IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BREMERTON METAL TRADES COUNCIL	)	
Petitioner	)	
v.	)	No. 18-72675
FEDERAL LABOR RELATIONS AUTHORITY	)	
Respondent	)	

MOTION OF THE FEDERAL LABOR RELATIONS AUTHORITY TO DISMISS THE PETITION FOR REVIEW

The petition for review in this case should be dismissed because Congress specifically denied the Court subject-matter jurisdiction to review decisions of the Federal Labor Relations Authority (the "Authority") resolving exceptions to arbitration awards, except in very limited circumstances not present here.[1] *See Nat'l Treasury Emps. Union v. FLRA*, 112 F.3d 402, 404-05 (9th Cir. 1997) ("*NTEU*"); *U.S. Marshals Serv. v. FLRA*, 708 F.2d 1417, 1420 (9th Cir. 1983) ("*Marshals Service*"). The Petitioner, the Bremerton Metal Trades Council ("Union"), seeks review of just such an Authority decision resolving the exceptions of the U.S. Department of the Navy,

[1] Counsel for the FLRA did contact the Counsel for the Petitioner. We informed him of the Motion to Dismiss; Petitioner's Counsel indicated the Petitioner would oppose such a Motion. We also informed him that we would seek to enlarge the time to file the certified list of the record; Petitioner's Counsel indicated he would not oppose the Motion For Enlargement of Time.

Puget Sound Naval Shipyard and Intermediate Maintenance Facility Bremerton, Washington ("Agency") to an arbitrator's award pursuant to § 7122 of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2018) ("Statute"). In its decision, the Authority set aside the arbitrator's award after determining that the arbitrator improperly modified the parties' collective bargaining agreement ("Agreement").[2] *U.S. Dep't of Navy Puget Sound Naval Shipyard & Intermediate Maint. Facility Bremerton, Wash.,* 70 FLRA 754 (Aug. 13, 2018).[3]

This Court has repeatedly recognized that, under the Statute, *see* 5 U.S.C. § 7123(a)(1), Authority decisions involving review of arbitrators' awards are not subject to judicial review.[4] The only statutory exception to this rule, for cases that "involve[] an unfair labor practice," is inapplicable here. 5 U.S.C. § 7123(a)(1). The *arbitrator* made no mention of, and reached no determination about, any commission of an unfair labor practice, *i.e.*, a violation of § 7116(a) of the Statute, but only determined the Agency violated the Agreement. Further, and more important, *the*

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[2] The arbitrator's award is attached as Att. 1.

[3] The Authority's decision is attached as Att. 2.

[4] *See NTEU,* 112 F.3d at 404-05; *U.S. Marshals Serv. v. FLRA*, 778 F.2d 1432, 1435-36 (9th Cir. 1985) (observing that a final order of the Authority approving an arbitration award that did not involve an unfair labor practice was not directly reviewable by the Court); *U.S. Marshals Serv.*, 708 F.2d at 1420; *see also Broad. Bd. of Governors Office of Cuba Broad. v. FLRA*, 752 F.3d 453, 456 (D.C. Cir. 2014) (noting that it is a "fundamental principle of federal labor relations law: arbitration awards are presumed final and not subject to judicial review").

Authority's final order does not involve any discussion of an unfair labor practice by any party. The Court should thus dismiss the Union's petition for review.

STATEMENT OF THE CASE

A. Factual Background and the Arbitrator's Award

This case arises out of a grievance filed by the Union alleging that the Agency violated a non-discretionary policy established by the parties' past practice and federal regulations when the Agency failed to timely promote an apprentice on the date of her eligibility for promotion. Att. 1 at 3; Att. 2 at 1. The Agency denied the Union's grievance, claiming that any promotion policy for the apprentices was discretionary. Att. 2 at 1. The parties were unable to resolve the grievance, and they proceeded to arbitration. Att. 2 at 1. The arbitrator framed the issue as whether the Agency violated the Agreement, a nondiscretionary agency policy, or federal regulations by not promoting the grievant on the date of eligibility. Att. 1 at 3.

The arbitrator found the Agency's noncompetitive promotion of apprentices every six months when they met the program requirements to be a long-standing past practice that had become part of Article 39 of the Agreement. Att. 1 at 14. He found that but for the Agency's failure to timely process the grievant's promotion, the Agency would have promoted the grievant on June 29, 2015. Att. 1 at 14. The arbitrator concluded that because the Agency violated Article 39 of the Agreement, he had the authority to order a retroactive promotion to the eligibility date. Att. 1 at 14.

Therefore, the arbitrator directed the Agency to retroactively promote the grievant to the higher apprentice level. Att. 1 at 15; Att. 2 at 2.

B. The Authority Determines that the Arbitrator Improperly Modified Article 39 By Converting Past Practice Into a New Contract Provision

Pursuant to § 7122 of the Statute, 5 U.S.C. § 7122, the Agency filed exceptions to the arbitrator's award. The exceptions challenged the arbitrator's determination that a past practice had modified Article 39, and that the Agency violated Article 39 of the Agreement. Att. 2 at 2.

The Authority (Chairman Kiko and Member Abbott; Member DuBester, dissenting) held that the award failed to draw its essence from the Agreement because the arbitrator improperly modified the Agreement. Att. 2 at 2-3. To begin, the Authority considered the grounds for determining whether an award fails to draw its essence from the Agreement. It noted that, while arbitrators may consider the parties' past practices to interpret an ambiguous contract provision, arbitrators may not rely on past practices to modify the negotiated terms of the Agreement. In support, the Authority cited to its own precedent and to federal court decisions reviewing private sector labor arbitrations. Att. 2 at 2 (citing *Keebler Co. v. Milk Drivers & Dairy Emps. Union, Local 471*, 80 F.3d 284, 288 (8th Cir. 1996); *Judsen Rubber Works, Inc., v. Mfg., Prod. & Serv. Workers Union, Local No. 24*, 889 F. Supp 1057, 1064 (N.D. Ill. 1995)).

The Authority then reviewed Article 39 and determined that Article 39 only provided in general terms for the very existence of an apprentice program. Therefore,

the Authority found that there were no ambiguous contract terms that required the Arbitrator to consider past practice to determine when or how to effectuate an apprentice's promotion from one level to another. Att. 2 at 2. The Authority concluded that the arbitrator effectively converted what he had found to be the parties' past practice into a new contract provision that entitled apprentices to promotions in certain circumstances. Thus, the Authority determined that the arbitrator modified, rather than interpreted, Article 39 and set the award aside as it failed to draw its essence from the Agreement.[5] Att. 2 at 3.

The Authority therefore granted the Agency's exception to the arbitrator's award. The Union's petition for review to this Court followed.

ARGUMENT

THIS COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE THE AUTHORITY'S ARBITRATION DECISIONS ARE UNREVIEWABLE UNDER THE STATUTE

A. Congress Intended the Authority to be the Final Stop For Arbitration Awards

It is axiomatic that Congress confers federal court jurisdiction and that Congress may limit or foreclose review as it sees fit. *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 297 (2013); *Am. Fed'n of Labor v. NLRB*, 308 U.S. 401, 411-12 (1940);

[5] The Authority also overruled prior cases to the extent they had held that "an agreement's silence on a matter addressed by an arbitrator does not, by itself, demonstrate that the arbitrator's award fails to draw its essence from the agreement." Att. 2 at 3 & n.20 (citing *U.S. Dep't of the Treasury, IRS, Ogden Serv. Ctr.*, 69 FLRA 599 (2016); *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Office of Marine & Aviation Operations, Marine Operations Ctr.,* 67 FLRA 244 (2014)).

