

71 FLRA No. 73

UNITED STATES
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER
OF THE CURRENCY
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
LOCAL 299
(Union)

0-AR-5384

—
DECISION

November 4, 2019

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

I. Statement of the Case

In this case involving performance evaluation grievances, we again remind the federal labor relations community that procedural-arbitrability determinations must be taken seriously, and also hold that an arbitrator may not substitute her judgment for management's in determining a grievant's performance rating.

The Union disputed the grievant's 2014 and 2015 annual performance evaluations. The Agency argued that the 2014 grievance was not arbitrable because a hearing was not timely scheduled. In her award, Arbitrator Mollie H. Bowers determined that the 2014 performance evaluation grievance was procedurally arbitrable, and subsequently sustained both grievances on the merits and directed the Agency to raise the grievant's performance rating and adjust his pay for both years.¹

The Agency filed exceptions, challenging the Arbitrator's procedural-arbitrability determination as to the 2014 grievance, as well as her determination on the merits of both grievances. Because the Arbitrator's procedural-arbitrability determination is incompatible with the plain language of the collective-bargaining

agreement (CBA), we find that determination fails to draw its essence from the agreement and vacate the portion of the award relating to the 2014 grievance. We deny the Agency's essence exception as it pertains to the 2015 grievance. However, because the Arbitrator's remedy for the 2015 grievance excessively interferes with management's right to evaluate and rate its employees—an aspect of the rights to direct employees and assign work—we find the award contrary to § 7106(a) of the Federal Service Labor-Management Relations Statute (Statute) and vacate the Arbitrator's remedy.

II. Background and Arbitrator's Award

The grievant was rated a Level 3 on the skill element Organizational Skills/Productivity for both his 2014 and 2015 performance evaluations. The Union filed a grievance challenging the grievant's 2014 performance evaluation and invoked arbitration. Later, the Union filed a second grievance that challenged the grievant's 2015 rating and invoked arbitration. The Arbitrator was selected to arbitrate both grievances.

After the parties scheduled a hearing, but before the hearing took place, the Agency submitted a Motion to Dismiss alleging that the 2014 performance evaluation grievance was not arbitrable because the Union failed to schedule the grievance for hearing within six months as required by Article 28, Section 3C (Article 28) of the CBA. Article 28 states:

Unless mutually agreed otherwise by the parties, any requested arbitration that has not been scheduled for hearing within six months will be deemed to be moot and will be considered withdrawn. No further arbitration will take place with respect to the matters covered by that grievance.²

The Arbitrator noted that if she adhered to the principle that clear and unambiguous contract language trumps all other evidence, then she must find the 2014 grievance "moot and . . . withdrawn."³ In this regard, she found that "the Union failed to schedule the arbitration of the 2014 . . . grievance within six months of the invocation of arbitration" pursuant to Article 28.⁴ However, she concluded that, based on the circumstances of this case, the grievance was nonetheless arbitrable. Specifically, she found that the Agency waived its right to complain by delaying its challenge to arbitrability, impeded scheduling the hearing by failing to timely inform the Union of the name of its representative, and the Agency previously had

¹ Award at 18, 63.

² *Id.* at 3.

³ *Id.* at 16.

⁴ *Id.*

not raised arbitrability challenges in other cases where the Union missed the six-month requirement.

Article 8, Section 6A (Article 8) of the CBA provides, in part, that “[a]n employee’s evaluation will not be negatively impacted by the performance . . . of work by others for which the employee is not responsible.”⁵ The Arbitrator found that the Agency violated Article 8 when it compared the grievant’s performance to that of other employees and considered the grievant’s performance in resolving customer incident tickets, which is not provided for in the performance standards.⁶ Additionally, the Arbitrator rejected the justifications offered by the grievant’s first-level supervisor for the challenged ratings. The Arbitrator found that the Agency improperly rated the grievant and sustained both grievances.

In determining an appropriate remedy, the Arbitrator found that “it was not necessary for the Union to demonstrate that the [g]rievant’s performance warranted” the requested Level 4 rating.⁷ Instead, she found it necessary only that the Union established “there were fatal flaws in the evaluation process.”⁸ Accordingly, the Arbitrator directed the Agency to increase the grievant’s rating to a Level 4 and awarded corresponding retroactive merit pay increases for both years.

The Agency filed exceptions to the award on June 4, 2018, and the Union filed an opposition on July 2, 2018.

