABOR RELATIONS BOARD
(Agency)

and

NATIONAL LABOR RELATIONS BOARD UNION
(Union)

0-AR-5556

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DECISION

May 5, 2021

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

I. Statement of the Case

In this case, we take the opportunity to further clarify the standard for determining whether an agency action constitutes a change to a condition of employment, thereby triggering a duty to bargain. In the instant case, the Arbitrator found that the Agency violated a contractual duty to bargain because it changed a condition of employment by terminating the health services contract which provided employees with access to health service units at their workplace.[1] The Arbitrator also found that the Agency violated the parties' agreement by cancelling the health services contract. As remedies, the Arbitrator ordered the Agency to restore the health services contract, to reimburse bargaining-unit employees for medical expenses incurred for obtaining services elsewhere, to restore any leave that the employees used for receiving healthcare that would have been provided by the health service units, and to post notices regarding the outcome of the award.

The Agency argues that the award finding that it had a duty to bargain is contrary to law because it did not change a condition of employment by cancelling the health services contract. Because access to health service units is not a condition of employment, we grant this exception and vacate the Arbitrator's finding that the Agency had a contractual duty to bargain. However, we deny the Agency's essence exception because the Arbitrator properly used a past practice to interpret an ambiguous term, finding that the Agency was separately required by the parties' agreement to provide the employees with access to the health service units.

The Agency also argues that the awarded remedies violate management's right to determine its budget. We find that the remedy requiring reimbursement of the employees' medical expenses does not reasonably and proportionally relate to the Agency's violation of the parties' agreement. However, we uphold the remedy requiring the Agency to restore the Union's access to the health service units because the award does not excessively interfere with management's right to determine its budget. Consequently, we vacate the award, in part.

II. Background and Arbitrator's Award

The Agency convened a Cost Saving Work Group (Work Group), which included management and Union representatives, to identify potential cost-saving measures. One of its suggestions was terminating a contract with Federal Occupational Health (FOH), a Department of Health and Human Services (HHS) agency that provided employees with access to health services units at their workplace without charge. On February 1, 2018, the Agency informed the Union that it would adopt some of the Work Group's recommendations, but did not mention the health service units. The Agency terminated the health services contract the same day, to be effective April 1, 2018.

The Union grieved the Agency's action. As relevant here, it contended that the Agency violated the parties' agreement and § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute),[2] when it terminated the FOH contract without first notifying the Union and offering it an opportunity to bargain. The parties were unable to resolve the grievance and submitted it to arbitration.

[1] This is the second case arising from the Agency's decision to terminate the health services contract that has come before us, although the earlier case arose from a grievance filed by a separate union. *See NLRB Pro. Ass'n*, 71 FLRA 737, 739 (2020) (denying, in part, and dismissing, in part, exceptions to award that found grievance was not arbitrable because it was untimely).

[2] 5 U.S.C. § 7116(a)(1), (5).

The Arbitrator noted that Article 5, Section 7 of the parties' agreement requires the Agency to notify the Union and offer it an opportunity to bargain over changes in matters affecting conditions of employment to the extent required by the Statute. The Arbitrator also found that Article 23, Section 4[3] requires the Agency to "permit employees reasonable opportunity to visit Agency-authorized health service units" without charge to leave and to "actively publicize the medical services . . . available to employees."[4] In the Arbitrator's view, Article 23, Section 4 contractually established "working conditions associated with access to the health service units,"[5] because the Agency had provided access to health units for at least thirty years and found that this past practice created a condition of employment as defined by the Statute. Therefore, the Arbitrator found that the Agency violated Article 5, Section 7 of the parties' agreement because it changed a condition of employment by cancelling the health services contract without notifying the Union of the change and giving it the opportunity to bargain.

Moreover, the Arbitrator noted that the phrase "Agency-authorized health service units" was ambiguous because it did not plainly obligate the Agency to provide access to the health service units. Consequently, because the Arbitrator found that the Agency had a past practice of providing access to the health service units, the Arbitrator found that Article 23, Section 4 also obligates the Agency to provide employees with access to the health service units. As a result, the Arbitrator found that the Agency violated Article 23, Section 4 by cancelling the health services contract.

As a remedy, the Arbitrator ordered the Agency to restore the contract to provide health service units, to reimburse bargaining-unit employees for medical expenses incurred for obtaining services elsewhere, to restore any leave that the employees used for receiving healthcare after the health units were eliminated, and to post notices regarding the outcome of the award.

