72 FLRA No. 49

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

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 178
(Union)

0-AR-5631

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DECISION

May 7, 2021

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

I. Statement of the Case

In this case, Arbitrator Patrick J. Halter found that the Agency violated the parties' agreement by using "catch-all" phrases to assign job duties from a work unit that are not regular and recurring to the employees' work unit. The Agency filed exceptions to the award based on nonfact, essence and contrary-to-law grounds. Because the Agency fails to demonstrate that the award does not draw its essence from the parties' agreement, we deny the Agency's essence exception. Additionally, the Agency's nonfact and management-rights exceptions are denied because they do not establish any deficiencies in the award. However, we set aside the portion of the award that grants attorney fees because the Arbitrator awarded attorney fees before the Agency had an opportunity to respond to the Union's petition. We remand the attorney fee issue to the parties for resubmission to the Arbitrator for further findings consistent with this decision.

II. Background and Arbitrator's Award

Prior to April 2019,[1] bargaining-unit employees (BUEs) assigned to the cargo processing (cargo) unit at the Agency's facilities had shifts from either 7:30 a.m. to 3:30 p.m. or 2:00 p.m. to 10:00 p.m. Consequently, there was a ninety-minute overlap between shifts. On April 28, the Agency eliminated the overlap by changing the shift schedule for the cargo unit as follows (the schedule change): 6:00 a.m. to 2:00 p.m. (day shift) and 2:00 p.m. to 10:00 p.m. Additionally, because the cargo unit did not begin processing cargo until 8:00 a.m., the Agency directed BUEs—who worked the day shift in the cargo unit—to assist the passenger processing (PAX) unit from 6:00 a.m. to 7:30 a.m. The parties bargained over the schedule changes and the Union viewed these changes as a trial ending on May 31.

On August 2, the Agency made the changes permanent in its annual bid, rotation, and placement (BRP) announcement. Specifically, the BRP announcement established that the schedule change was permanent and that BUEs working the day shift in the cargo unit would exclusively assist the PAX unit from 6:00 am to 7:30 am. The BRP announcement also established that the cargo and PAX units were separate units with different duties.

The Union grieved the BRP announcement.[2] The Union claimed that the BRP announcement violated Article 13, Section 2(B) of the parties' agreement because it used "catch-all" phrases to assign PAX duties to the cargo unit.[3] The Agency denied the grievance, arguing that the changes were proper because the parties' agreement states that the Port Director solely determines the structure and functions of the work units.[4] The Agency also argued that the Union did not timely grieve the cargo unit's schedule change because the Agency changed the schedule on April 28 and the Union failed to file the grievance within forty-five days of that date.

The Arbitrator found that the Agency violated the parties' agreement. Initially, he determined that the

[1] All dates hereinafter mentioned are in 2019 unless otherwise indicated.

[2] On August 1, the Union filed a step-one grievance alleging that the Agency violated the parties' agreement by failing to timely publish an annual BRP announcement. Exceptions, Attach. 5, Union Step-One Grievance. In its response to the Union's step-one grievance, the Agency acknowledged that that the Union's step-one grievance also claimed that the August 2 BRP announcement violated the parties' agreement. Exceptions, Attach. 6, Agency Step-One Resp. (Agency Step-One Resp.) at 2.

[3] We note that the Union's grievance also claimed that the BRP announcement violated the parties' agreement because it used catch-all phrases to assign non-unit duties to the tactical analysis unit (TAU). Award at 2. However, because this issue is not raised by the parties' filings and the Arbitrator also found that the Agency's BRP announcement did not violate the parties' agreement by using catch-all phrases to assign non-unit duties to the TAU, we do not address this issue. *Id.* at 12.

[4] Agency Step-One Resp. at 2 (citing Exceptions, Attach. 4, Collective-Bargaining Agreement (CBA) at 33-34.)

grievance was arbitrable because the Union grieved the contents of the BRP announcement made on August 2. The Arbitrator noted that the BRP announcement, along with the Agency's subsequent responses to the grievance, demonstrated that the schedule change and the assignment of PAX duties to the cargo unit's day shift became permanent on or after August 2. Therefore, he held that the Union was not required to file the grievance within forty-five days of April 28. Additionally, while the Arbitrator recognized that the Port Director determines the structure and function of the Agency's work units, he noted that the Port Director made the cargo and PAX units separate units in the BRP announcement. Furthermore, the Arbitrator noted that the job duties for the PAX unit are not duties that are regular and recurring to the cargo unit. Because Article 13, Section 2(B) prohibits the Agency from using a catch-all phrase to assign duties from a work unit that are not regular and recurring to a BUE's work unit, the Arbitrator held that the Agency's BRP announcement violated Article 13, Sections 2(A) and (B) of the parties' agreement.

