

71 FLRA No. 32

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
DUBLIN, CALIFORNIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3584
(Union)

0-AR-5357

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DECISION

June 12, 2019

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

I. Statement of the Case

The parties have received two arbitration awards, from different arbitrators, concerning whether the Agency's decisions to vacate certain mission-critical posts comply with Article 27 of the parties' collective-bargaining agreement. In 2014, Arbitrator Edna E. J. Francis issued an award finding that the Agency violated Article 27 (the Francis Award), and her award became binding when neither party filed exceptions to it. A second award by Arbitrator Carol A. Vendrillo in 2018 (the Vendrillo Award) addressed whether the Agency had complied with the Francis Award *and* whether the Agency continued to violate Article 27 since receiving the Francis Award.

We must resolve exceptions to the Vendrillo award, but to the extent that they challenge compliance with the final-and-binding Francis Award, we dismiss them as untimely.

Arbitrator Vendrillo found that, since receiving the Francis Award, the Agency continued to vacate "mission[-]critical" posts in a manner that violated Article 27.¹ The main question before us is whether the

awarded remedy, which precludes the Agency from vacating mission-critical posts "in the absence of an emergency or other rare circumstance[],"² is contrary to management's right to assign work under § 7106(a)(2)(B) of the Federal Service Labor-Management Relations Statute (Statute).³ Applying the framework articulated in *U.S. DOJ, Federal BOP (DOJ)*,⁴ we find that the award excessively interferes with that right, and we vacate the award, in part.

II. Background and Arbitrator's Award

In 2004, the Federal Bureau of Prisons implemented a national policy that allowed management to identify "mission[-]critical" posts and list them on a mission-critical roster.⁵ As relevant here, under the policy, "mission[-]critical" posts are defined as those that are necessary for daily operations and that the Agency would "vacate[]" only under rare circumstances."⁶

Article 27 of the parties' agreement requires, in pertinent part, that the Agency reduce the inherent hazards of the prison facility "to the lowest possible level, without relinquishing its rights under . . . [§] 7106" of the Statute.⁷

In 2014, the Francis Award found that the Agency violated Article 27 by vacating mission-critical posts, and it awarded *some* employees backpay for missed overtime from August 2011 to May 2014.⁸ Arbitrator Francis later issued several clarification awards that addressed the backpay remedy. The Agency did not file exceptions to the Francis Award or to any of the other awards that Arbitrator Francis issued.

Weeks later, on June 23, 2014, the Union filed a grievance alleging that the Agency continued to vacate posts in violation of the Francis Award. The Union cited several instances in which it alleged that the Agency vacated posts in violation of Article 27, as interpreted by the Francis Award. As remedies, the Union requested that the Agency "cease and desist [from] further violations," correct the mission-critical rosters, and award backpay to employees who would have worked overtime but for the Agency's contractual violation.⁹ The Agency denied the grievance.

The grievance went to arbitration in October of 2017 before Arbitrator Vendrillo, who examined whether

² *Id.*

³ 5 U.S.C. § 7106(a)(2)(B).

⁴ 70 FLRA 398, 405-06 (2018) (Member DuBester dissenting).

⁵ Francis Award at 9.

⁶ *Id.* at 11.

⁷ Exceptions, Attach. 1, Collective-Bargaining Agreement at 61.

⁸ Francis Award at 42, 45-47.

⁹ *Id.* at 5.

¹ Vendrillo Award at 16.

the Agency had complied with the Francis Award and whether the Agency continued to violate its obligation under Article 27 to reduce the inherent hazards of the prison facility by leaving mission-critical posts vacant.¹⁰

At arbitration, the Agency argued that “implement[ing] the [U]nion’s” staffing preferences “would . . . abrogate several of management[’s] rights under . . . § 7106(a)” of the Statute.¹¹ The Vendrillo Award rejected that argument. Specifically, Arbitrator Vendrillo found that the Agency’s contractual commitments in Article 27 did not abrogate management’s rights under § 7106.¹² Arbitrator Vendrillo found that the Agency had failed to comply with the Francis Award *and* continued to violate Article 27 by designating mission-critical positions on the roster and then leaving some of those designated mission-critical posts vacant in the absence of an emergency or other rare circumstance. Consequently, she ordered the Agency to “cease and desist” from violating the agreement.¹³ She also awarded additional backpay for lost overtime from May 2014 to the date of her award in February 2018 – a time period that was not covered by Arbitrator Francis’s earlier remedy.¹⁴

On March 14, 2018, the Agency filed exceptions to the Vendrillo Award, and on April 13, 2018, the Union filed an opposition to the Agency’s exceptions.