The Agency filed exceptions on October 18, 2019. The Union filed an opposition on November 24, 2019.[6]

III. Analysis and Conclusions

A. The Arbitrator's finding that the Agency violated Article 5, Section 7 of the parties' agreement is contrary to law.

The Agency argues that the award is contrary to law.[7] Specifically, it challenges the Arbitrator's determination that both its past practice of providing access to health service units and Article 23, Section 4 establish that access to health service units is a condition of employment over which it had a duty to bargain under Article 5, Section 7 of the parties' agreement.[8] It contends that it had no duty to bargain over the decision to stop providing access to health service units because bargaining-unit employees' work "does not relate to providing medical services via the health units or related services."[9] Therefore, the change does not affect the "day-to-day circumstances" under which the employees perform their jobs.[10]

An agency must bargain over matters that significantly impact an employee's conditions of

[3] Article 23, Section 4 states the following:

> The Agency will permit employees reasonable opportunity to visit Agency-authorized health service units for emergency and appropriate health maintenance care. Where approved, such visits will be permitted without charge to annual leave, compensatory leave, or leave without pay. Each Region will actively publicize the medical services, such as flu vaccinations, cholesterol screenings, and diabetes screenings, available to employees from the Department of Health and Human Services.

Exceptions, Ex. 9, Collective-Bargaining Agreement (CBA) at 159-60.

[4] *Id.*; Award at 31.

[5] Award at 36.

[6] We note that the Agency served its exceptions on the Union by commercial delivery on October 18, 2019. Opp'n at 2 n.3. Accordingly, the Union's opposition was due November 25, 2019 and is timely filed. 5 C.F.R. § 2429.21(a)(1).

[7] When an exception involves an award's consistency with law, rule, or regulation, the Authority reviews any question of law raised by the exception and the award de novo. *U.S. Dep't of State, Bureau of Consular Affs., Passport Servs. Directorate*, 70 FLRA 918, 919 (2018) (citing *U.S. Dep't of Com., Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 67 FLRA 356, 358 (2014) (*NOAA*)). In applying the standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *Id.* (citing *NOAA*, 67 FLRA at 358). In making that assessment, the Authority defers to the arbitrator's underlying factual findings, unless the appealing party establishes that those findings are nonfacts. *Id.* (citing *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014)).

[8] Exceptions at 14-15.

[9] *Id.* at 15.

[10] *Id.* at 14.

employment.[11] However, two questions must be addressed *before* determining whether a change is significant enough to require bargaining.[12] Based on the definition of "conditions of employment" in § 7103(a)(14) of the Statute,[13] the first question is whether there has been an *actual change* to a personnel policy, practice, and matter, whether established by rule, regulation, or otherwise.[14] Second, the change must "affect working conditions"—the state of affairs attendant to an employee's performance of a job.[15]

While the Agency changed a policy, practice or matter by eliminating the health service units, that change did not affect working conditions. Here, the Arbitrator did not make any findings which demonstrate that the elimination of the health service units impacted the working conditions of bargaining-unit employees; instead, she found that the past practice established that access to health service units is a condition of employment.[16] To the contrary, the Authority has held that a matter does not become a condition of employment through past practice alone.[17] Rather, an employee's working conditions are affected if an agency-initiated policy change impacts the circumstances or state of affairs attendant to one's performance of a job.[18]

In that regard, the Union cites several Authority cases to demonstrate that the elimination of health service units affects the working conditions of bargaining-unit employees.[19] The Union cites cases where the Authority found that the price of agency-provided dining services is a condition of employment,[20] held that the elimination of agency-provided water bottles changes a condition of employment,[21] and determined that that the availability of agency-provided daycare facilities is a condition of employment.[22] However, none of the aforementioned cases applied the new standard for determining whether a change affects an employee's working conditions—the circumstances or state of affairs attendant to one's performance of a job.[23] Put simply, the cases cited by the Union do not demonstrate that the change affected the performance of an employee's day-to-day job. Relatedly, in *DOD, Department of Defense Education Activity* (*DODEA*), we held that the elimination of the ability to have personal packages delivered to employees' workplaces did not establish a direct connection to the work situation or employment relationship of the employees.[24] Consequently, we will no longer follow the

[11] *See U.S. Dep't of Educ.*, 71 FLRA 968, 970 (2020) (then-Member DuBester dissenting) (PS-44). The Authority has previously noted that the distinction between a contractual and a statutory duty to bargain is not warranted unless the contract language indicates that the contractual bargaining obligations differ substantively from the obligations that the Statute imposes. *U.S. Dep't of Com., Nat'l Inst. of Standards & Tech.*, 71 FLRA 199, 200 (2019) (*NIST*) (then-Member DuBester dissenting) (citing *Broad. Bd. of Governors, Off. of Cuba Broad.*, 64 FLRA 888, 891 n.4 (2010); *AFGE*, 59 FLRA 767, 769-70 (2004)). Because the parties' agreement uses wording that resembles or restates statutory wording, Award at 3, we find that the issue before us is statutory. *See NIST*, 71 FLRA at 200.

[12] PS-44, 71 FLRA at 970.

[13] 5 U.S.C. § 7103(a)(14) (defining "conditions of employment" as: (1) "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise" that (2) "affect[] working conditions").

[14] PS-44, 71 FLRA at 970.

[15] *U.S. DHS, U.S. CBP, El Paso, Tex.*, 72 FLRA 7, 10 (2020) (then-Member DuBester dissenting in part) (*El Paso II*).