NTEU, 112 F.3d at 404. When it enacted the Statute, Congress exercised that prerogative with an "'unusually clear congressional intent . . . to foreclose review'" of virtually all Authority decisions in arbitration cases under the Statute, as the court observed in *Griffith v. FLRA*, 842 F.2d 487, 490 (D.C. Cir. 1988). *See also NTEU*, 112 F.3d at 404-05.[6]

Section 7123(a) of the Statute explicitly precludes judicial review of Authority decisions in arbitration cases. This section states, in relevant part:

> Any person aggrieved by any final order of the Authority *other than an order under* –
>
> > (1) section 7122 of this title (*involving an award by an arbitrator*), unless the order involves an unfair labor practice under section [7116][7] of this title. . . .
>
> may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order. . . .

5 U.S.C. § 7123(a) (emphasis added). Thus, the plain language of § 7123(a) bars judicial review of Authority decisions on exceptions to arbitrators' awards and narrowly restricts the jurisdiction of courts of appeals to review Authority arbitration

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[6] *See also Eisinger v. FLRA*, 218 F.3d 1097, 1103 (9th Cir. 2000) (finding that the Statute's legislative history supported "the plain language of [S]tatute: All final FLRA orders are appealable, except those relating to appropriate unit determinations and arbitration awards").

[7] Although the text of the Statute refers to § 7118, that reference has generally been recognized as a typographical error. *Am. Fed'n Of Gov't Emps., Local 2510 v. FLRA,* 453 F.3d 500, 502 n.* (D.C. Cir. 2006) ("*AFGE Local 2510*"). Section 7116 of the Statute is the correct citation. *Id.*

decisions to those instances that "involve[] an unfair labor practice" under the Statute. *See Marshals Serv.*, 708 F.2d at 1420 (no jurisdiction to review arbitration decision unless an unfair labor practice is explicit, a necessary ground, or necessarily implicated in the Authority's final order). This Court has already recognized this broad jurisdictional bar in *Marshals Service*, as have all of the courts of appeals that have considered the issue.[8]

The legislative history of § 7123(a)'s provisions for limited judicial review underscores Congress's intentional decision to restrict appellate scrutiny of Authority decisions involving an arbitration award. As this Court has observed, "[t]here remains a compelling explanation for the congressional encouragement to arbitrate, and that is the integrity of the bargaining and contract process itself." *Marshals Serv.*, 708 F.2d at 1420. Congress strongly favored arbitrating executive branch labor disputes and sought to create a scheme characterized by finality, speed, and economy. *Id.* To this end, the conferees discussed judicial review in the following terms:

> [T]here will be *no judicial review* of the Authority's action on those *arbitrators*['] *awards in grievance cases which are appealable to the Authority*. The Authority will only be authorized to review the award of the arbitrator on very narrow grounds similar to the scope of judicial review of an arbitrator's award in the private sector. In light of the limited nature of

[8] *See Begay v. Dep't of the Interior*, 145 F.3d 1313, 1315-16 (Fed. Cir. 1998); *U.S. Dep't of the Interior, Bureau of Reclamation, Mo. Basin Region v. FLRA*, 1 F.3d 1059, 1061 (10th Cir. 1993); *Phila. Metal Trades Council v. FLRA*, 963 F.2d 38, 40 (3d Cir. 1992); *Overseas Educ. Ass'n v. FLRA*, 824 F.2d 61, 63 (D.C. Cir. 1987); *U.S. Dep't of Justice v. FLRA*, 792 F.2d 25, 27 (2d Cir. 1986); *Tonetti v. FLRA*, 776 F.2d 929, 931 (11th Cir. 1985); *AFGE, Local 1923 v. FLRA*, 675 F.2d 612, 613 (4th Cir. 1982).

> the Authority's review, the conferees determined *it would be inappropriate for there to be subsequent review by the court of appeals in such matters*.

H.R. REP. NO. 95-1717, at 153 (1978), *reprinted in* Subcomm. on Postal Personnel and Modernization of the Comm. on Post Office and Civil Serv., 96th Cong., 1st Sess., *Legislative History of the Fed. Serv. Labor-Mgmt. Relations Statute, Title VII of the Civil Serv. Reform Act of 1978*, at 821 (1978) (emphasis added) (available at: https://go.usa.gov/xPfNk). The conference committee also indicated its intent that once an arbitrator's award becomes "final," it is "not subject to further review by *any . . . authority* or administrative body" other than the Authority. *Id.* at 826 (emphasis added).

The Union's petition ignores this well-settled jurisdictional bar. The Statute precludes the Court's review of the Authority's decision in this routine arbitration involving only contract interpretation, not an unfair labor practice. Dismissal of the Union's petition is therefore exactly what Congress intended. *See Marshals Serv.*, 708 F.2d at 1421.

B. The Narrow Exceptions to the Rule Against Judicial Review of the Authority's Arbitration Decisions Do Not Apply

There are two avenues for the Union to obtain judicial review of an Authority arbitration decision in this Court. It must either show that the statutory exception for arbitration decisions involving unfair labor practices applies, 5 U.S.C. § 7123(a), or it must persuade the Court that this case falls into a narrow judicially-created exception. As shown below, the Union cannot meet either of these burdens.

1. As the District of Columbia Circuit has observed, the limited statutory exception allowing judicial review only of Authority arbitration decisions that involve an unfair labor practice "'furthers Congress's . . . stated interest of ensuring a single, uniform body of case law concerning unfair labor practices.'" *Broad. Bd. of Governors Office of Cuba Broad. v. FLRA*, 752 F.3d 453, 456 (D.C. Cir. 2014) ("*BBG*") (quoting *Ass'n of Civilian Technicians v. FLRA*, 507 F.3d 697, 699 (D.C. Cir. 2007)); *see* 5 U.S.C. § 7123(a)(1). This Court has observed that the plain language of § 7123(a) makes it clear that a circuit court can only review a final arbitration decision of the Authority if an unfair labor practice is involved; where it is undisputed that a case does not involve an unfair labor practice, the Authority's final order is unreviewable. *See NTEU*, 112 F.3d at 404.

Under this Court's own precedent, an Authority order involves an unfair labor practice only if a statutory unfair labor practice is "an explicit or a necessary ground for the final order issued by the Authority." *Marshals Serv.*, 708 F.2d at 1420. An unfair labor practice must be "necessarily implicated" for there to be any judicial review. *Id.* The decision must "contain a substantive discussion of an unfair labor practice claim" – a mere "passing reference" will not suffice. *BBG*, 752 F.3d at 457 (internal quotation marks omitted). Even if an arbitrator's award does address an unfair labor practice, "'it is the order of the Authority that is the subject of the petition for judicial review,' not the arbitrator's award or the initial grievance." *BBG*, 752 F.3d at 457 (quoting *AFGE, Local 2510,* 453 F.3d at 504).