Consequently, the Arbitrator ordered the Agency to comply with Article 13 and to restore the cargo unit's shift schedule to its pre-violation status.[5] The Arbitrator noted that BUEs previously received overtime for working in the PAX unit during the early morning hours. Therefore, the Arbitrator awarded backpay with interest to any BUEs who were deprived of overtime by the Agency's actions. Lastly, the Arbitrator awarded attorney fees to the Union because the Agency knew or should have known that the catch-all phrases in the BRP announcement violated the parties' agreement.

On May 8, 2020, the Agency filed exceptions to the award and the Union filed an opposition to the Agency's exceptions on June 11, 2020.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar one of the Agency's exceptions.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the arbitrator.[6] The Agency repeatedly claims that the award is based on nonfacts and that it does not draw its essence from the parties' agreement because the Arbitrator considered issues that were not raised by the Union in its step-two or step-three grievances.[7] However, the sparse record before us demonstrates that the Agency never raised these arguments before the Arbitrator.[8] Rather, the Agency's sole arbitrability argument was that the grievance could not encompass the cargo unit's schedule changes because it was not filed within forty-five days of April 28.[9] Accordingly, we dismiss the Agency's exceptions to the extent that they claim the Arbitrator improperly considered issues that were not raised by the Union's grievances.[10]

IV. Analysis and Conclusions

A. The award is not based on nonfacts.

The Agency argues that the award is based on nonfacts because the Arbitrator improperly found that the Agency waived its timeliness argument.[11] The Agency also claims that the award is based on nonfacts because the Arbitrator found that the Agency first implemented the change to the cargo unit's shift schedule on April 28.[12] Therefore, because the Union's step-two grievance only concerns the BRP announcement and not the schedule change, the Agency argues that the Arbitrator disregarded his own framed issues by ruling on the schedule change.[13]

Here, the Agency fails to demonstrate that the award is based on any nonfacts. The Arbitrator found—and the Agency acknowledges[14]—that the grievance is

[5] By ordering the Agency to restore the cargo unit's shift schedule to its pre-violation status, the award requires the Agency to make the cargo unit's shift schedule 7:30 a.m. to 3:30 p.m. and 2:00 p.m. to 10:00 p.m. Award at 12-13.

[6] 5 C.F.R. §§ 2425.4(c), 2429.5.

[7] *See* Exceptions at 16-19, 26. Under Article 27, Section 8 of the parties' agreement, "[i]ssues not raised and actions not requested in the initial filing of the Step 2 grievance form . . . may not be introduced at arbitration absent mutual agreement." CBA at 125.

[8] *See* Award at 7-9; Exceptions, Attach. 2, Agency Written Opening Statement (Agency Opening Statement) at 1; Exceptions, Attach. 17, Agency Written Closing Statement (Agency Closing Statement) at 1.

[9] *See* Agency Closing Statement at 1.

[10] *U.S. Dep't of VA, Cent. Ark. Veterans Healthcare Sys. Cent.*, 71 FLRA 593, 595 n.21 (2020) (*Ark. VA*) (then-Member DuBester concurring) (dismissing a management's right exception because it was never presented at arbitration).

[11] Exceptions at 16. To establish that an award is based on a nonfact, the excepting party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *AFGE, Loc. 3369*, 72 FLRA 158, 159 (2021) (*Loc. 3369*). Further, 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. *Id.*

[12] Exceptions at 16-17.

[13] *Id.* at 17-18.

