

**72 FLRA No. 117**

UNITED STATES  
DEPARTMENT OF VETERANS AFFAIRS  
VETERANS HEALTH ADMINISTRATION  
CONSOLIDATED MAIL OUTPATIENT PHARMACY  
LEAVENWORTH, KANSAS

(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES

LOCAL 85

(Union)

0-AR-5690

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DECISION

December 21, 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)

## **I. Statement of the Case**

Arbitrator Peggy A. McNeive issued a remedial award requiring the Agency to assign employees, instead of managers, to escort Union representatives visiting the Agency's Consolidated Mail Outpatient Pharmacy (CMOP). The Agency filed exceptions challenging, among other things, the award's interference with management's right to determine the personnel by which Agency operations shall be conducted under § 7106 of the Federal Service Labor-Management Relations Statute (the Statute).<sup>1</sup> For the reasons that follow, we find that the award excessively interferes with the Agency's right to determine personnel. Accordingly, we vacate the portion of the Arbitrator's remedial award requiring the Agency to assign non-management officials to escort Union representatives.

## **II. Background and Arbitrator's Awards**

Because of the danger of mistakes and security concerns that come with storing and processing pharmaceuticals, the Agency requires visitors to the CMOP to be escorted by either an Agency employee or a

management official. The Union filed a grievance alleging that the Agency prohibited Union representatives from entering the facility without a management escort, in violation of the parties' collective-bargaining agreement. After the Agency denied all allegations, the matter proceeded to arbitration.

The parties stipulated that the issues before the Arbitrator included whether the Union proved that the Agency interfered with, or denied it, access to bargaining-unit employees, as well as any appropriate remedies.

The Arbitrator found that the Agency's surveillance of Union representatives interfered with employees' exercise of their rights. For example, the Arbitrator found that a manager at outside the door of a Union-sponsored function, which interfered with employees' right to engage in Union activities. The Arbitrator also found that Agency officials engaged in surveillance by requiring management officials to escort Union representatives within the facility. After the Arbitrator issued an award concluding that the Agency violated the parties' agreement (the initial award),<sup>2</sup> the parties briefed the issue of remedies for the Arbitrator.

In a separate award, the Arbitrator addressed remedies (the remedial award). The parties agreed upon several remedies, including that the Agency would post a notice. The Arbitrator adopted the notice wording proposed by the Union.<sup>3</sup> As relevant here, the notice states that the Agency "will not require bargaining[-]unit employees to disclose, under threat of discipline, whether or not they met with Union representatives while engaging in protected activity."<sup>4</sup>

The Arbitrator also issued several remedies requested by the Union that were not previously agreed upon by the parties. Relevantly, the Arbitrator directed:

The Union shall not be escorted by a [m]anagement official while at the facility. While regulations require the Agency assign an "authorized" person to escort Union representatives while

<sup>2</sup> Initial Award at 15 (finding the Agency violated the parties' agreement "by interfering with [Union] efforts to represent its members by denying union officials access to bargaining[-]unit members").

<sup>3</sup> Exceptions, Ex. 8, Notice to All Employees Posted Pursuant to an Arbitration Award (Notice) at 1. Although the Arbitrator did not include the notice in the remedial award, the Agency included it in the record for the Authority's consideration. *Id.* According to the Agency, the "Arbitrator used the Union's language for the notice without discussing the language with the Agency." Exceptions Br. at 2.

<sup>4</sup> Notice at 1 (emphasis omitted).

<sup>1</sup> 5 U.S.C. § 7106(a)(2)(B).

they are at the facility, i[t] does not require such authorized person be a member of the [m]anagement team.<sup>5</sup>

As part of this remedy, the Arbitrator directed the Agency to train the non-management “authorized person” in how to escort Union representatives.<sup>6</sup>

On December 21, 2020, the Agency filed exceptions to the remedial award. The Union did not file an opposition.

### III. Analysis and Conclusion: We set aside a portion of the remedial award as contrary to law.

As relevant here, the Agency argues that the remedial award is contrary to law in two respects.<sup>7</sup> In resolving a contrary-to-law exception, the Authority reviews any question of law raised by the exception and the award de novo.<sup>8</sup> In applying a de novo standard of review, the Authority assesses whether the arbitrator’s legal conclusions are consistent with the applicable standard of law.<sup>9</sup> In making that assessment, the Authority defers to the arbitrator’s underlying factual findings unless the excepting party establishes that they are nonfacts.<sup>10</sup>