III. Preliminary Matter: Any Agency exceptions that challenge the Francis Award are untimely.

In its opposition, the Union contends that the Agency’s “attempt . . . to have the Authority overturn the [Francis Award] is untimely and improper.”¹⁵ In this regard, the Union correctly points out that the Agency did not timely file exceptions to the Francis Award.¹⁶ To the extent that any Agency arguments challenge the merits of the Francis Award, we dismiss them because they are untimely challenges to the Francis Award.¹⁷ However, Arbitrator Vendrillo conducted an independent analysis of whether the Agency had violated Article 27,¹⁸ and the Agency’s exceptions here primarily challenge the

Vendrillo Award, not the Francis Award.¹⁹ Thus, for the reasons discussed below, we reject the Union’s argument that the Vendrillo Award resolved *only* the question of whether the Agency had complied with the Francis Award.²⁰

Importantly, the Francis and Vendrillo Awards are distinguishable: the positions eligible for backpay under each award are different,²¹ and the time periods covered by each award’s remedies are different.²² And although Arbitrator Francis issued clarifying awards after her merits decision, none of those awards expanded the coverage of the remedy from her merits decision or purported to reach beyond the date of that decision. Therefore, the scope of these two awards differs and undercuts the notion that any challenge to the Vendrillo award could or should have been raised as an exception to the Francis award.

Moreover, while the Agency argued before both arbitrators that implementing the Union’s staffing preferences would “abrogate” management’s rights under § 7106 of the Statute,²³ the Agency argues in its exceptions here that the Vendrillo award violates management’s right to assign work “[u]nder the [Authority’s] *new* [management-rights] standard.”²⁴ In *DOJ*, the Authority rejected the abrogation standard and set forth a new framework for determining whether an arbitration award impermissibly encroaches on a management right.²⁵ Applying *DOJ*’s framework here is consistent with the principle that the Authority resolves arbitration cases based on the state of the law at the time that it decides those cases.²⁶ Therefore, we find it appropriate to address the Agency’s exceptions to the Vendrillo Award – except for those portions of the

¹⁰ Vendrillo Award at 3.

¹¹ Exceptions, Attach. 2, Agency’s Post-Hr’g Br. at 48.

¹² Vendrillo Award at 20.

¹³ *Id.* at 16.

¹⁴ The Vendrillo Award’s backpay remedy extended to more positions than the earlier backpay remedy in the Francis Award. *Id.* at 16-18.

¹⁵ Opp’n at 15.

¹⁶ *Id.* at 2.

¹⁷ *E.g.*, *AFGE, Council 243*, 67 FLRA 96, 97 (2012).

¹⁸ Vendrillo Award at 20 (finding that the Agency’s “continued failure” to fill all mission critical posts “violated Article 27”); *see also id.* at 14-16, 18-20.

¹⁹ *See* Exceptions at 3-7 (alleging that the Vendrillo Award is inconsistent with decisions of the U.S. Court of Appeals for the District of Columbia Circuit), 10 (arguing that, “[u]nder the [Authority’s] *new* [management-rights] standard,” the Vendrillo award violates management’s right to assign work).

²⁰ Opp’n at 8-9.

²¹ *See* Vendrillo Award at 8, 16-18 (finding that the Francis Award granted backpay to only those positions that the Agency could not have filled using a process of “augmentation,” but holding that no such limit would apply to the positions eligible for backpay under the Vendrillo Award).

²² *Compare* Francis Award at 47, *with* Vendrillo Award at 20.