[14] *See* Agency Opening Statement at 1 ("In its Step 2 grievance, which governs the issue in this arbitration, the [U]nion complained about two issues: (1) they complained about what

timely to the extent that it claims the BRP announcement violates the parties' agreement.[15] Based on the fact that the parties were bargaining over the schedule change, the Arbitrator also determined that the BRP announcement and the Agency's subsequent actions demonstrated that the schedule change and the assignment of PAX duties to the cargo unit's day shift became permanent on or after the August 2 BRP announcement.[16] Moreover, the Arbitrator noted that the Union's step-two grievance is timely because it raised both of these changes as catch-all phrases that violate the parties' agreement.[17] While the Agency repeatedly argues that the Union was required to grieve the schedule change and not the BRP announcement, the Agency does not challenge any of these findings as nonfacts and it fails to demonstrate that any of the Arbitrator's findings are clearly erroneous.[18] We deny the Agency's nonfact exception.[19]

B. The award draws its essence from the parties' agreement.

The Agency argues that the award fails to draw its essence from the parties' agreement because the Arbitrator misinterpreted Article 13, Section 2(B) of the parties' agreement.[20] The Agency argues that the BRP announcement comports with the parties' agreement because the Port Director has the discretion to create work units that include duties that are normally associated with separate work units.[21] The Agency also argues that Article 13, Section 2(B) only states that "when a port director creates a work unit that combines the duties from multiple work units, all of the duties in the work description must be regular and recurring, rather than temporary or sporadic."[22] In addition, the Agency cites to prior arbitration decisions to support its interpretation of Article 13, Section 2(B).[23]

Article 13, Section 2(B) states, in relevant part, the following:

> Given the flexibilities in this Article to meet operational requirements through flex-capable employees and temporary pulls, Port Directors will not include "catch-all" phrases in unit descriptions so as to require employees to work in units other than their bid work unit. A catch-all phrase is a statement within a work unit description that captures duties that are not regular or recurring within the work unit.[24]

Based on the plain wording of Article 13, Section 2(B), the Arbitrator found that the parties negotiated this section to preclude the Agency from using a catch-all phrase to assign BUEs to work in a unit other than their bid unit.[25] Moreover, the Arbitrator noted that the parties' agreement provides multiple mechanisms by which the Agency can assign non-unit work to meet its operational needs.[26] Namely, the Agency can utilize flex-capable employees, flexible work units, temporary assignments, and temporary pulls out of work units.[27]

However, rather than utilizing these mechanisms, the Port Director opted to label the cargo unit and the PAX unit as separate units in the BRP announcement and then she assigned PAX work to the cargo unit day shift.[28] Consequently, the Arbitrator found that the Port Director exercised her authority to determine the work units by labeling the PAX unit and the cargo unit as separate units.[29] Furthermore, the Arbitrator noted

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they called '*catch-all*' phrases in the . . . Cargo Processing 2020 B&R announcements, which announcements the [A]gency sent out by email . . . on August 2, 2019; and (2) they complained about the Cargo unit announcement listing work hours in Passenger Processing (PAX) as M-F (6 a.m. – 7:30 a.m.) . . . .").

[15] Award at 7-10.

[16] *Id.*

[17] *Id.* at 9.

[18] *Loc. 3369*, 72 FLRA at 159; *AFGE, Loc. 3254*, 70 FLRA 577, 580 (2018) ("A challenge that fails to identify clearly erroneous factual findings does not demonstrate that an award is based on a nonfact.").

[19] To the extent that the Agency's nonfact exception attempts to raise exceeds-authority exceptions, we deny them for the same reasons stated above. *U.S. Dep't of the Air Force, Pope Air Force Base, N.C.*, 71 FLRA 338, 340 n.18 (2019) (then-Member DuBester concurring) ("To the extent this argument attempts to raise an 'exceeds' exception to further displace the finality of the damages award, we reject it as well."). Additionally, the Agency makes identical arguments in its essence-exception that the award is deficient because the Arbitrator disregarded the Agency's timeliness argument. Exceptions at 24-25, 27-28. However, we reject this argument for the reasons stated above and because the Agency has not demonstrated that any of the Arbitrator's findings are nonfacts.

[20] Exceptions at 20. 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. *SSA, Off. of Hearings Operations*, 72 FLRA 108, 110 n.28 (2021) (Chairman DuBester dissenting in part).

[21] Exceptions at 20, 23-24.

[22] *Id.* at 23.

[23] *Id.* at 21-22.

[24] CBA at 34.

[25] Award at 11.

[26] *Id.*

[27] *Id.*

[28] *Id.* at 9-11.

[29] *Id.* at 10.

that the Agency's reliance on prior arbitration decisions is misplaced because the parties negotiated Article 13 subsequent to those decisions.[30] While the Agency may disagree with the Arbitrator's interpretation of Article 13, Section 2(B),[31] it fails to highlight any language that demonstrates the Arbitrator ignored, irrationally interpreted, or implausibly read the parties' agreement when he concluded that the Agency violated the parties' agreement by using catch-all phrases in the BRP announcement.[32] Therefore, we deny this exception.