The Authority's final order in this case contains no discussion of an unfair labor practice whatsoever. After the arbitrator found a violation of the Agreement, the only exception that the Authority entertained was whether the award failed to draw its essence from the Agreement. Att. 2 at 2. Accordingly, the Authority's decision involved only an interpretation of the Agreement. It did not discuss, analyze, or expound upon the Statute's unfair labor practice provisions. As this Court recently noted, where no unfair labor practice is involved in a case, an appeal from an arbitrator's decision is immune from any form of judicial review. *AFGE, AFL-CIO Local 2152 v. Principi*, 464 F.3d 1049, 1054 (9th Cir. 2006).

Equally illustrative is *AFGE, Local 2510*, in which the court held that when the Authority's decision nowhere cites § 7116 of the Statute (regarding unfair labor practices), and only makes passing reference to the arbitrator's unfair labor practice finding in recounting the case's history, the decision does not involve an unfair labor practice for jurisdictional purposes. *AFGE, Local 2510*, 453 F.3d at 504. This conclusion comports with Congressional intent, because when the Authority's analysis does not reach § 7116, its decision poses no risk of straying from "the path of the law of" unfair labor practices. *Id.* at 505. Similarly, here, because the Authority's decision in this case does not involve an unfair labor practice, the Statute does not provide the Court with jurisdiction over the Union's petition.

2. This Court should reject any attempt by the Union to rely on a judicially-created exception to the statutory bar on judicial review of Authority arbitration decisions.

First, this Court explicitly rejected, in *NTEU*, 112 F.3d at 405, the exception to the bar on judicial review that the District of Columbia Circuit created in *U.S. Department of the Treasury, U.S. Customs Service v. FLRA*, 43 F.3d 682, 691 (D.C. Cir. 1994). In *Treasury*, the District of Columbia Circuit had allowed judicial review of Authority arbitration decisions to determine whether the Authority had exceeded its own jurisdiction. *See Treasury*, 43 F.3d at 691. In contrast, this Court has found the language of § 7123(a) to be quite clear that judicial review of arbitration decisions was precluded unless the Authority's final order involved an unfair labor practice. *NTEU*, 112 F.3d at 405. Second, the Union has not claimed or invoked in its petition any colorable constitutional claim. *See generally Griffith v. FLRA*, 842 F.2d 487, 494 (D.C. Cir. 1988) (finding the Statute did not explicitly bar review of constitutional claims).

CONCLUSION

The petition for review should be dismissed for lack of jurisdiction.

Respectfully submitted,

/s/Fred B. Jacob
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/s/Tabitha G. Macko
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November 13, 2018

CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because this motion contains 2,887 words.

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point font in Garamond.

November 13, 2018 /s/ Fred B. Jacob
FRED B. JACOB

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of November, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by Using the CM/ECF system. I also certify that the foregoing document is being served on counsel of record and that service will be accomplished by the CM/ECF system.

/s/ Fred B. Jacob
FRED B. JACOB

ATTACHMENT 1

Arbitrator's Award

JAR-5240

ARBITRATION OFFICE OF WALTER KAWECKI, JR. ESQ.

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IN THE MATTER OF THE ARBITRATION BETWEEN:

PUGET SOUND NAVAL SHIPYARD Bremerton Washington Employer	
BREMERTON METAL TRADES COUNCIL Union	**DECISION AND AWARD of**
RE: Promotion of Ashley Jones to next Level of an Apprentice (CNN00655-E)	**WALTER KAWECKI, JR. ARBITRATOR Federal Mediation and Conciliation Service Case October 10, 2016**

Appearances:

Arbitrator: Walter Kawecki, Jr., Esq.
756 Barton Way
Benicia, CA 94510

For the Employer: Matthew Dunand,
Assistant Counsel
Puget Sound Naval Shipyard & IMF Code 107
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For the Union: Jeffrey G. Letts, Attorney
Representing Federal Employees
P.O. Box 77062
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I. BACKGROUND

The arbitration hearing was held on September 28, 2016, in the Jackson Community Center at 90 Olding Road, Bremerton, Washington. This hearing arose pursuant to the Labor Agreement (hereafter referred to as collective bargaining

agreement or CBA) between Puget Sound Naval Shipyard and Intermediate Maintenance Facility (hereafter referred to as Agency) and the Bremerton Metal Trades Council (hereafter referred to as the Union), Effective April 23, 2010

The parties stipulated that the CBA was in effect at the time of the filing of the Grievance on 8/26/15 by Ashley Jones and her Union Representative; and the CBA currently remains in effect. The parties also stipulated that the grievance/arbitration regarding promotion of Ms. Jones was properly before the Arbitrator and there are no procedural issues regarding the grievance. Additionally, the parties stipulated the Arbitrator has 30 days to write his decision and award from September 28, 2016 (close of hearing) and email it to the attorneys representing the Agency and Union.

The parties decided not to have a court reporter at the hearing.

In accordance with Article 31, of the CBA, Walter Kawecki, Jr. was selected by the Agency and Union to serve as Arbitrator from the Federal Mediation and Conciliation Service Master list they received at the beginning of the year.

The attorney for the Union and the attorney for the Agency gave opening and closing statements regarding their position of the case.

During the hearing the parties were given an opportunity to state their positions, examine and cross-examine witnesses, present documentary evidence and argue their case. The parties agreed that the Arbitrator retains authority over the implementation of the award.

The Attorney for the Agency and Union both decided to give closing statements at the hearing, rather than file briefs.

II. STATEMENT OF THE ISSUE

The parties did not agree on the language for the issue; however, the parties agreed the Arbitrator would frame the issue. The proposed issue by the Agency is the following:

"Did the Agency violate a nondiscretionary agency policy by not promoting Ms. Jones from WT-03 to WT-04 effective 6/29/2015? If so, what is the appropriate remedy?

The proposed issue by the Union is the following:

"1. Whether the Employer has a past practice of promoting apprentices, who are performing successfully in the classroom, on the job and have 900 OJT hours in six month intervals? If so, what shall the remedy be?

2. Whether federal regulations require an apprentice to be promoted in six month intervals? If so, what shall the remedy be?

3. Whether Ms. Ashley Jones was treated in a fair and equitable manner? If not, what shall the remedy be?"

Based on the agreement of the parties the Arbitrator frames the issue as follows: Did the Agency violate the CBA and/or a nondiscretionary agency policy or federal regulations by not promoting Ms. Ashley Jones from WT-03 to WT-04 on 6/29/2015? If so, what is the appropriate remedy?

III. STATEMENT OF FACTS

The following statement of facts is a description of the exhibits submitted and entered into evidence, without objection, and the testimony of Union and Agency witnesses:

Joint exhibit 1- The Agreement between Puget Sound Naval Shipyard and

Intermediate Maintenance Facility and the Bremerton Metal Trades Council effective April 23, 2010.

Joint exhibit 2- Grievance from Ashley Jones dated 8/26/15 that her promotion to WT-4 was delayed because of management failure to act and as a remedy she ask for retroactive promotion to 6/29/15 and be made whole It also has the response by Agency.