²³ *See* Francis Award at 29; Exceptions, Attach. 2, Agency’s Post-Hr’g Br. at 13.

²⁴ Exceptions at 10 (citing *DOJ*, 70 FLRA at 400-05) (emphasis added).

²⁵ 70 FLRA at 405.

²⁶ *See, e.g.*, *U.S. Dep’t of the Army, U.S. Army Reserve Pers. Ctr., St. Louis, Miss.*, 49 FLRA 902, 903 (1994) (citing *Pan. Canal Comm’n*, 39 FLRA 274, 277 (1991); *U.S. Dep’t of HHS, SSA, Kan. City, Miss.*, 38 FLRA 1480, 1484 (1991)).

exceptions that challenge the enforcement of the Francis Award²⁷ – and to apply the *DOJ* framework.²⁸

IV. Analysis and Conclusion: The award violates management’s right to assign work under § 7106(a)(2)(B) of the Statute.

The Agency argues that the award excessively interferes with its management right to assign work under § 7106(a)(2)(B) of the Statute because the award precludes the Agency from leaving mission-critical posts vacant and determining when to assign overtime.²⁹ The right to assign work under § 7106(a)(2)(B) 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.³⁰ The right to assign work also includes the right *not* to assign work.³¹

Evaluating the Agency’s argument under the three-part framework set forth in *DOJ*, the first question is whether the arbitrator has found a violation of a contract provision.³² Here, Arbitrator Vendrillo found that the Agency violated Article 27 by vacating mission-critical posts in the absence of an emergency or other rare circumstance.³³ Thus, the answer to the first question is yes.

²⁷ See *U.S. Dep’t of the Interior, Nat’l Park Serv., Gettysburg Nat’l Military Park, Gettysburg, Pa.*, 64 FLRA 940, 942 (2010) (denying exception as an improper collateral attack on the merits of original award). *But see Veterans Admin. Cent. Office, Wash., D.C.*, 27 FLRA 835, 840 (1987) (declining to enforce arbitration award to which no exceptions were filed because award conflicted with Title 38 in a matter over which the Authority had no statutory jurisdiction).

²⁸ The Union cites *DOD, Department of the Navy, U.S. Marine Corps, U.S. Marine Corps Air Station, Cherry Point, North Carolina*, 15 FLRA 686, 688 (1984) (*Cherry Point*), as an obstacle to addressing the Agency’s *DOJ* arguments here. *Cherry Point* concerned whether a party’s failure to comply with an arbitration award, to which no exceptions were timely filed, constituted an unfair labor practice (ULP) under § 7116(a)(1) and (8) of the Statute. But there is no ULP alleged in this case. Further, the Agency is not seeking to reverse Arbitrator Francis’s backpay awards for the period from August 2011 to May 2014. Rather, the exceptions challenge Arbitrator Vendrillo’s award about the period from May 2014 to February 2018. Thus, *Cherry Point* does not prohibit evaluating the Agency’s *DOJ* arguments.

²⁹ Exceptions at 8-10.

³⁰ See, e.g., *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Lompoc, Cal.*, 70 FLRA 596, 597 (2018) (*BOP*) (Member DuBester dissenting); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Big Spring, Tex.*, 70 FLRA 442, 443 (2018) (Member DuBester concurring); *U.S. DOJ, Fed. BOP*, 70 FLRA 398, 400 (2018) (Member DuBester dissenting).

³¹ See, e.g., *BOP, 70 FLRA at 597 (citing NLRB, Wash., D.C.*, 61 FLRA 154, 161 (2005)).

³² See *DOJ, 70 FLRA at 405*.

³³ Vendrillo Award at 15.

The second question is whether the Arbitrator’s remedy reasonably and proportionally relates to the violation of Article 27.³⁴ Arbitrator Vendrillo found that by vacating mission-critical posts in the absence of an emergency or other rare circumstance, the Agency disregarded the bargain that it struck with the Union in Article 27 “to reduce inherent hazards in the correctional environment ‘to the lowest possible level.’”³⁵ As a remedy, she ordered the Agency to stop vacating mission-critical posts in the absence of an emergency or other rare circumstance.³⁶ Therefore, the awarded remedy reasonably and proportionally relates to the contractual violation, and the answer to the second question is also yes.