[16] Award at 36.

[17] *See U.S. Dep't of the Treasury, IRS*, 62 FLRA 411, 413 (2008) ("However, a matter that is not otherwise a condition of employment does not become a condition of employment through past practice."); *U.S. Customs Serv., Wash., D.C.*, 29 FLRA 307, 308 n.2 (1987) ("A matter does not become a condition of employment through past practice. Rather, an independent analysis of whether a matter is a condition of employment at the time a dispute arises is necessary.").

[18] *El Paso II*, 72 FLRA at 10 ("Therefore, to determine whether the [a]gency 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.").

[19] Opp'n Br. at 8-9.

[20] *AFGE, Loc. 1547*, 64 FLRA 635, 637-38 (2010).

[21] *U.S. DOL, Wash., D.C.*, 38 FLRA 899, 909 (1990).

[22] *AFGE, AFL-CIO*, 2 FLRA 603, 606-08 (1980).

[23] *El Paso II*, 72 FLRA at 10.

[24] 72 FLRA 15, 17-18 (2020) (then-Member DuBester dissenting). According to the dissent, because the Agency permitted employees to use the health units without using leave, health units must concern conditions of employment. Dissent at 12-13 (citing *AFGE, Loc. 12*, 60 FLRA 533, 540 (2004) (Member Armendariz dissenting) ("Under Authority precedent, a proposal that addresses 'employees' use of duty time, without loss of pay, for certain activities' involves a condition of employment." (quoting *AFGE, Loc. 2077*, 43 FLRA 344, 355 (1991)))). However, this establishes only that *Article 23, Section 4's protection of employees' leave* affects working conditions. It does not establish that the health units themselves affect working conditions. As we noted in *DODEA*, there are many non-work activities that employees would prefer to perform on-site and on duty time. But employee convenience does not convert agencies' decisions into changes to conditions of employment. *See DODEA*, 72 FLRA at 17 (the added convenience of an employer-sponsored personal mail delivery service did not establish that cessation of such a service affected employees' conditions of employment); *id.* (the convenience of permitting employees to cash personal checks using the agency's treasury, and the inconvenience of having to cash checks off-site, did not bring personal check cashing at the workplace within the duty to bargain (citing *Maritime Metal Trades Council*, 17 FLRA 890 (1985))).

test set forth in the cases cited by the Union.[25]

Because the award does not demonstrate that the elimination of the health service units affected the circumstances attendant to the grievants' performance of their jobs, we find that the Statute did not require the Agency to bargain.[26] Therefore, we hold that the Arbitrator's finding that the Agency violated Article 5, Section 7 of the parties' agreement is contrary to law.[27] Consequently, we grant the Agency's contrary-to-law exception and vacate the award's finding that the Agency had a duty to bargain under the parties' agreement.

B. The Arbitrator's finding that the Agency violated Article 23, Section 4 draws its essence from the parties' agreement.

The Agency argues that the award does not draw its essence from the parties' agreement because its past practice of providing health service units to the Union does not establish that the plain wording of Article 23, Section 4 requires it to provide access to said health service units.[28] As relevant here, the Authority has found that an award fails to draw its essence from a parties' agreement where the award conflicts with the agreement's plain wording.[29] The Authority has also stated that arbitrators may not look beyond an agreement—to extraneous considerations—to modify the agreement's clear and unambiguous terms.[30]

Here, the Arbitrator noted that Article 23, Section 4's reference to "Agency-authorized health service units" is ambiguous because it does not define what health service units are authorized by the Agency.[31] Furthermore, the Arbitrator noted that Article 23, Section 4 states that health services are available to employees through the health units provided by HHS.[32] Specifically, Article 23, Section 4 states that "[e]ach Region will actively publicize the medical services, such as flu vaccinations, cholesterol screenings, and diabetes screenings, available to employees from the Department of Health and Human Services."[33] As such, she found that the only reasonable interpretation of Article 23, Section 4 is that the phrase "Agency-authorized health service units" must require the Agency to provide access to the health service units because of the Agency's longstanding past practice of providing the health units through HHS.[34] The Authority has noted that arbitrators may use a past practice to interpret an ambiguous contact provision.[35] Here, the Agency fails to demonstrate that the Arbitrator demonstrated a manifest disregard of the parties' agreement when she found that Article 23, Section 4's reference to "Agency-authorized health units" is ambiguous.[36] Therefore, we find that the Arbitrator's use of a past practice to interpret Article 23, Section 4 was proper because she did not use a past practice to modify an agreement's clear and unambiguous terms, but instead used a past practice to interpret the ambiguous term.[37] Consequently, the Agency fails to demonstrate that the award does not draw its essence from Article 23, Section 4 of the parties' agreement. We

[25] The remaining cases cited by the Union are inapposite. Opp'n Br. at 8-9; *see U.S. Dep't of the Interior, U.S. Geological Survey, Great Lakes Sci. Ctr., Ann Arbor, Mich.*, 68 FLRA 734, 737 (2015) ("The [a]gency does not claim that the [j]udge misapplied the Authority's long-standing precedent concerning the establishment of a past practice."); *U.S. Dep't of the Treasury, IRS*, 68 FLRA 329, 331 (2015) (finding that the agency violated the Statute without determining whether the elimination of a health unit was a change to a condition of employment).