Joint exhibit 3- 5 CFR section 532.265

Joint exhibit 4-The Comptroller General decision B-211784 dated May 1, 1984 regarding Retroactive promotions—nondiscretionary Agency Policy

Union exhibit 1- Ms. Jones offer to apprentice program dated 12/11/2013

Union exhibit 2-SF 50, Ms. Jones promotion from Helper Trainee electrician to Electrician Apprentice WT-1 on 12/29/13; promotion to WT-2 on 6/29/14; promotion to WT-3 12/28/14; promotion to WT-4 on 8/23/15

Union exhibit 3- Job Description of electrician apprentice from WT-1 to WT-8 and WG-10 Journey Level dated 9/17/13

Union exhibit 4- Letter from HR specialist Barbara Worden to President of Metal Trades Council regarding steps to eliminate delays to meet the intent of promotions being every 6 months for apprentices dated 2/5/16.

Union exhibit 5- Guide for apprenticeship dated 9/18/13

Union exhibit 6- General information on apprentices dated 9/18/13

Union exhibit 7- Updated version of apprentice guide dated 1/29/16

Union exhibit 8-Special Pay Plan for apprentices dated 11/16/14

Union exhibit 9- FLRA decision 52-FRA-21 dated 9/27/96

Union exhibit 10-FLRA 36-65 dated 8/10/90

Union exhibit 11- FLRA 51-60 dated 1/17/16

Agency exhibit 1A- same as Joint exhibit 2- see above

Agency exhibit 1 B- Communication via emails from Jana Rider, OCHR

regarding promotion of Ashley Jones effective 8/23/15.

Agency exhibit 2- Article 39 regarding apprentice program from CBA

Agency exhibit 3- Notification on changes to apprentice program dated 4/29/13

Agency exhibit 4- Promotion eligibility and timeframes for apprentices

Agency exhibit 5- Email from electrical instructor for Ms. Jones regarding processing of her promotion to WT-4 dated 9/21/16

Agency exhibit 6-29 CFR about criteria and standards for apprentices

Agency exhibit 7- Code 730 excel spread sheet listing apprentice promotions with names and dates and declarations by Jana Rider, Reuben Farley and Crag Wilkey

Agency exhibit 8- same as Joint exhibit 3 see above

Agency exhibit 9- 5 CFR chapter 1 wages for apprentices

Agency exhibit 10- Subchapter S11 special wage rate schedules

Agency exhibit 11- Federal wage system and Navy Apprentice training dated 1/17/84

Agency exhibit 12- Special pay plan for worker trainees dated 12/30/14

Agency exhibit 13- Comptroller general decision on delayed promotion dated 11/13/95

Agency exhibit 14- Comptroller general decision retroactive promotion dated 9/12/85

Agency exhibit 15- Comptroller general decision retroactive promotion dated 12/21/77

Agency exhibit 16- Civilian Human Resources Mgmt. SECNAV 12250.6A dated 1/17/13

Agency exhibit 17- Appeal of Agency denial of career ladder promotion dated 7/26/06

Agency exhibit 18- same as joint exhibit 4 see above

Agency exhibit 19- Naval shipyard apprentice program policy and guidelines

2/21/01.

The witnesses for the Union were Ashley Jones, electrical apprentice and grievant; Jared Duvall, Heavy Mobil Mechanic; Tyler Barbour, Heavy Mobil Equipment electrical apprentice; Samual Smith, President of Bremerton Metal Trades Council and Electrician; and Danny F. Haas, Retired Head NAVSEA West Training.

The witnesses for the Agency were Brian Watland, Training Superintendent;, Greg Wilkey Supervisor Human Resource Specialist; Ira Ruben Farley, Student Program Director; Tammy Johnson, Operations Director Office of Civilian Human Resources; Jana Rider, Resource Manager; Julie Brown, Command Advisor for Human Resources.

The first witness for the Union was the grievant, Ashley Jones. She testified she was hired on August 2013 as a helper and was accepted into the apprentice program in December 2013.

Ms. Jones testified that she completed 900 hours on 6/22/15 and she signed the work experience worksheet on 6/30/15, and turned it into her supervisor on that date. She said she did not turn the work sheet in until 6/30/15 because the policy at that time was that an employee had to wait until the end of the month to turn in the worksheet. Agency witness Jana Rider, Resource Manager, verified that worksheets were to be turned in at the end of the month, even if an apprentice met the 900 hours prior to the end of the month as Ashley Jones did. Agency Exhibit 5 shows that Ms. Jones did sign the work sheet on 6/30/15. The work sheet was not signed by the supervisor until 7/6/15. Ms. Jones testified she did not know why he said he received it on 7/6/15 when she testified she gave it to him on 6/30/15.

Martin Morris stated in an email (Agency exhibit 5) to Mr. Dunand that he did not recall the day the logs were provided to him. He looked at the June 2015 logs and said her supervisor at the time signed them on 7/6/15 and he did not receive them until

sometime after 7/6/15.

Ms. Jones testified she had good work performance, which her supervisor on the work sheet she dated 6/30/15 verified. The supervisor said, on the work sheet, Ashley continues to put forth a wonderful attitude and a strong set of ethics. Her want for knowledge is only exceeded by her wanting to help the shop and new hires.

Ms. Jones testified she had an excellent GPA of 3.9 in her classroom studies in the apprentice program.

There was no evidence on cross-examination that refuted Ms. Jones' testimony.

The next Union witness was Jared Duvall, heavy mobile mechanic. Mr. Duvall testified he was hired same time as Ashley and was told in orientation they would be promoted every 6 months if they met requirements of 900 hours, good performance and successful in college with a 2.5 or better. Mr. Duvall's promotion was delayed until February 7, 2016 because he took about 100 hours of leave and did not meet the 900 hours when eligible for promotion.

The next Union witness was Tyler Barbour, heavy mobile equipment apprentice. He testified that he was told he would get promoted every 6 months if he met requirements of 900 hours, education and performance. He was promoted on May 29, 2015.

The next Union witness was Samuel Smith, Electrician and President of Bremerton Metal Trades Council. Mr. Smith testified he was hired as an apprentice in 1988. Mr. Smith testified he was president for two months, vice president for two years and chief steward for electricians. Mr. Smith testified he represents 8300 to 8500 employees in 10 unions within the Metal Trades Council.

Mr. Smith testified the past practice has been to promote apprentices every 6 months when they meet the criteria and the Agency has not requested to negotiate over changing this practice.

The next Union witness was Danny F. Haas, retired October, 2011, as Head

NAVSEA West Training. Mr. Haas went to the Naval Academy and left before completion. He received a degree at University of Washington in teaching. He became a pipefitter apprentice. In 1980 he was assigned asst. apprentice administrator. In 1991 he was promoted to head of employee development, which included oversight of the apprenticeship program. In 2001 he was promoted to water front superintendent. In 2008 he was promoted to production superintendent. In 2009 he was promoted to head NAVSEA West Training. In this last position he was still physically located at Puget Naval Shipyard, but he was over apprenticeship programs at both Puget Naval Shipyard and Mare Island Naval Shipyard. He also testified that because of his professional interest, he remained involved in ensuring the apprentice program was working as intended, during his 30 year career with the Puget Sound Naval Shipyard.