The final question is whether the Arbitrator’s interpretation of the contract provision excessively interferes with a management right under § 7106(a).³⁷ If the answer to that question is yes, then the arbitrator’s award is contrary to law and we must vacate it.³⁸ In similar Federal Bureau of Prisons cases, the Authority has found that arbitration awards excessively interfered with management’s right to assign work where the awards precluded the Agency from vacating shifts: solely “for economic reasons”,³⁹ except in “emergency situations or for other good cause”,⁴⁰ or for “administrative convenience and without good reason.”⁴¹ Here, the awarded remedy precludes the Agency from vacating mission-critical posts in the absence of an emergency or other rare circumstance. Therefore, we find that the remedy excessively interferes with the Agency’s right to assign work under § 7106(a)(2)(B). As such, the answer to the final question is yes, and we vacate the Vendrillo Award, except to the extent that it enforces the Francis Award.⁴²

V. Decision

We vacate the award, in part.

³⁴ *DOJ, 70 FLRA at 405*.

³⁵ Vendrillo Award at 16 (quoting Article 27).

³⁶ *Id.*

³⁷ *DOJ, 70 FLRA at 405*.

³⁸ *Id.* at 405-06.

³⁹ *BOP, 70 FLRA at 598*.

⁴⁰ *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Lompoc, Cal.*, 58 FLRA 301, 303 (2003) (Chairman Cabaniss concurring and Member Pope dissenting).

⁴¹ *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Sheridan, Or.*, 58 FLRA 279, 280-84 (2003) (Chairman Cabaniss concurring and Member Pope dissenting in part).

⁴² Because we set aside the award on the ground discussed above, we need not resolve the Agency’s remaining contrary-to-law arguments. *E.g., BOP, 70 FLRA at 598*.

Member DuBester, dissenting:

The underlying matter is a compliance action designed to enforce the Francis award. And, I strongly disagree with the majority's characterization that the Ventrillo award is anything more than that. Accordingly, I would dismiss the Agency's exceptions because they constitute an improper collateral attack on the Francis award.¹

The record shows that the Ventrillo award resolved only the question of whether the Agency had complied with the Francis award. Arbitrator Ventrillo described the grievance before her as alleging that "the Agency was in violation of [the Francis] award."² She then framed the issue as: "Did the Agency violate the . . . cease and desist order issued by Arbitrator . . . Francis by leaving mission critical posts vacant at the [Agency]? If so, what is the appropriate remedy?"³

Moreover, Arbitrator Ventrillo summarized the parties' positions at arbitration solely in terms of whether the Agency had complied with the Francis award.⁴ Arbitrator Ventrillo concluded that the Agency failed to comply with the Francis award's cease and desist order by leaving missing critical posts vacant.⁵ And "[l]ike Arbitrator Francis," she found it "appropriate to order the Agency to cease and desist from vacating mission critical posts and to grant back pay."⁶

The majority concludes that "Arbitrator Ventrillo conducted an independent analysis of whether the Agency violated Article 27."⁷ But

Arbitrator Ventrillo did not conduct an independent analysis of whether the Agency violated Article 27. She merely summarized the Francis award and reiterated Arbitrator Francis' conclusion that "the Agency violated Article 27 . . . when it failed to fill mission critical posts."⁸ And in finding the Agency in noncompliance with the Francis order, she found that the Agency continued to violate Article 27. This finding is consistent with her earlier finding that "the Agency has continued to disregard Arbitrator Francis's cease and desist order by leaving mission critical posts vacant."⁹ In fact, Arbitrator Ventrillo recognized that "the Agency cannot now contest [*Arbitrator Francis*] finding that leaving mission critical posts vacant violated" Article 27 because the Agency did not file exceptions to the Francis award.¹⁰