[26] *See El Paso II*, 72 FLRA at 10.

[27] Because we vacate the award's finding that the Agency had a duty to bargain and the Agency's remaining exceptions concern the Arbitrator's finding that the parties' agreement requires the Agency to provide the Union with access to the health units, we do not reach its argument that eliminating access to health units was necessary to its functioning. *See* Exceptions Br. at 15-17; *U.S. DHS, U.S. CBP, Detroit Sector, Detroit, Mich.*, 70 FLRA 572, 574 (2018) (*CBP Detroit*) (then-Member DuBester dissenting) (finding it unnecessary to address remaining arguments when an award has been set aside); *SPORT Air Traffic Controllers Org.*, 68 FLRA 9, 11 (2014) ("Thus, 'necessary functioning' is a defense to a charge of unlawful unilateral implementation.").

[28] Exceptions Br. at 10-14. 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. *Libr. of Cong.*, 60 FLRA 715, 717 (2005).

[29] *U.S. DHS, U.S. CBP*, 71 FLRA 744, 745 (2020) (*U.S. DHS, U.S. CBP*) (Member Abbott concurring; then-Member DuBester dissenting); *U.S. Dep't of the Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, 70 FLRA 754, 755-56 (2018) (*Puget Sound*) (then-Member DuBester dissenting).

[30] *Puget Sound*, 70 FLRA at 755-56.

[31] Award at 30-34.

[32] *Id.* at 31.

[33] *Id.*

[34] *Id.* at 30-31.

[35] *Puget Sound*, 70 FLRA at 755-56.

[36] *See* Award at 3 ("The Agency will permit employees reasonable opportunity to visit Agency-authorized health service units for emergency and appropriate health maintenance care." (quoting Art. 23, § 4)).

[37] *See U.S. DHS, U.S. CBP*, 71 FLRA at 745; *Puget Sound*, 70 FLRA at 755-56.

deny the Agency's exception.[38]

C. The Arbitrator's remedy of medical expense reimbursements violates the Agency's § 7106(a)(1) management rights.

The Agency argues that the award violates management's right to determine its budget under § 7106(a)(l) of the Statute.[39] Specifically, the Agency claims that both remedies—which require the Agency to reimburse the grievants' medical expenses and to restore access to the health service units—do not reasonably and proportionally relate to the Agency's violation of Article 23, Section 4. Moreover, the Agency argues that both remedies excessively interfere with the Agency's ability to determine its budget.[40]

With regard to the first question under *DOJ*,[41] the Arbitrator found that the Agency violated Article 23, Section 4 of the parties' agreement by terminating the contract for the health service units.[42] Therefore, the answer to the first question is yes.

As to the second question under *DOJ*, the Arbitrator found that the Agency's violation of Article 23, Section 4 required it to reimburse the grievants' medical expenses and to restore their access to the health units.[43] Because the Arbitrator found that the parties' agreement requires the Agency to provide the Union with access to the health service units, the remedy requiring the Agency to enter into a new contract for health services reasonably and proportionally relates to the Agency's violation of Article 23, Section 4. However, to require the Agency to reimburse the grievants for medical expenses they obtained elsewhere goes far beyond the Agency's duty to provide access to the health service units.[44] Article 23, Section 4 never required the Agency to pay for employees medical costs, but instead, only required the Agency to provide "reasonable opportunity to visit Agency-authorized health service units," and that "such visits will be permitted without charge to annual leave, compensatory leave, or leave without pay."[45] Consequently, the Arbitrator's remedy requiring medical reimbursement does not reasonably and proportionally relate to the Agency's violation of the parties' agreement and it is vacated.[46] Therefore, the answer to the second *DOJ* question is yes, in part, and we vacate the remedy requiring the Agency to reimburse employees for medical expenses.[47]

The third question under the *DOJ* test is whether the Arbitrator's interpretation of the parties' agreement excessively interferes with the Agency's right to determine its budget. While the Agency certainly has a right to determine its budget, we have held that an award that simply requires an agency to adhere to a provision it agreed to generally does not excessively interfere with

[38] The Agency also argues that the award is contrary to law because the Arbitrator awarded a status-quo-ante (SQA) remedy without applying the factors required by *Federal Correctional Institution*, 8 FLRA 604, 606 (1982) (*FCI*). Exceptions Br. at 21-23. However, the Authority has noted that arbitrators must utilize the five *FCI* factors when determining whether an SQA remedy is appropriate where an agency violated a statutory or contractual duty to bargain. *NIST*, 71 FLRA at 200. Here, we have vacated the Arbitrator's finding that the Agency had a duty to bargain under the parties' agreement or the Statute. *See supra* Parts III.A-B. Therefore, because we only uphold the Arbitrator's finding of a separate contractual violation under Article 23, Section 4, the Arbitrator was not required to apply the *FCI* factors and we deny the Agency's exception. *See NIST*, 71 FLRA at 200.