C. The award is contrary to law, in part.

1. The award is not contrary to § 7106 of the Federal Service Labor-Management Relations Statute (Statute).

The Agency argues that the award violates its right to assign work under § 7106(a)(2)(B) of the Statute.[33] The Agency makes general claims that the award excessively interferes with these rights because it prevents the Agency from creating new work units that combine the duties of two or more work units.[34] To determine if the award is contrary to the Agency's management rights, we apply the three part framework set forth in *U.S. DOJ, Federal BOP* (*DOJ*).[35]

With regard to the first question under *DOJ*,[36] the Arbitrator found that the Agency violated Article 13, Sections 2(A) and (B) of the parties' agreement by using catch-all phrase to assign duties from a work unit that was not regular and recurring to the grievants' work unit.[37] Therefore, the answer to the first question—whether the arbitrator found a violation of a contract provision—is yes.[38]

Under *DOJ*, the second question asks whether the arbitrator's remedy reasonably and proportionally relates to the violation.[39] Here, the Arbitrator ordered the Agency to comply with Article 13 and to restore the cargo unit's shift schedule to its pre-violation status, which is 7:30 a.m. to 3:30 p.m. and 2:00 p.m. to 10:00 p.m.[40] Additionally, the Arbitrator awarded backpay—for up to fourteen days prior to the filing of the grievance—to any grievants who were deprived of overtime by the schedule change.[41] Because the Arbitrator found that the parties' agreement precluded the Agency from using the BRP announcement to permanently establish the schedule change and to assign BUEs to work in a unit other than their bid unit,[42] the remedies reasonably and proportionally relate to the Agency's violations of Article 13. Accordingly, the answer to the second question is yes.[43]

[30] *Id.* at 11.

[31] *U.S. Dep't of HHS, Substance Abuse & Mental Health Servs. Admin.*, 65 FLRA 568, 571-72 (2011) (finding that a different interpretation of a particular article does not automatically render the arbitrator's interpretation implausible).

[32] *U.S. Dep't of VA, Veterans Benefits Admin.*, 72 FLRA 57, 59 (2021) (Member Abbott concurring; Chairman DuBester dissenting) ("While the [a]gency may disagree with the [a]rbitrator's interpretation of Article 44, Section 2(H), it fails to highlight any language in Article 44 that demonstrates the [a]rbitrator ignored, irrationally interpreted, or implausibly read the parties' agreement when he concluded that the national grievance was not an improper elevation of the local grievance."); *U.S. Dep't of Com., Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 71 FLRA 1239, 1240-41 (2020) (Member Abbott concurring; then-Chairman Kiko dissenting); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Tallahassee, Fla.*, 71 FLRA 622, 624 (2020) (then-Member DuBester concurring) (denying the agency's essence exception because it did not "establish that the award fails to draw its essence from the agreement").

[33] Exceptions at 28. When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception de novo. *U.S. DOJ, Fed. BOP*, 70 FLRA 398, 408 (2018) (*DOJ*) (then-Member DuBester dissenting). In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *Id.* In making this assessment, the Authority defers to the arbitrator's underlying factual findings unless they are shown to be nonfacts. *Id.*

[34] Exceptions at 28.

[35] 70 FLRA at 405. Under the three-part framework set forth in *DOJ*, the first question is whether the arbitrator found a violation of a contract provision. *Id.* 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 405-06.

[36] *Id.* at 405.

[37] Award at 12-13.

[38] 70 FLRA at 405.

[39] *Id.*

[40] Award at 12-13.

[41] *Id.* We also note that the Agency argues that the award of backpay does not draw its essence from the parties' agreement because the Arbitrator awarded backpay for, up to, fourteen days prior to the filing of the grievance. Exceptions at 27-28. However, the Authority has held that arbitrators do not violate the Back Pay Act when they award backpay for the entire six-year period prior to the filing of a grievance. *Ark. VA*, 71 FLRA at 596. Moreover, because the Agency does not challenge the Arbitrator's finding that BUEs were deprived of overtime opportunities during the awarded period, the Arbitrator did not err by awarding backpay for up to fourteen days prior to the filing of the grievance. *See id.*

[42] Award at 11.

[43] We note that the instant case was the result of an expedited arbitration and that the award does not address how much backpay is awarded to the Union. Award at 9, 13.