III. Analysis and Conclusions

- A. The procedural-arbitrability determination regarding the 2014 grievance fails to draw its essence from the parties’ agreement.

The Agency argues that the Arbitrator’s finding that the 2014 performance evaluation grievance was arbitrable fails to draw its essence from the parties’ agreement⁹ because it does not comply with the plain language of Article 28.¹⁰

The Authority recently addressed the same provision in *U.S. Department of the Treasury, Office of the Comptroller of the Currency (OCC)*.¹¹ In that case, the Union waited over seven months after invoking arbitration to schedule a hearing, but the arbitrator determined that the grievance was arbitrable because of the parties’ past practice. We held therein that “when parties agree to a procedural deadline—with no mention of any applicable excuse—the parties intend to be bound by that deadline.”¹² Because Article 28 clearly and unambiguously requires a hearing to be scheduled within six months, and does not excuse non-compliance, we found the arbitrator’s determination incompatible with the plain wording of Article 28 and set aside the award.¹³

Article 28 states that “any requested arbitration that has not been scheduled for hearing within six months will be deemed to be moot and will be considered withdrawn.” It does not provide for any type of excuse.¹⁴ Even the Arbitrator found that this language is clear and unambiguous and that if she adhered to it, she would find the matter to be moot and withdrawn.¹⁵ The undisputed facts reflect that no hearing was scheduled within six months. Therefore, the Arbitrator’s conclusions that the 2014 grievance was not moot and that the Agency waived its right to challenge arbitrability by waiting seven months to raise the issue – even though the CBA imposes

⁵ *Id.* at 57-58 (quoting Article 8).

⁶ Article 8 provides:

Performance evaluations will measure actual work performance in relation to the performance objectives and standards set forth in the performance plan provided by the Employer. An employee will only be evaluated on their performance on work assigned or performed through their own initiative. An employee’s evaluation will not be negatively impacted by the performance (or non-performance) of work by others for which the employee is not responsible.

Id. at 2.

⁷ *Id.* at 60.

⁸ *Id.*

⁹ Exceptions Br. at 6. The Authority will find that an arbitration award fails to draw its essence from a collective-bargaining agreement when the appealing party establishes that the arbitrator’s interpretation of the agreement is irrational, unfounded, implausible, or evidences a manifest disregard of the agreement. *U.S. Dep’t of the Treasury, IRS*, 70 FLRA 539, 542 n.24 (2018) (*Treasury*) (Member DuBester concurring) (citing *Bremerton Metal Trades Council*, 68 FLRA 154, 155 (2014)).

¹⁰ Exceptions Br. at 6-9.

¹¹ 71 FLRA 179 (2019) (Member DuBester dissenting).

¹² *Id.* at 180 (citing *U.S. Small Bus. Admin.*, 70 FLRA 525, 527-28 (2018) (*SBA*) (Member DuBester dissenting)); *see also U.S. Dep’t of the Treasury, IRS*, 70 FLRA 806, 808-09 (2018) (*IRS*) (Member DuBester dissenting).

¹³ *OCC*, 71 FLRA at 180.

¹⁴ Award at 3.

¹⁵ *Id.* at 16.

no timeframe for such a challenge¹⁶ – are not plausible interpretations of the agreement.¹⁷ Further, the Arbitrator’s reliance on the Agency’s history of not challenging arbitrability in similar cases¹⁸ runs counter to our precedent wherein we have held that past practices may not modify an agreement’s clear and unambiguous wording.¹⁹

Accordingly, the Arbitrator’s procedural-arbitrability determination does not represent a plausible interpretation of the parties’ agreement. Thus, we grant the Agency’s essence exception and set aside the portion of the award that pertains to the 2014 performance evaluation grievance.

B. The award as to the 2015 grievance draws its essence from Article 8 of the parties’ agreement.

The Agency generally asserts that the Arbitrator’s award, which also sustained the 2015 grievance, fails to draw its essence from Article 8 of the parties’ agreement.²⁰