Mr. Haas testified that apprentices are the backbone of the Navy Shipyards because these employees become the leaders of the shipyards.

Mr. Haas testified that the system was set up to noncompetitively promote apprentices every 6 months until they became a journeymen, if they met the 900 hour experience requirement, had satisfactory performance during the 900 hours and a 2.5 or better GPA in the educational requirements.

Mr. Haas testified that for the many years he was overseeing the apprenticeship programs, when an apprentice met the 900 hour requirements, satisfactory performance and met the educational requirements, he ensured they were promoted every 6 months. If there was a problem with performance he would directly work with the shop to address the performance problems, to give the apprentice an opportunity to improve performance to a satisfactory level or remove the employee from the apprenticeship program if the performance was not corrected. He also monitored the educational requirements to ensure apprentices were meeting those requirements.

On cross-examination, he testified he personally signed the SF 50's for the promotions of apprentices every 6 months if they met the requirements of satisfactory

completing the 900 hours and the educational requirements. He also testified that after he retired, personnel actions for apprentices were sent to the Region.

The first witness for the Agency was Brian Watland, training superintendent for one year. He started in 1981 as an apprentice. He was promoted to apprentice instructor and then promoted to deputy administrator of apprentice program for 10 years. He testified he was in charge of apprentice program.

He testified that the apprentice program is under the department of labor as described in CFR 29, Agency exhibit 6. He testified that the promotion criteria is described in Agency exhibit 4. Mr. Watland testified that when all the criteria for promotion is met, he is finished with it and it goes to the shop for the final determination when an apprentice has ability to do the work and should be promoted.

On cross-examination, Mr. Watland testified that the apprentice does not have to compete for promotions in the program. Mr. Watland testified that if everything is exactly the same, promotions should be the same. On cross-exam Mr. Watland was asked how long the shop could hold up the noncompetitive promotion of the apprentice and Mr. Watland testified there was no time limit.

Next Agency witness was Greg Wilkey, supervisory human resource specialist. He testified to the accuracy of his declaration under Agency exhibit 7. Mr. Wilkey in his declaration states that he confirmed all entries on the spreadsheet listed in Agency Exhibit 7 to be correct.

Next Agency witness was Ira Ruben Farley, student program director of apprentice program. Mr. Farley is responsible for determining eligibility for promotions of employees in the apprentice program. He verified that all students listed in the spreadsheet were passing all academic requirements on the dates listed in the spreadsheet in Agency exhibit 7.

Next Agency witness was Tammy Johnson, Director of Civilian Human Resources. Ms. Johnson testified she started working in 1980 in as a human resources

classification specialist at Puget Sound Naval Shipyard. Ms. Johnson worked in labor relations, EEO, head of staffing, training, appeals. In 2012 she was promoted to her current position in which she provides assistance to 58,000 staff, in personnel, staffing, training and investigation. Ms. Johnson testified that retroactive promotions under the back pay act were only allowed for one of the following three reasons: 1. Error prevented action 2. Non-discretionary Agency policy. 3. Deprived employee of right by regulation or statue.

Ms. Johnson testified under cross-examination that the apprentice program was a four year program from WT1 to 8 with non-competitive promotions every 6 months. She testified it is a training program, not exactly a career ladder because apprentices are changing levels not grades.

On cross-examination Ms. Johnson testified she personally knew Danny F. Haas and he was very knowledgeable about the training program for apprentices and had years of experience directing the apprenticeship program at Puget Sound Naval Shipyard.

Next Agency witness was Jana Rider, Resource Manager. Ms. Rider testified she approves promotions of apprentices in Code 730 (Ms. Ashley Jones was in Code 730) when the following is met: the apprentice completes 900 hours, turns in worksheets showing the 900 hours, performance is satisfactory, there are no major discipline issues, and the apprentice meets education requirements. Ms. Rider testified that if an apprentice could not satisfactorily perform duties or did not meet education requirements, the apprentice would be removed from the program. After Ms. Rider receives an email that an apprentice completed education requirements and satisfactorily performed the 900 hours, she approves the promotion and sends the SF 50 to the Regional Human Resource Office to process the promotion. Ms. Rider testified the Regional Human Resource Office needed 10 days to process the approved promotion action.

When asked by the Arbitrator, Ms. Rider testified that apprentices could not complete the worksheets documenting their 900 hours until the end of each month. So

even though Ashley Jones may have satisfactorily completed her 900 on June 22, 2015, Ms. Jones could not turn in the worksheet until June 30, 2016. Ms. Rider testified that she could not change this process but testified the Shipyard Commander could change it to allow apprentices to turn in the worksheets whenever they completed the 900 hours.

On cross-examination, Ms. Rider testified that one of the reasons Ashley Jones promotion was delayed was that the employee who was processing the promotion actions for submission to the Regional Human Resource Office was not doing her job. Ms. Rider had to get another clerk at the Shipyard to process the actions.

In Ms. Rider`s declaration (Ax7) before determining whether or not to promote an apprentice she did check the following:

1. That the apprentice is passing their classes.
2. That the apprentice has met the 900 hour requirement
3. That the apprentice has turned in their OJT sheets – thereby proving that they have met the 900 hour requirement
4. That they are performing work at a satisfactory level, in other words, they are able to complete electrical and mechanical crane maintenance.

Next Agency witness was Julie Brown, command advisor and resource manager for human resources. Ms. Brown testified that she never stopped or delayed a promotion of an apprentice except possibly Kim Lee.

Based on the documents submitted into evidence and the testimony of witnesses, Ashley Jones was eligible for a non-competitive promotion from an apprentice WT-3 to WT -4 on June 29, 2015. However, Ashley Jones` promotion to WT-4 was delayed until August 23, 2015.

The policy of the Agency is to promote apprentices every six months, consistent with CFR section 532.265 (Jx3), and the testimony of Danny Hass who was director of the apprentice program for many years, as well as Jana Rider, the manager responsible for approving promotions in the Code Ms. Jones was assigned. Ms. Rider stated in her

declaration the apprentice is promoted when they meet the following: 1. The apprentice is passing all required classes with a 2.5 or better GPA, thereby meeting the academic requirement for apprentices. 2. The apprentice has met the 900 hour requirement of trade related work experience. 3. The apprentice has turned in their OJT sheets, thereby proving that they have met the 900 hour requirement. 4. The apprentice is performing work at a satisfactory level. For apprentices in Ashley Jones position, that means they are able to complete electrical and mechanical crane maintenance.

IV. OPINION AND DECISION

The attorney for the Union argued there is a past practice of promoting apprentices every 6 months following agency policy and federal regulations. In his past practice argument he cited the Agency prepared a spreadsheet in Agency Exhibit 7 that shows that over 60% of the apprentices are promoted in 6 months. He argues it is fair and equitable that when an apprentice meets the 900 hours of satisfactory experience, and all the required educational courses with a GPA of 2.5 or better, they are entitled to be noncompetitively promoted consistent with the intent of the Puget Sound Naval Shipyard policy and federal regulations.

The attorney for the Union cites Mr. Haas, who was director of the apprentice program for many years saying the navy policy was to promote apprentices every 6 months, if they met the Navy policy requirements of satisfactory performance for 900 hours and the education requirements.