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 assign work and to assign its employees. The Authority has previously held that the right to assign work includes the right to determine the particular duties to be assigned, when work assignments will occur, and to whom or what positions the duties will be assigned.[44] Generally, an award that simply requires an agency to adhere to a provision to which it agreed does not excessively interfere with its management's rights.[45] 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.[46]

The Arbitrator found that Article 13, Section 2(B) of the parties' agreement prevents the Agency from using the BRP announcement to permanently establish the schedule change and to assign BUEs to work in a unit other than their bid unit.[47] As relevant here, the Arbitrator emphasized that the Port Director determined the work units and that the parties' agreement provides for alterative mechanisms for the Agency to meet its operational needs.[48] Furthermore, the Agency does not argue that the Arbitrator's interpretation of Article 13 is beyond the scope of what the Agency can legally agree to under § 7106 of the Statute. Therefore, because the Agency fails to demonstrate that the award does not draw its essence from the parties' agreement, the award does not excessively interfere with the Agency's right to assign work.

Consequently, because this issue is not addressed by the award, our decision is based on the assumption that the parties and the Arbitrator will be determining the amount of backpay to be awarded at a later date.

[44] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Big Spring, Tex.*, 70 FLRA 442, 443 (2018) (then-Member DuBester concurring).

[45] *See 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]").

[46] *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.").

[47] Award at 11-12. Consequently, we will apply the Arbitrator's interpretation of the parties' agreement because the Agency fails to demonstrate that the Arbitrator's interpretation of Article 13, Section 2(B) does not draw its essence from the parties' agreement.

[48] *Id.* at 10-12.

2. The Arbitrator prematurely awarded attorney fees to the Union.

The Agency argues that the award of attorney fees is contrary to law because the Arbitrator prematurely awarded attorney fees.[49] Specifically, the Agency notes that the Arbitrator awarded fees before the Union filed a petition and before the Agency could respond.[50]

While the grievants were awarded backpay under the Back Pay Act (BPA),[51] the Authority has repeatedly affirmed that, under the BPA, a petition for fees must be filed and the Agency must be permitted to respond to the petition.[52] Although this case utilized an expedited process, the Union is not absolved from its obligation to file a petition for fees and the Agency did not waive its right to file an opposition before the Arbitrator makes a determination regarding attorney fees. Because the Union did not file a petition and the Agency had no opportunity to respond, the award is modified to strike the granting of attorney fees. Upon remand, the Union may file a petition for attorney fees with the Arbitrator and the Agency must have an opportunity to respond.[53] Only then is the Arbitrator empowered to make a determination.

V. Decision

We deny the Agency's exceptions in part. We grant the Agency's exception to the Arbitrator's granting of attorney fees and remand the attorney-fee issue to the parties for resubmission to the Arbitrator, absent settlement, for further findings consistent with this decision.

[49] Exceptions at 31.

[50] *Id.*

[51] 5 U.S.C. § 5596.

[52] 5 C.F.R. § 550.807(a)-(b); *see AFGE, Loc. 2145*, 71 FLRA 346, 348 (2019) (*Loc. 2145*) (then-Member DuBester concurring); *Fraternal Ord. of Police, Lodge No. 1*, 71 FLRA 6, 6 (2019).

[53] *Loc. 2145*, 71 FLRA at 348.

Chairman DuBester, concurring:

I agree with the Decision denying the Agency's exceptions in part, granting the Agency's exception to the Arbitrator's granting of attorney fees, and remanding the attorney fee issue.

Member Abbott, concurring:

While I agree with the majority's decision, I write separately to discuss my concerns with the contractual provision central to the instant case.

As the majority notes, § 7106(a)(2)(B) of the Federal Service Labor-Management Relations Statute (the Statute) bestows the Agency and the Port Director with the right to assign work, including the particular duties to be assigned, when work assignments will occur, and to whom or what positions the duties will be assigned.[1] Consequently, the Port Director normally has the complete discretion to initiate a schedule change and to assign non-unit work to bargaining unit employees (BUEs).

However, contracts have consequences and the Agency should have used better judgment when it previously negotiated Article 13.[2] The Agency inexplicably agreed to Article 13, Section 2(B) of the parties' agreement and the Arbitrator subsequently found that this provision precludes the Agency from using a catch-all phrase to assign BUEs to work in a unit other than their bid unit.[3] Moreover, the Agency does not claim that Article 13, Section 2(B) encompasses subjects that are beyond the scope of what the Agency can legally agree to under § 7106 of the Statute. Therefore, because I also cannot reasonably conclude that the Arbitrator's interpretation of Article 13 is implausible, I am constrained to conclude that the Agency violated the parties' agreement.