¹⁶ We note that the dissent glosses over this key point, and ignores the plain language of Article 28, to conclude that the Arbitrator’s procedural-arbitrability determination is a plausible interpretation of Article 28. While an arbitrator’s determination on procedural-arbitrability is generally entitled to some level of deference, an arbitrator is not free to simply conjure up a new requirement that the parties never negotiated into their agreement. Here, the parties specifically agreed that an arbitration must be scheduled within six months. The parties also agreed, in the same article, that the arbitrator could determine arbitrability. However, the parties did not negotiate any requirement concerning when either party must raise an issue (as many other parties include in their agreements). If the parties had wanted to impose such a requirement, it must be presumed that they would have done so. Therefore, when the arbitrator determined that the six-month language was “clear and unambiguous” and that if she adhered to it, she would find the matter to be “moot,” she was interpreting the contract. Award at 16. However, when she concluded that the Agency “waived its right” to challenge arbitrability, she was adding a new requirement to the agreement that the parties never negotiated. *Id.* at 17. As we have held before, arbitrators “may not rely on past practices to create a new contract provision” or, as in this case, conjure up an entirely new requirement that seems reasonable to her. *See U.S. Dep’t of Navy, Puget Sound Naval Shipyard*, 70 FLRA 754, 755-56 (2018) (Member DuBester dissenting).

¹⁷ *See SBA*, 70 FLRA at 527-28 (finding that because nothing in the CBA provided for waiver, the arbitrator’s waiver determination did not represent a plausible interpretation of the agreement).

¹⁸ Award at 18.

¹⁹ *See OCC*, 71 FLRA at 180 (citing *SBA*, 70 FLRA at 528); *see also U.S. Dep’t of the Army, 93rd Signal Brigade, Fort Eustis, Va.*, 70 FLRA 733, 734 (2018) (Member DuBester dissenting) (finding that the arbitrator could not rely on the parties’ past practice to modify the agreement’s plain wording).

Article 8 of the CBA provides that performance evaluations will be in relation to the performance standards set forth in the Agency’s performance plan and that employees will only be evaluated on work assigned.²¹ Here, the Arbitrator discredited the grievant’s supervisor and determined that the Agency violated Article 8 by considering the grievant’s performance in resolving customer incident tickets and by comparing the grievant’s performance to other employees, neither of which are factors provided for in the grievant’s performance standards. Because the Agency fails to provide any specific argument as to how this interpretation is irrational, unfounded, implausible, or in manifest disregard of the agreement, we defer to the Arbitrator’s findings in this regard.²²

We deny the Agency’s exception as it pertains to the 2015 grievance.²³

²⁰ Exceptions Br. at 14-15; *see also supra* note 8 (discussing the essence standard).

²¹ Award at 2.

²² *Treasury*, 70 FLRA at 542 n.24.

²³ Because the Authority sets aside the award for the reasons in Sections III.A. and III.C. of the decision, Chairman Kiko would not find it necessary to reach this essence exception. *See infra* note 39 (declining to address the Agency’s nonfact exception). Accordingly, Chairman Kiko does not join in Section III.B. of the decision. She notes that if she were to reach the merits of the essence exception, she would conclude that the Arbitrator’s determination – that the Agency violated Article 8 when it gave the grievant a Level 3 rating in Organizational Skills/Productivity in 2015 – fails to draw its essence from the parties’ agreement. The violation appears to rest solely on the Agency’s consideration of the rate at which the grievant resolved customer incident tickets. *See Award at 57-58* (only express findings of contractual violations connected to grievant’s ticket-closure rate). No later than his 2014 performance evaluation, the Agency informed the grievant that his productivity rating would consider his ticket-closure rate and that “the *priority* of IT Customer Support work has always been focused on *resolving incident tickets*.” *Id.* at 26 (emphasis added). Not only did the grievant fail to improve his productivity, but his ticket-closure rate suffered because he *turned on a filter that prevented his computer from receiving tickets* and “forgot” to turn off the filter for months. *Id.* at 39, 57. Article 8 provides that employees will be evaluated on the work they are assigned and perform, and that they will not be penalized for the performance or non-performance of work “for which [they are] not responsible.” *Id.* at 2. The Arbitrator’s conclusion that the Agency’s consideration of the grievant’s *own* productivity violated Article 8 is irrational and implausible. Therefore, Chairman Kiko would find that the award sustaining the 2015 grievance fails to draw its essence from Article 8. *See, e.g., U.S. Dep’t of the Army, Aberdeen Proving Ground, Research, Dev. & Admin., Aberdeen Proving Ground, Md.*, 71 FLRA 54, 54-55 (2019) (Member DuBester dissenting).

- C. The remedy as to the 2015 grievance violates management's rights to direct employees and assign work under § 7106(a) of the Statute.