First, the Agency challenges the wording in the notice posting that prohibits the Agency from compelling “employees to disclose, under threat of discipline, whether or not they met with Union representatives while engaging in protected activity.”<sup>11</sup> According to the Agency, this remedy is contrary to § 7131(d) of the Statute<sup>12</sup> because the remedy precludes the Agency from discussing official-time requests with Union representatives in order to determine whether they are “reasonable, necessary, and in the public interest.”<sup>13</sup> But, the awarded remedy only prohibits the Agency from “threatening discipline”; it does not prevent the Agency from either discussing official-time requests or denying an official-time request that fails to provide sufficient

detail as required by § 7131.<sup>14</sup> Accordingly, we deny this exception.<sup>15</sup>

Second, the Agency argues that requiring it to assign a non-management employee to escort Union representatives visiting the CMOP (the escort remedy) is contrary to management’s right “to determine the personnel by which agency operations shall be conducted.”<sup>16</sup> The Authority will apply the three-part framework set forth in *U.S. DOJ, Federal BOP*<sup>17</sup> only in “cases where the awards or remedies affect[] a management right” under § 7106 of the Statute.<sup>18</sup> The right to determine personnel includes the right to determine the particular employees to whom work will be assigned.<sup>19</sup> So, awards that require an agency to assign particular duties to a particular individual affect this

<sup>14</sup> See *U.S. DHS, U.S. CBP*, 71 FLRA 119, 120 (2019) (then-Member DuBester dissenting) (finding that “under § 7131(d), the [a]gency must be permitted to gather the information that it needs to determine whether an official-time request is reasonable”).

<sup>15</sup> The Agency also argues that this notice wording conflicts with official-time requirements in Executive Order (EO) 13,837. Exceptions Br. at 7-8 (citing Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time Use, Exec. Order No. 13,837 (May 25, 2018), 83 Fed. Reg. 25,335 (June 1, 2018)). However, the Authority has recognized that, generally, agencies must apply the law in effect at the time a decision is made, even when that law has changed during the course of a proceeding. *U.S. Dep’t of the Navy, Mare Island Naval Shipyard, Vallejo, Cal.*, 49 FLRA 802, 811 (1994) (law in effect at time of decision applies unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary). President Biden has revoked EO 13,837. Protecting the Federal Workforce, Exec. Order No. 14,003, 86 Fed. Reg. 7,231 (Jan. 22, 2021) (revoking Executive Order No. 13,837 in § 3(b)). Because the Agency is no longer subject to EO 13,837, that EO provides no basis for finding the award deficient. See *U.S. EPA*, 72 FLRA 114, 114 (2021) (Chairman DuBester concurring; Member Kiko concurring; Member Abbott concurring) (stating that the Authority generally applies the law in effect at the time of the Authority’s decision and noting that EO 14,003 revoked EO 13,837).

<sup>16</sup> Exceptions Br. at 10. Although the Agency cites § 7106(a)(2)(C) of the Statute, the quoted language appears in § 7106(a)(2)(B).

<sup>17</sup> 70 FLRA 398, 405 (2018) (*DOJ*) (then-Member DuBester dissenting).

<sup>18</sup> *U.S. Dep’t of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 72 FLRA 323, 325 (2021) (Chairman DuBester concurring) (quoting *U.S. Dep’t of the Treasury, Off. of the Comptroller of the Currency*, 71 FLRA 387, 390 (2019) (then-Member DuBester dissenting in part)).

<sup>19</sup> *U.S. Dep’t of VA, Med. Ctr., Detroit, Mich.*, 61 FLRA 371, 373 (2005).

<sup>5</sup> Remedial Award at 2.

<sup>6</sup> *Id.*

<sup>7</sup> Exceptions Br. at 7-10.

<sup>8</sup> *U.S. Dep’t of State, Bureau of Consular Affs., Passport Servs. Directorate*, 70 FLRA 918, 919 (2018).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Exceptions Br. at 7.

<sup>12</sup> 5 U.S.C. § 7131(d) (providing an employee “shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest”).

<sup>13</sup> Exceptions Br. at 9.

right.<sup>20</sup> Here, the award unambiguously requires the Agency to assign non-management employees to escort Union representatives visiting the CMOP,<sup>21</sup> which, we find, affects the Agency's right to determine personnel.

When applying the three-question test established by *U.S. DOJ, Federal BOP*,<sup>22</sup> the first question that must be answered is whether the arbitrator has found a violation of a contract provision; if the answer to that question is yes, then the second question is whether the arbitrator's remedy reasonably and proportionally relates to that violation.<sup>23</sup> If the answer to the second question is yes, then the third question is whether the awarded remedy excessively interferes with the § 7106(a) management right.<sup>24</sup> If the answer to this question is yes, then the remedy is contrary to law and must be vacated.<sup>25</sup>

Here, the Arbitrator found that the Agency violated the parties' agreement by interfering with the Union's efforts to represent its members.<sup>26</sup> Although the Arbitrator did not identify which provision of the parties' agreement the Agency violated, we infer from the initial award that the Arbitrator found a violation of Article 17, Section 3.<sup>27</sup> That provision confers upon employees the "right to assistance and representation by the Union, and the right to meet and confer with local union representatives in private during duty time."<sup>28</sup> Thus, the answer to the first question is yes.<sup>29</sup>

Turning to the second question, the remedy requiring non-management officials to escort Union representatives reasonably and proportionately relates to the Agency violating employees' right "to meet and confer with local union representatives in private."<sup>30</sup> Thus, the answer to the second question is also yes.