The attorney for the Union argued the past practice is clearly demonstrated by the Agency for the promotions of apprentices meeting the requirements stated above every 6 months.

The attorney for the Union argued that Ashley Jones had excellent work performance, completed all educational required courses with a GPA of 3.9, and completed her 900 hours on 6/22/15 and turned in and signed the worksheet on 6/30/15

because the worksheets could not be turned in until the end of each month. She had 6 months as a WT-3 on 6/29/15. Therefore, she met all Agency requirements for the noncompetitive promotion to a WT-4 on 6/29/15.

The attorney for the Union fully agrees with the Agency that apprentices should not be noncompetitively promoted until they have completed 900 OJT hours with satisfactory performance documented on the training sheets and have completed all the required courses with a 2.5 GPA or better.

Ashley Jones had excellent work performance, completed her 900 hours on 6/22/15, signed and turned in the OJL sheets on 6/30/15 which was the end of the month and the earliest date she was allowed to turn them in and Ms. Jones completed all required courses with a GPA of 3.9. Ms. Jones clearly met all her requirements for promotion to WT-4 on her six month anniversary of 6/29/15. But for, the Agency failing to timely process the paperwork, Ms. Jones should have been promoted to WT-4 on 6/29/15 following the Puget Sound Shipyard past practice.

The attorney for the Union asked the remedy be the following: Ashley Jones be promoted to WT-4 on 6/29/15 and subsequent promotions be adjusted to be every 6 months when she met the Agency requirements of 900 hours of successful performance and educational requirement, and that attorney fees be awarded.

The attorney for the Agency argues that the Puget Sound Naval Shipyard Apprentice Program Guide in Agency Exhibit 4, page 7, requires that apprentices will be eligible at 26 week intervals dependent upon meeting the following:

1. Official notification from the Educational Institution of successful completion of a 2.5 or better in each class of all required courses prior to promotion.

2. Complete and signed, satisfactory On-the-Job learning records that total no less than 900 hours of trade related work experience, program provided academics, trade theory and related instruction within the promotional time frame. Note - combined leave usage may delay the accumulation of the required on the job 900 hours.

3. Recommendation by shop management.

The Agency attorney argues that apprentices are eligible after six months but not entitled to the promotion after six months. He argues that promotions are discretionary because if they were nondiscretionary that would take away the ability to evaluate performance. The Agency attorney states that when promotions are discretionary they cannot be retroactive per 5 CFR 213 and comptroller general decisions.

Danny F. Haas, NAVSEA West Training director testified he managed the apprenticeship program at Puget Sound Naval Shipyard for 21 years from 1980 to 2001. Mr. Haas then was promoted to oversaw the apprenticeship program for 10 more years. Mr. Haas testified that the intent of the apprentice program was to train apprentices to be promoted every six months, until they were at a journeyman level. In order to be promoted, the apprentice had to perform at a satisfactory level for 900 hours of OJT and meet all the education required courses with a 2.5 GPA or better.

During the 30 years Mr. Haas managed or oversaw the apprenticeship program, he ensured that apprentices were promoted noncompetitively every six months when they met the satisfactory performance of 900 hours of OJT by completing and signing the Job Learning Sheets (OJL); and meeting all the educational requirements with a 2.5 GPA or better. There was no evidence submitted to contradict Mr. Haas' testimony.

In the Arbitrator's opinion this clearly is a long-standing past practice, which became part of Article 39 the CBA. But for the Agency failing to process the promotion of Ashley Jones on a timely basis Ms. Jones would have been promoted on 6/29/15. When there is a violation of the CBA and, the but for test is me.t the Arbitrator has the authority to make retroactive promotions (Elkouri & Elkouri, How Arbitration Works Page 94-98).

The Agency exhibit 7 shows that in Code 730 where Ashley Jones worked, the majority of apprentices were promoted within six month intervals, showing a continuing past practice.

Union Exhibit 4 is a letter from Barbara Worden, Human Resources Specialist to the Metal Trades Council President, Ryen Young, dated February 5, 2016. Ms. Worden explains there has been a delay in promoting apprentices every six months as intended because the OJL sheets are only submitted monthly. The new process still requires the OJL sheets submitted showing 900 hours but the current months hours may be verified via official timekeeping records, such as Supdesk or SAEM.

We do not want the apprenticeship going from a 4 year program to a 5 year program. In the opinion of the Arbitrator, this letter is evidence the Agency's intent is to promote every six months and the Agency has been having administrative problems in accomplishing their goal, so they are streamlining the administrative process so apprentices can be promoted every 6 months and so apprenticeship can be completed in 4 years as intended.

The back pay act allows for retroactive promotions, if they are nondiscretionary based on comptroller decisions submitted into evidence by the Agency and the testimony of Agency witness, Tammy Johnson. In the opinion of the Arbitrator, the Agency has established a nondiscretionary promotion practice of promoting apprentices every 6 months when the apprentice has satisfactory performance of 900 hours of OJT, completed and signed the OJL learning sheets, and has a GPA of 2.5 or better in all required courses.

Ashley Jones did in fact have an excellent performance of her 900 hours of OJT, and met the 900 hours on 6/22/15, completed and signed the OJL sheets on the earliest possible date of 6/30/15. (Current Shipyard guidelines state you can only submit the OJL sheets at the end of the month) and Ms. Jones has a GPA of 3.9.

Therefore, the Arbitrator sustains the grievance and Ashley Jones is to be retroactively promoted to WT-4 on 6/29/15 with any subsequent promotions adjusted to be within 6 month intervals, if Ashley Jones has satisfactory performance of her 900 hours of OJT, she signed and submitted her OJL sheets and she had a GPA of 2.5 or

better in all her required courses..

The request for Union attorney fees is denied, because in the opinion of the Arbitrator the Agency did not act in bad faith, but made delays in their administration of the promotions for Ashley Jones. (Elkouri & Elkouri, How Arbitration Works page 592).

V. AWARD

1. The decision of the Arbitrator is that the grievance is sustained.

2. Ashley Jones is to be retroactively promoted to WT-4 effective 6/29/15 and subsequent promotion are to be every 6 months if Ashley Jones had satisfactory performance of her 900 hours of OJT, she signed and submitted her OJL sheets and she had a GPA of 2.5 or better in all her required courses.

3. The Arbitrator retains jurisdiction over implementation of the award.

October 10, 2016 Walter Kawecki Jr

Dated Walter Kawecki, Jr. Arbitrator

ATTACHMENT 2

Authority Order

70 FLRA No. 152

UNITED STATES
DEPARTMENT OF THE NAVY
PUGET SOUND NAVAL SHIPYARD
AND INTERMEDIATE
MAINTENANCE FACILITY
BREMERTON, WASHINGTON
(Agency)

and

BREMERTON METAL TRADES COUNCIL
(Union)

0-AR-5240

_____

DECISION

August 13, 2018

_____

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

I. Statement of the Case

In this case, we vacate an award because the Arbitrator modified the terms of the parties' agreement instead of interpreting the agreement.