The Authority has held that “[t]he evaluation of employee performance is an exercise of management’s rights to direct employees and assign work.”²⁴ Moreover, the right to evaluate employee performance extends to the determination of the rating that management will assign to a given employee.²⁵

The Agency argues that the Arbitrator’s award should be vacated under the *U.S. DOJ, Federal BOP (DOJ)*²⁶ three-part framework for analyzing whether an award excessively interferes with a management right.²⁷ Specifically, the Agency argues that the Arbitrator’s award violates management’s rights to direct employees and assign work under § 7106(a) of the Statute because the Arbitrator determined that she could direct the Agency to raise the grievant’s rating to a Level 4 even though the Union never established that the grievant’s performance warranted a Level 4 rating.²⁸

Before turning to the Agency’s argument, we first note that “*DOJ* only applies in cases where the awards or remedies affect[] a management right.”²⁹ This test is a review of the *measure* of the impact of the arbitration award or remedy on management rights.³⁰ Here, the Arbitrator ordered the Agency to raise the grievant’s rating as a remedy. As noted above, the Agency has the management right to determine an employee’s rating. Therefore, *DOJ* properly applies in this case.³¹

Under *DOJ*, the first question that must be answered is whether the Arbitrator found a violation of a contract provision.³² Here, the Arbitrator found that the Agency violated Article 8 of the CBA when it considered the number of customer-incident tickets resolved and compared the grievant’s performance with other employees.³³ The answer to the first question is yes.

The second question is whether the Arbitrator’s remedy reasonably and proportionally relates to the violation.³⁴ Here, the Arbitrator found the Agency considered factors not part of the grievant’s performance standards and, as a remedy, set aside the flawed rating and directed the Agency to change the grievant’s rating to a Level 4. Because this remedy reasonably and proportionally relates to the contractual violation, the answer to the second question is yes.³⁵

The final question is whether the Arbitrator’s interpretation of the CBA excessively interferes with a § 7106(a) management right.³⁶ The Agency argues that the Arbitrator’s remedy excessively interferes with management’s rights to direct employees and assign work because the Arbitrator directed the Agency to give the grievant a Level 4 rating without any consideration of whether the grievant’s “actual” performance warranted that rating.³⁷ On this point, the Agency notes that the parties’ CBA also requires that “performance evaluations will measure *actual* work performance in relation to the performance objectives and standards.”³⁸

²⁴ *NTEU*, 47 FLRA 705, 709 (1993) (*NTEU*) (citing *AFGE, AFL-CIO, Local 1760*, 28 FLRA 160, 169 (1987) (*Local 1760*)); see also *Nat’l Weather Serv. Emps. Org.*, 63 FLRA 450, 452 (2009).

²⁵ *NTEU*, 47 FLRA at 710 (citing *Local 1760*, 28 FLRA at 169).

²⁶ 70 FLRA 398 (2018) (Member DuBester dissenting).

²⁷ Exceptions Br. at 9-13.

²⁸ *Id.*

²⁹ *U.S. DOD, Def. Logistics Agency*, 70 FLRA 932, 933 (2018) (*DOD*) (Member DuBester dissenting).

³⁰ *U.S. Dep’t of the Treasury, IRS*, 70 FLRA 792, 794 n.36 (2018) (Member DuBester dissenting).

³¹ See *DOD*, 70 FLRA at 933-34 (finding that *DOJ* applied).

³² *DOJ*, 70 FLRA at 405.

³³ Award at 57-60.

³⁴ *DOJ*, 70 FLRA at 405.

³⁵ Article 8 requires that “[p]erformance evaluations will measure actual work performance.” Award at 2. The Agency argues that the answer to *DOJ*’s second question is no because

the Arbitrator awarded the grievant a Level 4 while expressly disregarding his performance, in violation of Article 8. Exceptions Br. at 11-12. Chairman Kiko questions whether remedying one contract violation by mandating another is reasonable and proportional. Rather than ignoring the grievant’s performance altogether, a reasonable and proportional remedy might have been to direct the Agency to appraise the grievant’s performance without the “fatal flaws” identified in the award. Award at 60. However, in order to avoid an impasse between the Members, and because she would also find that the award excessively interferes with the cited management rights, she agrees that the answer to the second question is yes. See generally *SSA*, 69 FLRA 271, 273-74 (2016) (Member DuBester concurring, Member Pizzella dissenting) (noting that Members may agree to majority reasoning solely to avoid an impasse).

³⁶ *DOJ*, 70 FLRA at 405.