[1] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Big Spring, Tex.*, 70 FLRA 442, 443 (2018) (then-Member DuBester concurring).
[2] *U.S. Dep't of Com., Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 71 FLRA 1239, 1239 (2020) (Member Abbott concurring; then-Chairman Kiko dissenting) ("In this case, we remind the federal labor-relations community that contracts have consequences and that a party cannot avoid a provision's consequences when it agrees to that provision."); *see also U.S. Dep't of Transp., FAA*, 68 FLRA 402, 405 n.40 (2015) ("Member Pizzella notes that contracts have consequences. An agency should use better judgment when drafting and negotiating provisions and should not, as here, attempt to use its exceptions to wriggle out of a poorly thought out and constructed contract provision.").
[3] Award at 12-13.

Member Kiko, dissenting:

I would set aside the award as failing to draw its essence from the parties' agreement. The Authority will set aside an award that fails to draw its essence from a collective-bargaining agreement where the excepting party establishes that the award does not represent a plausible interpretation of that agreement.[1] As pertinent here, an award fails to draw its essence from an agreement where it conflicts with the agreement's plain wording.[2]

In Article 13, Section 1(O) (Section 1(O)) the parties have defined "work unit" as:

> the smallest operational unit, *determined by the Port Director*, to which groups of employees can expect to be assigned and for which qualifications are defined and applied. Such units are specific to the configuration of each Port, and are designed based on the regular and recurring functions that will be performed, *as determined by the Port Director* consistent with this definition . . . . Within any specific port, *actual work units and functions performed within the work unit are the responsibility of the Port Director*.[3]

The Port Director properly exercised this contractual authority when determining that, for the upcoming year, the cargo unit would include regular and recurring passenger processing duties. The Arbitrator's interpretation of Article 13, Section 2 (Section 2) would render meaningless the discretion management preserved for itself in Section 1(O). Although the Arbitrator focused on whether passenger processing duties had *historically* recurred in the cargo unit,[4] nothing in Section 2 prohibits the Agency from changing the duties performed by a work unit. The Agency properly gave employees notice of this change in the annual bid, rotation, and placement announcement. As the Agency argues, "[t]aking the [A]rbitrator's strained interpretation of Article 13 to its logical extreme, a [P]ort [D]irector would never be permitted to create a new work unit that combines duties that are normally associated with any other units, which is a nonsensical and unreasonable interpretation of the [agreement]."[5]

The Arbitrator's reliance on Article 13, Section 5 (Section 5) is also misplaced.[6] Section 5 expressly provides "temporary" measures to address any "short-term operational requirement."[7] The Arbitrator correctly noted the Agency's commitment, in Section 2, to use the mechanisms found in Section 5 "to move employees outside their bid work unit."[8] Importantly, however, no employees were moved outside their bid work unit in this case. And nothing in the parties' agreement requires the Agency to use Section 5's procedures to address a sustained, recurring operational requirement.

The Arbitrator's interpretation of Article 13, particularly Section 1(O) and Section 2, fails to draw its essence from the agreement. The Arbitrator and the majority misinterpret contractual provisions meant to protect employees from unfair surprise as handcuffing the Agency's ability to create work units best suited to perform essential functions. Because the parties' negotiated agreement does not impose such restrictions on the Agency, I dissent.

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[1] *See U.S. Dep't of the Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, 70 FLRA 754, 755 (2018) (then-Member DuBester dissenting).

[2] *U.S. Small Bus. Admin.*, 70 FLRA 525, 527 (2018) (then-Member DuBester concurring, in part, and dissenting in part) (citing *U.S. Dep't of the Air Force, Okla. City Air Logistics Command, Tinker Air Force Base, Okla.*, 48 FLRA 342, 348 (1993)).

[3] Opp'n, Attach. 4, Collective-Bargaining Agreement Excerpts (CBA) at 33-34 (emphasis added) (quoting Art. 13).

[4] *See* Award at 10.

[5] Exceptions at 20.

[6] *See* Award at 11 (finding that the Agency disregarded the Section 5 mechanisms that "it agreed to follow and use when the Port Director determines an operational need requires the assignment of officers to a work unit other than the officer's bid unit").

[7] CBA at 37-38.

[8] *Id.* at 34; Award at 12.