Arbitrator Walter Kawecki, Jr. issued an award finding that the Agency had a nondiscretionary policy, established by past practice, of promoting apprentices every six months when they satisfied certain training and education requirements. He also found that this policy had been incorporated into Article 39 of the parties' collective-bargaining agreement (Article 39). Consequently, he found that the Agency violated Article 39 when it failed to timely promote one apprentice (the grievant) who had satisfied the requirements.

The main question before us is whether the award fails to draw its essence from the agreement. The Arbitrator relied on an alleged past practice to effectively create a new contract provision that entitles apprentices to nondiscretionary promotions under certain circumstances. Because the Arbitrator's finding modified – rather than interpreted – Article 39, the award fails to draw its essence from the agreement. Accordingly, we set aside the award.

II. Background and Arbitrator's Award

The grievant participates in the Agency's apprentice program. Under the apprentice program, the Agency initially appoints apprentices to wage trainee (WT)-1, and they are eligible for noncompetitive promotions every six months until they reach the highest grade of WT-8. Article 39 includes general statements about the apprentice program. For example, it provides that: apprentices will be excepted-service employees until their successful completion of the program, the Agency will train apprentices and assign them a variety of increasingly complex work assignments, and the program administrator will certify apprentices' satisfactory completion of the program. In addition, the Agency's apprentice-program policy states that apprentices' "[p]romotion eligibility will be contingent upon satisfactory academic and work performance and successful completion of a minimum of 900 hours of academics, trade theory[,] and related on-the-job training every six months."[1]

As relevant here, the Agency promoted the grievant from WT-3 to WT-4, but delayed processing the promotion, so she did not receive it on her six-month anniversary. The Union filed a grievance alleging that the Agency failed to timely promote the grievant. The grievance went to arbitration.

At arbitration, the parties did not agree to a stipulated issue, so the Arbitrator framed the issues as: "Did the Agency violate the [agreement] and/or a nondiscretionary [A]gency policy or federal regulations by not promoting [the grievant] . . . on [her six-month anniversary]? If so, what is the appropriate remedy?"[2]

Before the Arbitrator, the Union argued that the Agency had a nondiscretionary policy, established by past practice, of promoting apprentices every six months when they satisfied certain training and education requirements. The Union maintained that the grievant met these requirements by her six-month anniversary, but that the Agency failed to timely promote her because of an administrative error.

Conversely, the Agency argued that apprentices are *eligible* for – but not *entitled* to – promotions every six months because, under the apprentice-program policy, "[p]romotion *eligibility* [is] . . . *contingent* upon satisfactory academic and work performance and successful completion of" certain training and education requirements.[3] According to the Agency, promotions are discretionary because the Agency must evaluate whether

[1] Exceptions, Attach. C, Apprentice Program Policy and Guidelines (Apprentice Policy) at 2.
[2] Award at 3.
[3] Apprentice Policy at 2 (emphasis added).

apprentices have successfully completed the apprentice-program requirements before it approves their promotions.

The Arbitrator considered evidence from both parties regarding the existence of a past practice. The Arbitrator found that no evidence contradicted a Union witness's testimony that, "[d]uring the [thirty] years [that he] managed or oversaw the apprenticeship program, he ensured that apprentices were promoted noncompetitively every six months when they": (1) completed and signed a worksheet demonstrating fulfillment of the 900-hour training requirement, and (2) satisfied all educational requirements with at least a 2.5 grade-point average.[4] The Arbitrator also noted that a particular Agency exhibit (Exhibit 7) showed that the Agency promoted apprentices in six-month intervals 60% of the time. The Arbitrator found that Exhibit 7 demonstrated that "the majority of apprentices were promoted within six[-]month intervals, showing a continuing past practice."[5] Further, the Arbitrator found that a letter from the Agency to the Union concerning the process for verifying training hours demonstrated "the Agency's intent . . . to promote [apprentices] every six months."[6]

In light of these findings, the Arbitrator found that the Agency had "a long-standing past practice" of promoting apprentices every six months when the apprentice "met the satisfactory performance of 900 hours of [training] by completing and signing the [training worksheet,] and [met] all [of] the educational requirements with a 2.5 [grade-point average] or better."[7] The Arbitrator found that this practice created a "nondiscretionary"[8] policy that "became part of Article 39."[9] The Arbitrator also found that the grievant was eligible for a promotion under the policy because she satisfied the promotion requirements by her six-month anniversary. Thus, the Arbitrator concluded that the Agency violated the agreement by failing to timely promote the grievant. As a remedy, the Arbitrator found that the grievant was entitled to a retroactive promotion.

On November 8, 2016, the Agency filed exceptions to the Arbitrator's award, and on November 28, 2016, the Union filed an opposition to the Agency's exceptions.

[4] Award at 14.
[5] *Id.*
[6] *Id.* at 15.
[7] *Id.* at 14.
[8] *Id.* at 15.
[9] *Id.* at 14.

III. Analysis and Conclusion: The award fails to draw its essence from the parties' agreement.

The Agency argues that the award fails to draw its essence from the parties' agreement because the Arbitrator's finding of a nondiscretionary past practice of promoting apprentices every six months improperly modifies Article 39.[10] The Authority will find that an arbitration award fails 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.[11] Further, arbitrators may consider parties' past practices when interpreting an ambiguous contract provision,[12] but they may not rely on past practices to *modify* the terms of a contract.[13]

As noted above, Article 39 provides, in general terms, for the existence of an apprentice program. But Article 39 does *not* discuss the eligibility requirements for promoting apprentices every six months. Thus, there is no *ambiguous* contract term that required the Arbitrator to consider the parties' past practice. Yet the Arbitrator found that the Agency's alleged "long-standing past practice"[14] of promoting apprentices every six months when they satisfied certain program requirements created a "nondiscretionary"[15] promotion policy that "became part of Article 39."[16] By effectively converting the parties' practice into a brand new contract provision that entitles apprentices to promotions in certain circumstances, the Arbitrator modified – rather than interpreted – Article 39. Although arbitrators may look to parties' past practices when interpreting an

[10] Exceptions at 11-12.
[11] *See, e.g.*, *SSA*, 70 FLRA 227, 229 (2017); *Library of Cong.*, 60 FLRA 715, 717 (2005) (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).
[12] *E.g.*, *U.S. Dep't of the Treasury, U.S. Customs Serv., Region IV, Miami Dist.*, 41 FLRA 394, 396, 398-99 (1991) (*Treasury*) (arbitrator did not err by relying on parties' past practice to interpret ambiguous contract provision).
[13] *See Keebler Co. v. Milk Drivers & Dairy Empls. Union, Local No. 471*, 80 F.3d 284, 288 (8th Cir. 1996) ("Although the arbitrator is free to look to past practice to construe ambiguous contract language, he cannot amend the contract."); *Judsen Rubber Works, Inc. v. Mfg., Prod. & Serv. Workers Union, Local No. 24*, 889 F. Supp. 1057, 1064 (N.D. Ill. 1995) (noting that "for reliance on past practice to be proper, it must be predicated on some need for interpretive assistance").
[14] Award at 14.
[15] *Id.* at 15.
[16] *Id.* at 14.

ambiguous[17] contract provision, they may not rely on past practices to create a new contract provision.[18] Because the Arbitrator effectively did so here, we find that his award fails to draw its essence from the agreement, and we set it aside.[19]

In so doing, we acknowledge that the Authority has previously stated that an agreement's silence on a matter addressed by an arbitrator does not, by itself, demonstrate that the arbitrator's award fails to draw its essence from the agreement.[20] However, to the extent that such precedent is inconsistent with this decision, we reverse that precedent.