<sup>20</sup> See *id.* at 373-74 (holding that the right to determine personnel "includes the right to determine the particular employees to whom work will be assigned" and an award requiring an agency to assign certain duties to a particular employee affected that right).

<sup>21</sup> Remedial Award at 2.

<sup>22</sup> 70 FLRA at 405.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 405-06.

<sup>26</sup> Initial Award at 8.

<sup>27</sup> See *id.* at 5-6 (noting that Article 17, Section 3 is a "relevant collective[-]bargaining agreement provision[]" and quoting from it).

<sup>28</sup> *Id.* at 6 (quoting Art. 17, § 3).

<sup>29</sup> See *id.* at 8-15 (considering "whether the Agency interfered with the Union's ability to represent the bargaining[-]unit employees at CMOP" and concluding that the Agency violated the parties' agreement by interfering with the Union's "efforts to represent its members" by denying Union officials access to bargaining-unit members).

<sup>30</sup> *Id.* at 6 (quoting Art. 17, § 3).

Finally, we turn to the last question – whether the Arbitrator's remedy excessively interferes with management's right to determine personnel.<sup>31</sup> By requiring the Agency to assign employees – instead of management officials – to escort Union representatives, the escort remedy restricts which personnel the Agency may determine are proper escorts. The Agency argued, and the Arbitrator found, that there are numerous special security concerns at the CMOP.<sup>32</sup> In addition, federal regulations mandate that access to facilities that store, handle, and distribute prescription drugs "shall be limited," and "[a]ccess from outside the premises shall be kept to a minimum and well-controlled."<sup>33</sup> Just as the Authority has found that agencies' internal-security determinations in correctional environments are entitled to extra deference,<sup>34</sup> the sensitive nature of storing and processing pharmaceuticals entitles this Agency to similar deference in determining who is authorized to act as escorts. The escort remedy substitutes the Arbitrator's judgment for that of the Agency in making that determination. Keeping in mind the special nature of the work performed at CMOP, and the corresponding deference to which the Agency is entitled, we find that the escort remedy excessively interferes with management's right to determine the personnel by which Agency operations will be conducted.<sup>35</sup> Thus, the answer to the final question is also yes, and the awarded remedy is contrary to law.

<sup>31</sup> *DOJ*, 70 FLRA at 405. The question of excessive interference with management's right to determine personnel is not one that the Authority has previously considered under the *DOJ* standard.

<sup>32</sup> See Initial Award at 4 ("The reason for management escorting [U]nion representatives was to prevent mistakes in filling prescriptions; employees cannot be interrupted while they are working because they might make mistakes . . . . It is important to control access to the CMOP facility in order to maintain security because it handles numerous pharmaceuticals.

A variety of documents including VA Directives, VA Handbooks, the Code of Federal Regulations, CMOP Policies set out the type of security measures needed at the facilities.").

<sup>33</sup> 21 C.F.R. § 205.50(b).

<sup>34</sup> See *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Big Spring, Tex.*, 70 FLRA 442, 443-44 (2018) (then-Member DuBester concurring) (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Lompoc, Cal.*, 58 FLRA 301, 302-03 (2003) (Chairman Cabaniss concurring; Member Pope dissenting) (holding that "internal security within a correctional facility constitutes a greater than normal management concern, and a higher standard of deference should be accorded prison administrators regarding such matters").

<sup>35</sup> Cf. *id.* at 444 ("[B]y requiring the [a]gency to always staff the third floor of the housing units, the [a]rbitrator denies the [a]gency the ability to determine how it should staff the prison."); *U.S. Dep't of the Army, Womack Army Med. Ctr., Fort Bragg, N.C.*, 60 FLRA 721, 724 (2005) (finding award that prevented agency from assigning duties to particular positions excessively interfered with purported management right).

We grant the Agency's management-rights exception and vacate the portion of the remedial award containing the escort remedy.<sup>36</sup>

#### **IV. Decision**

We grant the Agency's management-rights exception and set aside the portion of the remedial award that required the Agency to assign non-management employees to escort Union representatives within its secure facility.

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<sup>36</sup> Because we have vacated this portion of the remedial award, we do not reach the Agency's other exceptions challenging it. Exceptions Br. at 9-11; *see U.S. Dep't of VA, Boise Veterans Admin., Med. Ctr.*, 72 FLRA 124, 129 n.61 (2021) (Member Abbott concurring; Chairman DuBester dissenting in part) (finding it unnecessary to address exception challenging a remedy the Authority had vacated on other grounds).