[39] Exceptions Br. at 18-21. Under the three-part framework set forth in *DOJ*, the first question is whether the arbitrator found a violation of a contract provision. *U.S. DOJ, Fed. BOP*, 70 FLRA 398, 405 (2018) (*DOJ*) (then-Member DuBester dissenting). If so, we proceed to the second question of whether the arbitrator's remedy reasonably and proportionally relates to that violation. *Id.* If the answer to both questions is yes, then the final question is whether the arbitrator's interpretation of the provision excessively interferes with a § 7106(a) management right. *Id.* If the answer to that question is yes, then the arbitrator's award is contrary to law and must be vacated. *Id.* at 406.

[40] Exceptions Br. at 18-21.

[41] 70 FLRA at 405-06.

[42] Award at 38.

[43] *Id.* at 37-39.

[44] *Id.*

[45] *See* CBA at 159-60.

[46] *See U.S. DOD, Def. Logistics Agency*, 70 FLRA 932, 933-34 (2018) (then-Member DuBester dissenting) ("[A]s remedies, he ordered the [a]gency to reinstate the grievant, allow her to telework full-time from Las Vegas, and provide her backpay and lost benefits. Those remedies are disproportionate to the [a]gency's violation of Article 9. Because Article 9 affords management the 'sole discretion' to determine an employee's telework schedule, the [a]gency's failure to provide the grievant with a specific justification for the denial of her telework request would entitle the grievant to, at most, a more specific justification for the denial."); *CBP Detroit*, 70 FLRA at 573 ("Although the [a]rbitrator found that the [a]gency did not provide the grievant with disciplinary notice at the 'earliest practicable date' under Article 32G, awarding a remedy of twelve months of backpay for lost overtime, spanning a window of time that ran heedless of actual events, is disproportionate to the [a]gency's violation of Article 32G's notice provision.").

[47] We note that the Agency did not except to the remedy requiring it to restore leave to employees who used leave "for any service of a type that would have been provided by the health service units;" therefore, that portion of the remedy stands. Award at 38.

management's rights.[48] However, an exception to this general rule would be if an agency can demonstrate that the arbitrator's interpretation of the provision encompasses subjects that are beyond the scope of what an agency can legally agree to under § 7106 of the Statute.[49] Because the Agency does not argue that the Arbitrator's interpretation of Article 23, Section 4 is beyond the scope of what the Agency can legally agree to under § 7106 of the Statute, the awarded remedy requiring the Agency to restore the health service units does not excessively interfere with the Agency's right to determine its budget. Accordingly, we find that the answer to the third question is no, and we deny the Agency's exception as it pertains to the remedy of restoring the Union's access to the health units.[50]

IV. Decision

Because we find that the award is contrary to law, in part, we vacate the award, in part.

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[48] S*ee Ass'n of Civilian Technicians, Mont. Air Chapter No. 29 v. FLRA*, 22 F.3d 1150, 1155-56 (D.C. Cir. 1994) (finding "[t]he nonnegotiability of management rights enumerated in [§ 7106](a) is expressly '[s]ubject to [§ 7106](b)'" and finding "the agreement cannot subsequently be deemed unlawful . . . simply because it pertains to a permissible – rather than mandatory – subject of [bargaining]").

[49] *DOJ*, 70 FLRA at 405 ("In other words, the '[s]ubject to subsection (b) of this section' in § 7106(a) and the corresponding '[n]othing in this section shall preclude any agency and any [union] from negotiating' language in § 7106(b) do not create a standard to evaluate an arbitrator's award but have to do with what the agency must negotiate or may elect to not negotiate.").

[50] The Agency also argues that the Arbitrator exceeded her authority because she "awarded relief to persons whom the Union did not file a grievance over by ordering the Agency to generally reinstate health units with no distinction on which group or groups of Agency employees would have access to the units." Exceptions Br. at 23-25. However, the award only requires the Agency to comply with Article, 23, Section 4 of the parties' agreement by restoring access to the health service units. Award at 38. Additionally, the Arbitrator notes elsewhere in the award that the Union's grievance only raises the Agency's budget to the extent that it is necessary to provide bargaining-unit employees with access to the health service units. *Id.* at 35 ("Moreover, the Agency inflated the impact of eliminating health service units by citing a whole fiscal year's cost for all NLRB personnel, by not accounting for the fact that the Agency had already paid for half of a fiscal year's cost for the units, and *by not separating out that portion of the resulting savings that could be realized by denying access to these units by bargaining unit employees*." (emphasis added)). Therefore, the Agency's exception constitutes mere disagreement with the awarded remedy and we deny the Agency's exception. *See AFGE, AFL-CIO, Loc. 2608*, 49 FLRA 1589 (1994) ("[T]he [u]nion's exception in this regard constitutes mere disagreement with [the] [a]rbitrator's interpretation of the collective[-]bargaining agreement and, as such, provides no basis for finding the award deficient.").

