74 FLRA No. 68

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
(Agency)

and

PROFESSIONAL AVIATION
SAFETY SPECIALISTS, AFL-CIO
(Union)

0-AR-5807

DECISION

June 11, 2026

Before the Authority: Colleen Duffy Kiko, Chairman, and Anne Wagner and Charles O. Arrington, Members

I. Statement of the Case

Arbitrator Eric B. Lindauer issued an award finding the Agency violated the parties' agreement, Agency policy, and COVID-19 guidance when it denied three bargaining-unit employees' (the grievants') excused-absence requests. The Agency excepted, arguing the award is contrary to law, is based on a nonfact, and fails to draw its essence from the parties' agreement. For the reasons discussed below, we find that the award is contrary to management's right to assign work under § 7106(a)(2)(B) of the Federal Service Labor-Management Relations Statute (the Statute),[1] and we set it aside on that basis. Accordingly, we find it unnecessary to resolve the remaining exceptions.

II. Background and Arbitrator's Award

On August 17, 2020, the Agency issued a memorandum (the Memorandum) entitled "COVID-19 Guidance for [Agency] Managers: Non-Telework Eligible (and those who Cannot Perform All of their Duties via Telework) Higher-Risk Employees."[2] As relevant here, the Memorandum applies to employees who are at a higher risk for severe illness due to COVID-19 and who "perform[] emergency/mission[-]critical functions that must take place at a designated [g]overnment facility . . . on either a full-time or part-time basis."[3] Part II of the Memorandum provides, as relevant here:

> An employee in a higher-risk category, who is not telework eligible, may request leave as a means of minimizing exposure. Managers must follow existing policies and applicable collective[-]bargaining agreements in the event an employee requests to use sick leave, annual leave, . . . excused absence[,] or other types of approved leave.[4]

The Union filed grievances alleging the Agency violated the parties' agreement and the Memorandum when it denied the three grievants' requests for excused absences, and instead required them to use either sick leave or annual leave to "accommodate their concerns over on-the-job exposure to COVID-19 while performing on-site workplace responsibilities."[5] The parties consolidated the grievances and advanced them to arbitration on a record of stipulated facts.

The Arbitrator found Article 54, Section 1.d of the parties' agreement (Article 54) required the Agency to make "every reasonable effort to provide and maintain safe and healthful working conditions."[6] More particularly, the Arbitrator found the Memorandum demonstrated that the Agency acknowledged its "responsibility to protect its employees from exposure to COVID-19."[7] Therefore, in determining whether the Agency violated Article 54, the Arbitrator considered the Memorandum's requirements. The Arbitrator found the Memorandum allowed "employees who are high risk for severe illness due to COVID-19, and who are not telework eligible because at certain times they are required to perform mission[-]critical work at the facility, to request leave as a means of minimizing their COVID-19 exposure."[8] Based on the stipulated facts, the Arbitrator found the grievants were at high risk for severe illness from COVID-19, were not telework eligible, and requested excused absences on the days the Agency required them to work on-site.

At arbitration, the Agency argued that it complied with Article 54 by providing workplace modifications to reduce COVID-19 transmission, and that "nothing in the . . . Memorandum mandates the approval of [e]xcused

[1] 5 U.S.C. § 7106(a)(2)(B).
[2] Exceptions, Attach. 4 at 384; *see id.* 384-88.
[3] *Id.* at 385 (footnote omitted).
[4] *Id.* at 387.
[5] Award at 2.
[6] *Id.* at 15 (quoting Art. 54, § 1.d).
[7] *Id.*
[8] *Id.* at 17.

[a]bsence under the [grievants'] circumstances."[9] The Arbitrator rejected this argument, finding the Memorandum provided two distinct options to minimize COVID-19 exposure – workplace modifications and leave requests – "for employees who perform critical functions that 'cannot be completed in their entirety by telework and who are at higher risk for severe illness from [COVID]-19.'"[10] The Arbitrator concluded the Agency violated Article 54 and the Memorandum when it denied the grievants' excused-absence requests.

The Arbitrator also addressed Article 44, Section 3 of the parties' agreement (Article 44), which provides: "In the event the Agency determines that a condition exists at a facility/office that impacts employee safety or security and requires the release of employees from duty, those employees released will be on excused absence."[11] The Arbitrator found "from the [s]tipulated [f]acts in this case" that a covered "condition" existed at the Agency's facilities.[12] The Arbitrator also noted an Agency policy, "HRPM LWS 8.8" (the policy), provides that excused absences are "authorized in accordance with provisions of this policy or other official [Agency] document,"[13] and he determined the Memorandum was an "other official [Agency] document."[14] For these reasons, the Arbitrator concluded the Agency's denial of the grievants' excused-absence requests violated Article 44 of the parties' agreement, Agency policy, and the Memorandum.