**Chairman DuBester, concurring:**

I agree that the notice posting's wording that prohibits the Agency from compelling "employees to disclose, under threat of discipline, whether or not they met with Union representatives while engaging in protected activity,"<sup>1</sup> does not conflict with § 7131(d) of the Federal Service Labor-Management Relations Statute (the Statute).<sup>2</sup> I also agree that Executive Order 13,837 provides no basis for finding the award deficient.

Further, I agree that the remedy award conflicts with management's right to determine the personnel by which Agency operations shall be conducted under § 7106(a)(2)(B) of the Statute, insofar as it prohibits the Agency from assigning management officials to escort Union representatives through the facility. However, I do so for reasons different from the majority.

The majority's claim that the Arbitrator "found[] that there are numerous special security concerns" at the Agency's facility is questionable, at best.<sup>3</sup> The portion of the initial award that the majority cites for that claim is the *background* section, where it appears that the Arbitrator was merely summarizing witness testimony – not making any findings.<sup>4</sup> In addition, the majority's reliance on 21 C.F.R. § 205.50 is misplaced, as that regulation applies to state-licensing requirements for wholesale prescription-drug distributors, not to federal agencies. As such, I do not agree with the majority's deference to the Agency here, as if the Agency were a correctional institution making an internal-security determination.

Moreover, I continue to believe – for reasons I have expressed in previous cases – that the abrogation test is the appropriate test to determine whether an arbitrator's award impermissibly encroaches on a management right.<sup>5</sup> But, here, the remedial award entirely precludes management from assigning any manager to escort Union officials throughout the facility. Therefore, applying the abrogation test, I feel constrained

to find that remedy is contrary to law, and I concur in the result on this issue.<sup>6</sup>

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<sup>1</sup> Exceptions Br. at 7.

<sup>2</sup> 5 U.S.C. § 7131(d).

<sup>3</sup> Majority at 5.

<sup>4</sup> See Initial Award at 4.

<sup>5</sup> See *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Tallahassee, Fla.*, 71 FLRA 622, 625 (2020) (Concurring Opinion of then-Member DuBester) (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Lompoc, Cal.*, 70 FLRA 596, 598-99 (2018) (Dissenting Opinion of then-Member DuBester); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Big Spring, Tex.*, 70 FLRA 442, 445 (2018) (*FCI Big Spring*) (Concurring Opinion of then-Member DuBester); *U.S. DOJ, Fed. BOP*, 70 FLRA 398, 409-12 (2018) (Dissenting Opinion of then-Member DuBester)).

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<sup>6</sup> See *FCI Big Spring*, 70 FLRA at 445 (Concurring Opinion of then-Member DuBester) (finding award that precluded agency from leaving posts vacant abrogated management's rights).

**Member Abbott, concurring:**

In 2018, we determined that excessive interference, not abrogation, is the appropriate standard to apply when we are called on to determine whether an arbitrator's award impermissibly encroaches on a management right.<sup>1</sup> We took that step,<sup>2</sup> in large part because the Authority had never found *one* instance where an award interfered with a management right and because the D.C. Circuit had rejected abrogation as an appropriate standard.<sup>3</sup> According to the Court, the abrogation standard was an atextual construction of the Statute and thwarted the flexibility and ability of agencies to “successfully challenge and establish that an arbitrator's award impermissibly interferes with a § 7106(a) management right.”<sup>4</sup>

The Chairman's futile reference to an abandoned standard serves no constructive purpose and is quite irrelevant.

There is but one standard that we use to determine whether an arbitrator's award impermissibly interferes with a management right. That standard is excessive interference.

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<sup>1</sup> “In accordance with the D.C. Circuit's implicit rejection of abrogation, we will no longer follow that standard. Instead, we will return to the excessive interference test in order that we may return to the flexibility inherent in that standard and required to address the varied contexts in which it will be applied.” *U.S. DOJ, Fed. BOP*, 70 FLRA 398, 403 (2018) (*DOJ*) (then-Member DuBester dissenting).

<sup>2</sup> *Id.* at 398.

<sup>3</sup> *AFGE, Loc. 2782 v. FLRA*, 702 F.2d 1183 (D.C. Cir. 1983); see *U.S. EPA*, 65 FLRA 113 (2010) (Member Beck concurring); *U.S. Dep't of the Treasury, BEP, Wash., D.C.*, 41 FLRA 860 (1991); *U.S. Dep't of the Treasury, U.S. Customs Serv.*, 37 FLRA 309 (1990); *Int'l Plate Printers, Die Stampers & Engravers Union of N. Am., AFL-CIO, Loc. 2*, 25 FLRA 113 (1987).

<sup>4</sup> *DOJ*, 70 FLRA at 404.