Member Abbott, concurring:

I agree with every aspect of the instant decision, but I write separately to address the manner in which the dissent mischaracterizes the fundamental issue in this case.

It bears repeating that federal employees perform vital functions that are critical for the federal government to fulfill its responsibilities and to operate effectively and efficiently. The benefits, such as sick (and other) leave, that federal employees receive are established by Congress.[1] While some may argue that these benefits are excessive; others will argue that they are not sufficient. From my perspective, however, those arguments are quite irrelevant because, as noted above, the benefits are determined by Congress and the system it established has worked well for decades.[2] When a federal employee is hired, an agency is obligated to provide for certain benefits when they are "specifically provided for by Federal Statute" or they affect an employee's working conditions.[3]

Here, the on-site health units do not fulfill either requirement. Nonetheless, our dissenting colleague argues that the NLRB is required to maintain *multiple* on-site health units that serve the convenience of only a small number of NLRB employees. However, this convenience is not available to most federal employees, nor most employees throughout the private sector, regardless of the cost, efficiency, or impact on the mission of the NLRB. The on-site health units most certainly are convenient to the employees who work there, but, in no sense are they a condition of employment.

The dissent laments these realities and asserts that health service units are a condition of employment because they "relieve[] employees from having to use leave to travel to their own physicians" and "reduce[] the amount of time employees must spend away from the workplace."[4] Put another way, the dissent finds it unreasonable for NLRB employees to do what millions of workers across the federal government and throughout the private sector must do every day. The dissent wistfully ignores the fact, that outside the federal government, most employees manage to attend to their medical appointments and routine health care either during non-work hours, with sick or personal leave provided by the employer, or without pay where the employer does not provide for, or the employee does not qualify for, such benefits.[5] Furthermore, leave benefits earned by NLRB employees may be used, with little constraint, for any number of purposes, including routine health care and medical appointments for the employee, a family member, or any person with whom the employee shares an affinity.[6]

Although a health unit at any workplace may be *convenient*, mere *convenience* does not a condition of employment make. That point was made crystal clear by the court in *U.S. Department of the Air Force, Luke Air Force Base v. FLRA* (*Luke Air Force Base*).[7] The dissent asserts that our decision improperly removes health service units from the scope of bargaining.[8] In that case, the court severely chastised our dissenting Chairman and then-Chairman Pope for using convenience as the rationale for extending benefits intended for military members and their families to civilian employees. According to the court, the majority failed to establish *any* connection between a *convenience* and a *working condition*.[9] Thus, the dissent's protestation—that our decision improperly removes onsite health units from the scope of bargaining—is effectively the same failed argument that was rejected by the court in *Luke Air Force Base*. Put simply, access to onsite health units is not a

[1] 5 U.S.C. § 6307.

[2] John Grobe, *Stay or Leave: Pros and Cons of Federal vs. Private Sector Employment*, FedSmith (July 9, 2017, 12:42 PM), https://www.fedsmith.com/2017/07/04/stay-leave-pros-cons-federal-vs-private-sector-employment/ ("[T]he federal leave programs are generous. Not too many private sector employers give one day of annual leave per pay period, which is what an employee with [fifteen] or more years of federal service earns."); Michael Roberts, *The Pros and Cons of Working for the Government*, The Balance Careers (Nov. 24, 2019), https://www.thebalancecareers.com/the-pros-and-cons-of-a-government-job-1669764 ("Government benefits almost always exceed private sector benefits packages."); Career Pro Plus, *Federal Jobs vs. Private Sector Jobs: 5 Things to Consider Before You Make Your decision*, https://www.careerproplus.com/blog/federal-jobs-vs-private-sector-jobs-5-things-to-consider-before-you-make-your-decision/ (last visited Feb. 23, 2021) ("As a general rule, the federal sector tends to have better benefits.").

[3] 5 U.S.C. § 7103(a)(14)(C).

[4] Dissent at 12.

[5] Federal employees receive at least 104 hours of sick leave per year by accumulating four hours of sick leave per pay period, beginning on the employee's first day of service. 5 U.S.C. § 6307. In addition to sick leave, federal employees receive anywhere from thirteen days to twenty-six days of annual leave, depending on years of service, and many employees have the option of earning a bank of twenty-four credit hours to earn and use as they see fit. *Id.* § 6303.

[6] 5 U.S.C. § 6307.

[7] *See* 844 F.3d 957, 964-65 (D.C. Cir. 2016); *see also AFGE, Loc. 1547*, 67 FLRA 523, 532 (2014) (Dissenting Opinion of Member Pizzella) ("[T]he civilian employees. . . have ready access to numerous businesses from which they may purchase food, groceries, and other essential services and household items, compared to civilian employees who have accepted hardship assignments in Baghdad or Kabul.").