The Agency filed exceptions to the award on April 25, 2022, and the Union filed an opposition to the Agency's exceptions on May 25, 2022. On September 27, 2023, the Authority issued an order permitting the parties to file supplemental briefs addressing the Authority's revised test – set forth in *Consumer Financial Protection Bureau* (*CFPB*)[15] – for resolving management-rights exceptions to arbitration awards involving violations of collective-bargaining agreements. Neither party filed a supplemental brief.

III. Analysis and Conclusion: The award is contrary to management's right to assign work under § 7106(a)(2)(B) of the Statute.

As relevant here, the Agency asserts the award is contrary to law because it violates § 7106 of the Statute.[16] To resolve a contrary-to-law exception, the Authority reviews any question of law raised by the exception and the award de novo.[17] 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.[18] Under this standard, the Authority defers to the arbitrator's underlying factual findings, unless the excepting party establishes that they are nonfacts.[19]

The Agency argues the award affects management's right to assign work under § 7106(a)(2)(B) of the Statute by "eliminat[ing] management's discretion to determine whether an employee is to remain on duty to perform necessary work."[20] More specifically, the Agency argues the award "fails to preserve management's discretion to decide whether an employee's absence will conflict with the accomplishment of necessary work."[21] As mentioned earlier, the Authority in *CFPB* revised the test for resolving management-rights exceptions in cases where an arbitrator finds a collective-bargaining-agreement violation.[22] Therefore, in reviewing the Agency's management-rights challenge to the Arbitrator's finding of a contract violation, we apply *CFPB*.

Under the four-part *CFPB* framework, the first question is whether the excepting party establishes the arbitrator's interpretation and application of the parties' agreement, or the awarded remedy, affects a management right.[23] Management's right to assign work under § 7106(a)(2)(B) of the Statute includes the right to determine when work assignments will occur.[24] Therefore, requiring management to grant employees excused absences affects the right to assign work.[25] Here, the Arbitrator interpreted and applied the parties'

[9] *Id.* at 20.
[10] *Id.* at 21 (emphasis omitted) (quoting the Memorandum).
[11] *Id.* at 26 (quoting Art. 44, § 3).
[12] *Id.*
[13] *Id.* at 27 (quoting the policy).
[14] *Id.*
[15] 73 FLRA 670 (2023).
[16] Exceptions Br. at 15-16.
[17] *AFGE, Loc. 3254*, 73 FLRA 325, 326 (2022) (citing *AFGE, Loc. 3954*, 73 FLRA 39, 42 (2022)).
[18] *Id.*
[19] *Id.*
[20] Exceptions Br. at 15 (citing *NFFE, Loc. 1655*, 49 FLRA 874, 877 (1994) ("Provisions preventing management from assigning work during specified periods of the work day substantively limit . . . management's right to assign work . . . ."), 880 (requiring agency to grant excused absence interferes with management's right to assign work), 884 ("[S]ubstantively limit[ing] the [a]gency's right to assign particular tasks . . . interfere[s] with the [a]gency's right to assign work . . . .")).
[21] *Id.* at 16.
[22] 73 FLRA at 676-81.
[23] *Id.* at 676-77.
[24] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Seagoville, Tex.*, 74 FLRA 40, 43 (2024) (*Seagoville*).
[25] *AFGE, Loc. 1815*, 53 FLRA 606, 613 (1997) (provision requiring agency to grant excused absences to employee blood donors affected the right to assign work).

agreement as requiring the Agency to grant the grievants excused absences. As such, the Agency has shown that the Arbitrator's interpretation and application of the parties' agreement affects the right to assign work.[26]

Under *CFPB*'s second question, the Authority determines whether the arbitrator correctly found, or the opposing party demonstrates, that the pertinent contract language – as interpreted and applied by the arbitrator – is enforceable under § 7106(b).[27] As the Arbitrator did not address § 7106(b), we examine whether the Union demonstrates that Article 44 and Article 54 are enforceable under an exception to management rights.