³⁷ Exceptions Br. at 12.

³⁸ *Id.* at 11-12 (emphasis added).

By directing the Agency to raise the grievant's rating to a Level 4, *without finding that the grievant's 2015 performance actually supported a Level 4 rating*, the Arbitrator's remedy excessively interfered with the Agency's right to evaluate and rate the grievant's actual job performance.³⁹ Thus, the Arbitrator's award excessively interferes with management's rights.

Therefore, because the Agency has demonstrated that the Arbitrator's remedy excessively interfered with its rights to direct employees and assign work under § 7106(a) of the Statute, we find that the answer to the third question is yes. Accordingly, we vacate the award as it pertains to the 2015 performance evaluation.⁴⁰

IV. Decision

We grant the Agency's essence exception regarding the procedural-arbitrability determination and set aside the portion of the award that pertains to the 2014 performance evaluation grievance. We deny the Agency's essence exception pertaining to the 2015 performance evaluation grievance award. However, we grant the Agency's contrary-to-law exception to the 2015 grievance and set aside that portion of the award.

³⁹ Member Abbott observes that the dissenting opinion's reference to, and seeming regard for, the old *BEP-FDIC-EPA* matrix is as baffling as it is unwarranted. Dissent at 11 n.15. In *FDIC* and *EPA*, the Authority rejected *BEP* and then, in *DOJ*, we clearly relegated the equally flawed trio to the ash heap of history. See *DOJ*, 70 FLRA at 402-05.

⁴⁰ Because we find this portion of the award contrary to law and vacate it, we do not need to address the Agency's remaining arguments challenging the vacated portions of the award. See *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Lompoc, Cal.*, 70 FLRA 596, 598 (2018) (Member DuBester dissenting) (vacating the award as contrary to law under the *DOJ* framework and not addressing the agency's remaining exceptions); *U.S. Dep't of the Treasury, IRS*, 70 FLRA 792, 794 (2018) (Member DuBester dissenting) (not addressing the remaining arguments challenging vacated portions of the award).

Member DuBester, dissenting in part:

I agree with the majority's conclusion in Part B of the decision that the award sustaining the 2015 grievance draws its essence from Article 8 of the parties' agreement. However, I disagree with the majority's conclusion in Part A of the decision that the Arbitrator's procedural-arbitrability determination regarding the 2014 grievance fails to draw its essence from the parties' agreement. I also disagree with the majority's conclusion in Part C of the decision that the remedy for the 2015 grievance violates management's rights to direct employees and assign work.

Contrary to the majority, I believe that the Arbitrator's procedural-arbitrability determination regarding the 2014 grievance represents a plausible interpretation of the parties' collective-bargaining agreement.¹ For reasons that I have stated before, the decision in *U.S. Small Business Administration (SBA)*²⁴¹ – upon which the majority relies to vacate this portion of the award – sets forth a standard that is inconsistent with the Statute's requirements.³

In a previous case involving the same parties and same contract language, the majority applied *SBA* to set aside an arbitrator's procedural-arbitrability determination, holding that the arbitrator's consideration of past practice evidence was at odds with the agreement's "plain wording."⁴ The majority now strays further from the established judicial practice of deferring to arbitrators' contractual interpretations by setting aside the Arbitrator's procedural-arbitrability determination that the Agency had waived its right to challenge arbitrability.⁵

As an initial matter, it is noteworthy that the majority – while purporting to adhere to the plain language

of the parties' agreement – attributes no significance to the agreement's plain language empowering the Arbitrator to decide whether the dispute was arbitrable.⁶ But the majority's decision is equally flawed because it fails to defer to the Arbitrator's reasonable interpretation of the parties' agreement and her application of the agreement to the parties' arbitrability dispute.⁷

In finding that the Agency waived its right to challenge arbitrability of the grievance, the Arbitrator considered the Agency's eleven-month delay in raising this challenge, which she concluded "belie[s] its asserted concern for fidelity to the time limits" contained in the agreement.⁸ She also found that the Agency continued to work with the Union to schedule the arbitration hearing even after the six-month period set forth in Article 28 had passed. And she found that the Agency did not inform the Union of the identity of the Agency's representative until three months after this period lapsed. Based on these findings, the Arbitrator correctly concluded that the Agency waived its procedural-arbitrability challenge because the Agency's representative "made no excuses for his delinquency in responding to the Union in a timely manner about scheduling and/or for his delay in challenging the arbitrability of the subject grievance."⁹

The Arbitrator also found that the parties had a past practice of not adhering to the time frame for scheduling arbitration hearings, noting that the Agency had failed to challenge the arbitrability of prior grievances in which the time period for conducting a hearing had passed. Upon considering the full context of the arbitrability dispute – including the record evidence, the language of the parties' agreement, past practice, and the interests of justice – the Arbitrator concluded that the grievance is arbitrable because "the Union alone cannot be

¹ Majority at 4-5.