[8] Dissent at 12.

[9] *Luke Air Force Base*, 844 F.3d at 964-65.

working condition that affects *how* employees perform their work and thus is not a condition of employment.

The NLRB's Strategic Plan assures Congress and taxpayers that it will "manage agency resources in a manner that instills public trust."[10] Contrary to that commitment, one might call it tactless to call upon taxpayers—the ones who receive no such benefits or benefits far less generous[11] and for whom the National Labor Relations Act exists to protect their rights—to fund an extraordinarily costly convenience for each of the twenty-seven offices of the NLRB.[12]

Convenience does not a condition of employment make.

[10] NLRB, *Strategic Plan: FY 2019—2022*, 3 (2019), https://www.nlrb.gov/sites/default/files/attachments/pages/node-158/strategicplanfy19-22final-2018-12-12.pdf.

[11] *See* Award at 19 ("Additionally, the Union contends that only about half of the 1416 [full-time equivalent personnel] that the Agency paid for were bargaining unit employees."). In other words, the dissent supports the notion that it is reasonable to call upon taxpayers to fund at least twenty-seven health units (one health unit per approximately every twenty-six employees).

[12] NLRB, *Regional Offices*, https://www.nlrb.gov/about-nlrb/who-we-are/regional-offices (last visited Apr. 30, 2021) ("The [NLRB] has [twenty-six] regional offices and is headquartered in Washington, DC.").

Chairman DuBester, dissenting in part:

In my dissenting opinion in *U.S. DHS, U.S. CBP, El Paso, Texas* (*El Paso*),[1] I noted that the majority failed to "provide[] 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."[2] While the majority concluded in *El Paso* that it was "constrained by the law of th[e] case" to find that the agency's change affected the working conditions of the border patrol agents,[3] it was clear to me that the majority's "sole imperative" in crafting its new standard was "to limit the scope of bargaining."[4]

Today's decision confirms my belief. Applying this new standard, the majority concludes that the Agency was not required to bargain over its decision to eliminate the health service units because this change did not affect "the circumstances or state of affairs attendant to one's performance of a job."[5] And in reaching this conclusion, the majority rejects the Union's and the Arbitrator's reliance upon several Authority decisions – one dating back to 1980 – because they "do not demonstrate that the change affected the performance of an employee's day-to-day job."[6] Moreover, the majority announces that the Authority "will no longer follow the test set forth" in those cases to determine whether a change affects the working conditions of bargaining-unit employees.[7]

At the outset, it defies explanation to conclude that the Agency's provision of health care services to its employees does not affect their working conditions. As explained by the Union in its opposition, this arrangement relieves employees from having to use leave to travel to their own physicians, which reduces the amount of time employees must spend away from the workplace.[8] And by providing these services, the Agency promotes the general health and welfare of employees, thereby reducing absences due to illness and increasing employee productivity.[9] Indeed, as the Union notes, the Agency itself recognized – and promoted – these benefits by providing a list of these services to new employees during their initial Agency orientations.[10]

Should any doubt remain that this arrangement affected employees' working conditions, I would further note that employees "received approved time off to go to the 'Agency approved' health service units" pursuant to both Article 23, Section 4 of the parties' collective-bargaining agreement and the Agency's past practice.[11] This reinforces the Arbitrator's conclusion that this arrangement constitutes a condition of employment.[12]

Sorting through the debris of the majority's decision, it remains to be seen precisely what type of change *would* satisfy its new test. What is clear, however, is that the majority has yet to provide a plausible rationale for discarding our long-standing precedent governing this matter. It certainly failed to do so in *El Paso*. And given the absence of any such rationale, it is not surprising that the majority struggles mightily to explain why the Agency's elimination of the health service units did not affect the employees' working conditions.

For instance, the majority discards the precedent upon which the Union and the Arbitrator rely simply because "none of the aforementioned cases applied the new standard" articulated in *El Paso*. And the majority rejects any notion that the health care service units affect the employees' working conditions because, in the majority's view, they merely provide a "convenience" to the employees.[13] But this rationale *entirely ignores* the positive effects that the units have on employee productivity by reducing their absences and promoting their general health and welfare. As I noted in my dissenting opinion in *El Paso*, "[i]t is precisely this type of shoddy and conclusory reasoning that has led the D.C. Circuit to reverse previous Authority decisions."[14]

The rationale espoused by my concurring colleague fares no better. Similarly ignoring the health units' effects on *overall employee productivity*, my