The Union does not identify an applicable exception to management's rights in its opposition. As previously mentioned, the Authority provided the Union an opportunity to file a supplemental brief addressing *CFPB*, but the Union did not file one.[28] As such, the Union does not carry its burden to demonstrate that an exception to management's right to assign work applies.[29] Therefore, the answer to the second *CFPB* question is no, and we find that the Agency has successfully challenged the Arbitrator's finding of a contract violation on management-rights grounds.[30]

Under *CFPB*, where an excepting party successfully challenges the underlying finding of a contract violation, the Authority will set aside both the finding of a violation and the remedy for the violation.[31] Consistent with this principle, we set aside the Arbitrator's finding of a contract violation and his awarded remedies, to the extent that they are based on that violation.[32] Consequently, we need not consider the third and fourth questions under *CFPB*.[33]

As discussed above, the Arbitrator also found that the Agency violated the Memorandum and the policy. He did not find, and there is no claim, that the Agency negotiated either of those documents with the Union. As such, the *CFPB* test does not apply in assessing whether the Arbitrator's interpretation and application of those documents impermissibly affect management's right to assign work.[34] Nevertheless, the Arbitrator's interpretation and application of the Memorandum and the policy affect that management right for the same reasons as his interpretation and application of the parties' agreement. As the Authority stated in *CFPB*, "[i]f an arbitrator's award affects a management right and the arbitrator is not enforcing a lawful constraint on management rights, then we will set aside the award – or the pertinent part of the award – as appropriate."[35] The two lawful constraints on the management rights set forth in § 7106(a)(2) of the Statute – including the right to assign work – are: (1) contract provisions that are lawfully negotiable under § 7106(b) of the Statute;[36] and (2) "applicable laws."[37] As there is no basis for finding that the Memorandum and the policy are contract provisions, the first constraint does not apply. As for the second constraint, the Arbitrator did not find, and there is no claim, that those documents are applicable laws. Consequently, in finding violations of the Memorandum and the policy, the Arbitrator was not enforcing lawful constraints on management's right to assign work. Therefore, we set aside those findings of violations – and, to the extent that his remedies were based on those violations, we set aside the remedies as well.

In sum, we set aside the award in its entirety, as contrary to management's right to assign work. The Agency also argues that the award is based on a nonfact,[38] fails to draw its essence from the parties' agreement,[39] and is contrary to law on other grounds.[40] Because we have set aside the award as contrary to management's right to assign work, we need not resolve the Agency's remaining exceptions.[41]

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[26] *Compare U.S. DOJ, INS, Wash., D.C.*, 48 FLRA 1269, 1277 (1993) (finding that award concerning requests for administrative leave was consistent with the right to assign work because the award did "*no[t] require*[] the [a]gency to grant[] employees' requests for administrative leave" (emphasis added)), *with* Award at 28-29 (finding the Memorandum and the parties' agreement mandated granting the grievants' excused-absence requests).
[27] 73 FLRA at 677-80.
[28] *See* Order (Sept. 27, 2023) at 1 ("The parties are directed to file any additional briefs . . . to address how the revised management-rights test should apply in this case . . . .").
[29] *See CFPB*, 73 FLRA at 679-80.
[30] *See Seagoville*, 74 FLRA at 44.
[31] *Id.* (citing *CFPB*, 73 FLRA at 680).
[32] *Id.*
[33] *Id.*
[34] *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Lompoc, Cal.*, 73 FLRA 860, 862 (2024) ("The *CFPB* test applies 'only in cases where an arbitrator is enforcing a [collective-bargaining-agreement] provision' . . . ." (quoting *CFPB*, 73 FLRA at 676)).
[35] 73 FLRA at 676.
[36] *Id.* at 677.
[37] *Id.* at 673 n.50 ("The Statute provides that the management rights in § 7106(a)(2) must be exercised 'in accordance with applicable laws.'" (citing 5 U.S.C. § 7106(a)(2))).
[38] *See* Exceptions Br. at 8-9 (arguing the Arbitrator erroneously found the grievants were not telework eligible).
[39] *See id.* at 13-19.
[40] *Id.* at 9-11 (arguing the award is contrary to the plain language of the Memorandum); *id.* at 11-13 (arguing the award is contrary to Authority precedent because the Arbitrator shifted the burden of proof to the Agency).
[41] *See NLRB Pro. Ass'n*, 73 FLRA 50, 53 n.44 (2022) (finding it unnecessary to address additional arguments after setting aside award based on other argument).

IV. Decision

We grant the Agency's management-rights exception, and we set aside the award.