²

⁴¹ 70 FLRA 525 (2018) (Member DuBester concurring in part, dissenting in part).

³ *Id.* at 529-532 (Separate Opinion of Member DuBester).

⁴ *U.S. Dep't of the Treasury, Office of the Comptroller of the Currency*, 71 FLRA 179, 180 (2019) (Member DuBester dissenting).

⁵ Majority at 4-5.

⁶ Award at 15-16 (citing Art. 28, § 5.D of the parties' agreement). See, e.g., *Cleveland Elec. Illuminating Co. v. Util. Workers Union of Am.*, 440 F.3d 809, 812 (6th Cir. 2006) (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)) ("If the parties have agreed to allow the arbitrator to decide arbitrability, the [reviewing body] 'should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances.'")

⁷ *SBA*, 70 FLRA at 532 (Separate Opinion of Member DuBester) (it is the role of the arbitrator, not the Authority, to determine the meaning of contract language, since "it is the arbitrator's

construction of the agreement for which the parties have bargained") (citing *IFPTE, Ass'n Admin. Law Judges*, 70 FLRA 316, 317 (2017); *Dep't of HHS, SSA, Louisville, Ky. Dist.*, 10 FLRA 436, 437 (1982)).

⁸ Award at 16.

⁹ *Id.* at 18; see, e.g., *U.S. DOD Educ. Activity*, 70 FLRA 937, 939 (2018) (*DODEA*) (Dissenting Opinion of Member DuBester) ("Whether a party waives its right to raise timeliness . . . is a question arbitrators are responsible for resolving.") (citing *Peco Foods Inc. v. Retail Wholesale & Dep't Store Union Mid-S. Council*, 727 Fed. Appx. 604, 608 (11th Cir. 2018)). The majority rejects the Arbitrator's reasoned analysis on this point because the parties did not include a provision in their bargaining agreement explicitly governing "when either party must raise an issue." Majority at 4 n.16. However – as I have previously noted – under the well-established principles governing essence exceptions, an agreement's silence on a matter "does not demonstrate that the award fails to draw its essence from the agreement." *DODEA*, 70 FLRA at 939-40 (quoting *Bremerton Metal Trades Council*, 68 FLRA 154, 155 (2014)).

held culpable for the lapse of time” in scheduling the arbitration hearing.¹⁰

Under the deferential standard that is properly applied to arbitrators’ procedural-arbitrability determinations, the Arbitrator’s conclusion easily survives the Agency’s essence exception.¹¹ Accordingly, I dissent from the majority’s decision to set aside the portion of the award relating to the 2014 performance evaluation.

I also disagree with the majority’s decision to vacate the award as it pertains to the 2015 performance evaluation. I have previously expressed my objection to the majority’s adoption of the three-part test set forth in *U.S. DOJ, Federal BOP (DOJ)*¹² for analyzing whether an award excessively interferes with a management right.¹³ As I have cautioned, the majority’s analysis “rests on what appear[s] to be little more than [its] ‘vague’ impressions of what parties and arbitrators may and may not do in creating and administering collective-bargaining relationships. Lacking discernible principles, vague decisional frameworks like the majority’s ‘invite the exercise of arbitrary power.’”¹⁴

The majority’s conclusion that the award “excessively interferes” with management’s rights to direct employees and assign work under § 7106(a) of the Statute amply illustrates the basis for my concerns. In reaching this conclusion, the majority does not purport to articulate any discernible standard by which parties or arbitrators might, in future cases, ascertain whether an award will be vacated on these grounds.