[1] 72 FLRA 7 (2021) (then-Member DuBester dissenting).
[2] *Id.* at 13 (Dissenting Opinion of then-Member DuBester).
[3] *Id.* at 11.
[4] *Id.* at 14 (Dissenting Opinion of then-Member DuBester) (quoting *U.S. DHS, U.S. CBP, El Paso, Tex.*, 70 FLRA 501, 506 (2018) (Dissenting Opinion of then-Member DuBester)).
[5] Majority at 5.
[6] *Id.* at 5 & n.20-22 (citing *AFGE, Loc. 1547*, 64 FLRA 635 (2010); *U.S. DOL, Wash., D.C.*, 38 FLRA 899 (1990); *AFGE, AFL-CIO*, 2 FLRA 603 (1980)).
[7] *Id.* at 5.
[8] Opp'n at 7.
[9] *Id.* at 11.
[10] *Id.* at 8 (citing Tr. at 54).
[11] Award at 37; *see id.* at 3 (quoting Art. 23, § 4 ("The Agency will permit employees reasonable opportunity to visit Agency-authorized health service units for emergency and appropriate health maintenance care. Where approved, such visits will be permitted without charge to annual leave, compensatory leave, or leave without pay.")).
[12] *See, e.g.*, *AFGE, Loc. 12*, 60 FLRA 533, 540 (2004) (Member Armendariz dissenting) ("Under Authority precedent, a proposal that addresses 'employees' use of duty time, without loss of pay, for certain activities' involves a condition of employment") (quoting *AFGE, Loc. 2077*, 43 FLRA 344, 355 (1991)).
[13] Majority at 5 n.24.
[14] *El Paso*, 72 FLRA at 14 (Dissenting Opinion of then-Member DuBester) (citing *AFGE, Loc. 32, AFL-CIO v. FLRA*, 853 F.2d 986, 992 (D.C. Cir. 1988) (rejecting Authority's decision because it fails to show that the Authority "has a clear vision of the standard it is purporting to follow")).

colleague myopically focuses on the units' *additional* effects on the employees' working conditions – namely, that they reduce the amount of time employees must spend away from the workplace to receive health care. And, citing the decision in *U.S. Department of the Air Force, Luke Air Force Base v. FLRA* (*Luke AFB*),[15] my colleague contends that the units cannot be found to constitute a condition of employment based solely upon the convenience they provide employees.

But my colleague's assertion ignores that the connection of the health service units to the employees' conditions of employment in the case before us is based upon far more than mere "convenience." And *Luke AFB* did not, as my colleague seems to suggest, hold that a service provided to employees is *disqualified* as a condition of employment simply because employees *also* find it convenient.

My colleague also concludes that the parties should be precluded from bargaining over the provision of on-site health care services because taxpayers should not be asked to fund these services, and because providing these services erodes the Agency's ability to efficiently manage its resources. At the outset, my colleague's argument fails to take into account that providing these services to employees arguably *promotes* efficiency by reducing the amount of time they must spend *away from work* to obtain the same services. And by making these services readily available, agencies can reduce absences due to illness, thereby obviating the need for employees to use their paid sick leave in the first place.

But more fundamentally, my colleague fails to realize that his concern regarding the efficacy of providing these services is *precisely* the type of issue that an agency can raise during collective bargaining with the exclusive representative. By removing this issue from the scope of bargaining under our Statute, today's decision prevents this process from happening based solely on the majority's own perception of what is in the Agency's best interest.

I also disagree with the majority's conclusion that the Arbitrator's remedy requiring the Agency to reimburse the grievants for medical expenses they incurred as a result of the Agency's termination of the health service units is contrary to law. Applying the flawed analysis it adopted in *U.S. DOJ, Federal BOP* (*DOJ*),[16] the majority vacates this remedy because it does not "reasonably and proportionally relate to the Agency's violation of the parties' agreement."[17]

I have previously cautioned that "the majority's determination to set aside arbitral remedies that are 'disproportionate' to an agency's contract violation lacks any rational guidelines, and is arbitrary."[18] I have also explained how the majority's analysis "departs, without explanation, from the 'traditional, widely-recognized deference to arbitrators' remedial determinations.'"[19]

That is certainly true here. The Arbitrator ordered the Agency to reimburse bargaining unit employees "for all verified medical expenses that would otherwise have been paid for by the Agency through its contract with the [Federal Occupational Health] from the termination of benefits on April 1, 2018 until the date of this award."[20] In other words, the award simply requires the Agency to make whole the employees adversely affected by the Agency's termination of the contract for health service units, an action the Arbitrator found violated the parties' agreement.

Even under the flawed *DOJ* test, I fail to see how this remedy "goes far beyond" the Agency's obligations under the parties' agreement.[21] I would therefore deny the Agency's contrary-to-law exception and uphold the awarded remedies.

[15] 844 F.3d 957 (D.C. Cir. 2016).
[16] 70 FLRA 398 (2018) (then-Member DuBester dissenting).
[17] Majority at 8.
[18] *U.S. DOD, Def. Logistics Agency*, 70 FLRA 932, 935 (2018) (Dissenting Opinion of then-Member DuBester).
[19] *Id.* (quoting *DOJ*, 70 FLRA at 412 (Dissenting Opinion of then-Member DuBester)).
[20] Award at 39.
[21] *Id.* at 8.