The majority's effort to distinguish the Ventrillo award from the Francis award is similarly unavailing. Towards this end, the majority concludes that the remedy in the Ventrillo award extends beyond the Francis award. But the Francis award's backpay remedy was not limited to only the positions that the Agency could not fill with augmentation – namely, the phone monitor and unit posts.¹¹ In Arbitrator Francis' supplemental award on implementation of the remedy, she specifically recognizes that "there may be additional instances" other than the phone monitor and unit posts that "fall within the parameters" of the award of backpay.¹² Consistent with this supplemental award, Arbitrator Ventrillo found that the Francis award did not limit the scope of her backpay remedy only to the phone monitor and unit posts.¹³

Casting aside the majority's strained effort to recharacterize the Ventrillo award, we are left with a classic arbitration case where the arbitrator has framed the issue, to which we are to defer,¹⁴ and has fashioned a remedy responsive to that issue.¹⁵ Here, the Ventrillo award's backpay remedy simply addresses the harm caused by the Agency's failure to comply with the

¹ See *U.S. Dep't of the Interior, Nat'l Park Serv., Gettysburg Nat'l Military Park Gettysburg, Pa.*, 64 FLRA 940, 942 (2010) (*Gettysburg*) (finding that award's deficiency giving rise to agency's exception was set forth in original award, not in compliance award, and therefore, agency exception constitutes improper collateral attack on original award); *U.S. Dep't of VA, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 57 FLRA 72, 75 (2001) (*VA*) (finding that where party could have raised management-rights argument challenging an arbitrator's finding in its exceptions to an initial award, it is precluded from collaterally attacking the arbitrator's finding in exceptions to a later award).

² Ventrillo Award at 2.

³ *Id.* at 3.

⁴ *Id.* at 9 ("In the instant case, it is the Union's position the Agency continues to leave mission critical posts vacant on a regular and recurring basis despite Arbitrator Francis[] original cease and desist order. The Agency asserts it fully has complied with Arbitrator Francis'[] decision and award.").

⁵ *Id.* at 15.

⁶ *Id.* at 16.

⁷ Majority at 3. To the extent that the majority relies on other references to the Agency's violation of Article 27 in the Ventrillo award to support this proposition, this reliance is

misplaced. *Id.* In each instance, Arbitrator Ventrillo either makes no mention of Article 27, or merely reiterates and summarizes Arbitrator Francis' findings. See Ventrillo Award at 3, 16, 20; see also *id.* at 11-12, 14-16, 18-20.

⁸ Ventrillo Award at 20; see also *id.* at 11-12, 19-20.

⁹ Ventrillo Award at 15.

¹⁰ *Id.* at 12 (emphasis added).

¹¹ See Majority at 4 n.21.

¹² See Backpay Remedy Award, February 8, 2016, at 12 n.2.

¹³ Ventrillo Award at 20.

¹⁴ *U.S. DOT, FAA*, 64 FLRA 612, 613 (2010) (arbitrators accorded substantial deference in determination of issues submitted to arbitration).

¹⁵ *Broad. Bd of Governors, Office of Cuba Broad.*, 64 FLRA 888, 891 (2010) (finding that arbitrators have great latitude in fashioning remedies for contract violations.)

Francis award's cease and desist order.¹⁶ And as the alleged deficiency giving rise to the Agency's exception – that the award is contrary to management's right to assign work¹⁷ – was resolved in the Francis award, the Agency's exceptions constitute an improper collateral attack on the Francis award.¹⁸

Accordingly, I dissent.

¹⁶ See, e.g., *U.S. DOJ, Fed. BOP, Metro. Det. Ctr. Guaynabo, P.R.*, 68 FLRA 960, 967 (2015) (finding arbitrator's remedy ordering letters of apology to all employees, as opposed to only the grievant, addressed harm caused by agency's failure to comply with remedies ordered by earlier awards). Additionally, the Agency neither argues that Arbitrator Vendrillo exceeded her authority by extending the scope of the Francis award's remedy nor cites any statutory limitation on the remedy.

¹⁷ Exceptions at 8.

¹⁸ *Gettysburg*, 64 FLRA at 942; *VA*, 57 FLRA at 75.