IV. Decision

We set aside the award.

[17] Member Abbott reiterates his concerns about use of "ambiguous" contract provisions as he has expressed recently. *See U.S. DHS, CBP, El Paso, Tex.*, 70 FLRA 623, 625 (2018) (Concurring Opinion of Member Abbott) (rejecting the notion of "critical ambiguity" (aka "critical contract terminology") that forms basis upon which to remand).

[18] *See, e.g.*, *Keebler Co.*, 80 F.3d at 288 (award failed to draw its essence from the parties' agreement where "the arbitrator was not construing an ambiguous contract term, but rather was imposing a new obligation upon [the employer] thereby amending the collective[-]bargaining agreement"); *cf. Treasury*, 41 FLRA at 398-99 (rejecting claims that arbitrator's award was deficient where "[a]rbitrator considered the parties' past practice *only to interpret* the agreement" (emphasis added)).

[19] Because we set aside the award on essence grounds, we find it unnecessary to resolve the parties' remaining arguments.

[20] *E.g.*, *U.S. Dep't of the Treasury, IRS, Ogden Serv. Ctr.*, 69 FLRA 599, 602 (2016) (Member Pizzella dissenting); *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Office of Marine & Aviation Operations, Marine Operations Ctr.*, 67 FLRA 244, 246 (2014) ("where an arbitrator interprets an agreement as imposing a particular requirement, the agreement's silence with respect to that requirement does not, by itself, demonstrate that the arbitrator's award fails to draw its essence from the agreement").

Member DuBester, dissenting:

The majority's decision is another step in their misguided effort to eliminate consideration of parties' past practices when determining the parties' rights and obligations in their collective-bargaining relationship. In previous cases, the majority has rejected reliance on parties' past practices "to modify the clear terms of a bargained-for agreement."[1] I strongly disagreed. In my view, "[a]n arbitrator's award that appears contrary to the express terms of the agreement may nevertheless be valid if it is premised upon reliable evidence of the parties' intent."[2]

Now, the majority rejects reliance on parties' past practices even where no "clear terms of a bargained-for agreement" are involved. The majority's holding here, like their previous rejection of past-practice principles, conflicts with decades of legal authority on this subject, including long-standing, well-reasoned Authority past-practice precedent, established arbitral practice, and the predominant view of the courts.

Contrary to the majority, I would find that the award does *not* fail to draw its essence from the parties' agreement. In order to establish conditions of employment through a past practice, a party must show that the practice has been consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other.[3] And here, the Arbitrator found that the Agency "has . . . a nondiscretionary promotion practice of promoting apprentices every [six] months" when the apprentice meets the Agency's requirements.[4] The majority does not dispute this finding.

The Arbitrator further finds that this "long-standing past practice . . . became part of" the provision in the parties' agreement, Article 39, establishing the Agency's apprentice-training program.[5] Relying on this past practice, the Arbitrator determines that the grievant met all the requirements for her promotion, and concludes that "[b]ut for[] the Agency failing to timely process the paperwork," the grievant would have been promoted earlier.[6]

The majority rejects the Arbitrator's reliance on the parties' undisputed past practice because "Article 39 does *not* discuss the eligibility requirements for promoting apprentices every six months."[7] But the parties' failure to expressly discuss this particular aspect of the apprentice program does not alter the significance of the parties' past practice.

As the Authority has held, "the meaning of [an] agreement must '[u]ltimately . . . depend[] on the intent of the contracting parties.'"[8] And as the Supreme Court has explained in the context of labor arbitration: "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the [workplace] common law – the practices of the [workplace] – is equally a part of the collective[-]bargaining agreement, although not expressed in it."[9] *Elkouri and Elkouri* adds: "It is well recognized that the contractual relationship between the parties normally consists of more than the written word. Day-to-day practices mutually accepted by the parties may attain the status of contractual rights and duties, particularly where they are not at variance with any written provision negotiated into the contract by the parties and where they are . . . long standing and were not changed during contract negotiations."[10] "Unquestionably, the custom and past practice of the parties constitutes one of the most significant evidentiary considerations in labor-management arbitration,"[11] and accordingly can be used "to fill in the contract's gaps."[12]

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[1] *U.S. Small Bus. Admin.*, 70 FLRA 525, 528 (2018) (*SBA*) (Member DuBester dissenting); *see also U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Florence, Colo.*, 70 FLRA 748 (2018) (Member DuBester dissenting) (*DOJ*); *U.S. Dep't of the Army 93rd Signal Brigade Fort Eustis, Va.*, 70 FLRA 733, 734 (2018) (*Army*) (Member DuBester dissenting).

[2] *SBA*, 70 FLRA at 531 (Dissenting Opinion of Member DuBester) (quoting *Elkouri & Elkouri, How Arbitration Works*, 12-28 (Kenneth May ed., 8th ed. 2016) (*Elkouri*) (citing *Int'l Bhd. of Elec. Workers, Local Union No. 199 v. United Tel. Co. of Fla.*, 738 F.2d 1564, 1568 (11th Cir. 1984))); *see, e.g., Dep't of the Navy, Naval Underwater Sys. Ctr., Newport Naval Base*, 3 FLRA 413, 414 (1980) (parties may establish terms and conditions of employment by practice, and those terms and conditions may not be altered by either party in the absence of agreement); *see also DOJ*, 70 FLRA at 750-51 (Dissenting Opinion of Member DuBester); *Army*, 70 FLRA at 735 (Dissenting Opinion of Member DuBester).

[3] *See, e.g., U.S. Dep't of the Interior, U.S. Geological Survey Great Lakes Sci. Ctr., Ann Arbor, Mich.*, 68 FLRA 734, 737 (2015).

[4] Award at 15.

[5] *Id.* at 14.

[6] *Id.* at 13.

[7] Majority at 4.

[8] *IRS, Wash., D.C.*, 47 FLRA 1091, 1110 (1993).

[9] *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960)

[10] *Elkouri* at 12-2 (quoting Arbitrator Marlin M. Volz, in *Metal Specialty Co.*, 39 LA 1265, 1269 (Volv, 1962)).

[11] *Id.* at 12-1.

[12] *Id.* at 12-28; *see also Cruz-Martinez v. DHS*, 410 F.3d 1366, 1371 (Fed. Cir. 2005) ("We find that the arbitrator was correct that, on the facts in this case, the collective[-]bargaining agreement does not preclude the consideration of extrinsic evidence to show a binding past practice. This is particularly the case here where the past practice does not contradict any written provision in the collective[-]bargaining agreement, but simply defines the course of dealing between the parties in an area where the contract is silent, i.e., the past practice fills a gap in the contract.").

The Arbitrator's award adheres to these principles. The majority's decision disregards them. Accordingly, I defer to the Arbitrator's rational and well-reasoned interpretation of the parties' agreement and would find that the award draws its essence from the agreement. I dissent from the majority's decision to do otherwise.