Rather, the majority summarily concludes that the award does not pass muster under *DOJ* because the Arbitrator did not find “that the grievant’s 2015 performance rating actually supported a Level 4 rating.”¹⁵ The majority fails to cite a single Authority decision to support or explain this conclusion, and instead relies more generally upon decisions addressing negotiability appeals which merely reiterate that the evaluation of employee performance is an exercise of management’s rights to direct employees and assign work.¹⁶ Simply stated, the majority’s conclusory application of its “excessive interference” test to vacate the award “casts further light on the arbitrary nature of the *DOJ* analysis.”¹⁷

But more fundamentally, I disagree with the majority’s disregard for the Arbitrator’s “broad [remedial] discretion to remedy a meritorious grievance even if the remedy affects management rights under § 7106(a).”¹⁸ Here, the Arbitrator found that the Agency based the grievant’s 2015 performance rating upon improper factors, and that the grievant “provided extensive evidence of his accomplishments” to Agency officials.¹⁹ She further concluded that, because the Agency had remedied similarly “fatal flaws” with the grievant’s 2011 and 2012

¹⁰ Award at 18.

¹¹ See, e.g., *Drummond Coal Co. v. United Mine Workers of Am.*, Dist. 20, 748 F.2d 1495, 1498 (11th Cir. 1984) (concluding that arbitrator’s waiver finding drew its essence from the parties’ collective-bargaining agreement, notwithstanding the grievance procedure’s time limits, because the “[waiver] doctrine necessarily requires the arbitrator to look beyond the contract language to the actions of the parties that would indicate an intent to waive a contractual right or requirement”); *SBA*, 70 FLRA at 530-32 (Dissenting Opinion of Member DuBester) (discussing essence standard as applied to procedural-arbitrability determinations).

¹² 70 FLRA 398 (2018) (Member DuBester dissenting).

¹³ *Id.* at 409 (Dissenting Opinion of Member DuBester); see also, e.g., *U.S. Dep’t of the Treasury, IRS*, 70 FLRA 792, 795 (2018) (Dissenting Opinion of Member DuBester).

¹⁴ *U.S. DHS, U.S. CBP, Detroit Sector, Detroit, Mich.*, 70 FLRA 572, 576 (2018) (Dissenting Opinion of Member DuBester) (quoting *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223-24 (2018) (Concurring Opinion of Justice Gorsuch)).

¹⁵ Majority at 7. The majority’s stated rationale seems very similar to the standard set forth in *U.S. Dep’t of the Treasury, BEP, Washington., D.C. (BEP)*, in which the Authority held it would vacate awards concerning employee appraisals that do not

“reflect a reconstruction of what management’s appraisal . . . would have been if management had acted properly.” 53 FLRA 146, 154 (1997). However, in *FDIC, Division of Supervision & Consumer Protection, San Francisco Region*, the Authority specifically rejected continued application of the “reconstruction” standard because it “unduly limits the appropriate remedial authority of arbitrators.” 65 FLRA 102, 106 (2010). It is puzzling that the majority would now apparently resuscitate this framework as part of its ill-defined test under *DOJ*, insofar as the majority – in the *DOJ* decision itself – characterized the *BEP* framework as “flawed” and indicated that it would “no longer be followed.” *DOJ*, 70 FLRA at 402, 406.

¹⁶ See, e.g., *Nat’l Weather Serv. Emps. Org.*, 63 FLRA 450, 452 (2009) (“the evaluation of employee performance . . . constitutes an exercise of management’s rights to direct employees and assign work”); *NTEU*, 47 FLRA 705, 710 (1993) (“the right to evaluate employee performance extends to the determination of the rating that management will assign to a given employee”); *AFGE, Local 1760*, 28 FLRA 160, 169 (1987) (same).

¹⁷ *U.S. DOD, Def. Logistics Agency*, 70 FLRA 932, 935 (2018) (Dissenting Opinion of Member DuBester).

¹⁸ *DOJ*, 70 FLRA at 412 (Dissenting Opinion of Member DuBester) (quoting *FDIC*, 65 FLRA at 106).

¹⁹ Award at 58.

appraisals by raising those ratings to Level 4, it was appropriate to raise the grievant's disputed element rating to Level 4 for 2015.²⁰ Applying the deferential standard that, in my view, is properly applied to arbitrators' remedial discretion, I would conclude that the award is not contrary to § 7106(a) of the Statute.²¹

²⁰ *Id.* at 60-61.

²¹ *See, e.g., HHS, Ctrs. for Medicare & Medicaid Servs.*, 67 FLRA 665, 666-67 (2014) (Member Pizzella concurring)

(award directing Agency to change grievant's rating based on Agency's violation of contractual provision governing appraisal process is not contrary to § 7106(a) of the Statute).