FOREIGN SERVICE LABOR RELATIONS BOARD
WASHINGTON, D.C.

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AMERICAN FOREIGN SERVICE ASSOCIATION
(Union)

and

UNITED STATES DEPARTMENT OF STATE
(Agency)

FS-AR-0008

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DECISION

January 19, 2021

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Before the Board: Colleen Duffy Kiko, Chairperson, and
Dennis K. Hays and Thomas J. Miller, Members
(Chairperson Kiko dissenting)

I. Statement of the Case

For the years 2015 and 2016, the parties negotiated procedures for identifying employees whose work performance made them eligible for an award called a "[m]eritorious [s]ervice [i]ncrease[]" (MSI).[1] The procedures were identical for both years. The parties disagreed about the number of MSIs the procedures required the Agency to confer in those years. The Union argued that negotiated precepts delegated authority to Selection Boards to determine in rank order which members were eligible for promotion and, for those not promoted, the awarding of an MSI to the agreed-upon standard of "no more than 10%" of the class. The Agency contended it retained authority over granting MSIs and that the "no more than 10%" language was merely a cap, not a mandate.

The Union has now filed exceptions challenging a Foreign Service Grievance Board (Grievance Board) decision regarding the 2015 and 2016 procedures. For the reasons discussed below, we reverse the Grievance Board's decision.

[1] *U.S. Dep't of State*, FS-AR-0006 (2016) at 1 (alterations in original).

II. Background and Decisions

This is the fourth time the Foreign Service Labor Relations Board (the Labor Relations Board, or FSLRB) has considered the arbitration of disputes over the parties' MSI procedures.[2]

This issue first arose in a dispute over the implementation of the 2013 Selection Board precepts. Unlike in subsequent years, the 2013 procedures included a paragraph about how budget sequestration (or related policies and regulations) could affect MSIs. When the Union disagreed with the Agency's reduction of MSIs under the 2013 procedures, the Union filed an "implementation dispute" with the Agency.[3] Because the parties could not resolve the implementation dispute themselves, the Union then filed a "complaint" with the Grievance Board concerning the Agency's application of the 2013 procedures.[4]

As relevant here, the Grievance Board's decision addressed two alleged ambiguities in the 2013 procedures. The first alleged ambiguity concerned the sequestration paragraph (the sequestration ambiguity), and, although the details are not relevant here, the Grievance Board resolved the sequestration ambiguity adversely to the Agency. The second alleged ambiguity concerned whether the 2013 procedures required the Agency to grant MSIs to all employees in the top 10% among those who were eligible (the 10% ambiguity). The Grievance Board resolved this second alleged ambiguity by finding that the 2013 procedures mandated MSIs for the top 10%.[5] The Agency then filed, with the Labor Relations Board, exceptions to the Grievance Board's decision. One of the Agency's arguments was that the Grievance Board's resolution of the *sequestration ambiguity* failed to draw its essence from the 2013 procedures. However, the Agency did not challenge the Grievance Board's resolution of the *10% ambiguity* on essence grounds. Ultimately, the Labor Relations Board denied all of the Agency's exceptions.

The second and third Labor Relations Board decisions about MSIs concerned the 2014 procedures. For 2014, the parties eliminated the sequestration paragraph that had appeared in the 2013 procedures, but they kept the same wording that gave rise to the 10% ambiguity, the language the Agency chose not to challenge in the 2013 dispute. Nevertheless, the 10% wording spurred an implementation dispute over the

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[2] In other words, half of all of the Labor Relations Board's decisions in arbitration cases have concerned disputes over MSI procedures. *See U.S. Dep't of State*, FS-AR-0007 (2018) (*State III*); *U.S. Dep't of State*, FS-AR-0007 (2016) (*State II*); *U.S. Dep't of State*, FS-AR-0006 (2016) (*State I*).

[3] 22 U.S.C. § 4114(a)-(b) (statutory description of implementation disputes); *see also State I*, FS-AR-0006 at 2-4 (describing the circumstances leading to the implementation dispute over the 2013 procedures).

[4] Although the Foreign Service Act refers to these filings as "appeal[s] to the . . . Grievance Board," 22 U.S.C. § 4114(a)(3), the implementing regulation for filing such appeals refers to the them as "complaint[s]," 22 C.F.R. § 911.2.

[5] The Grievance Board based this holding, in part, on its finding that "the parties had a past practice for at least 30 years of paying MSIs to whatever number of employees the selection Board has recommended, up to the percentage limitation specified in the Precepts." Exceptions, Attach. 2015 Grievance Board Decision (2015 Grievance Board Decision) at 18.

2014 procedures. When the parties could not resolve that dispute, the Union filed a complaint with the Grievance Board. The Grievance Board issued an initial decision about the 2014 procedures, and the Union filed exceptions to the initial decision. The Labor Relations Board granted one of the Union's exceptions and set aside the initial decision as contrary to law.[6] Consequently, the Labor Relations Board remanded the 2014-procedures dispute, and the Grievance Board issued a second decision again resolving the 10% ambiguity by finding that the 2014 procedures mandated MSIs for the top 10% of eligible employees. Unlike with the Grievance Board's decision on the 2013 procedures, the Agency filed an exception with the Labor Relations Board arguing that the interpretation of the 10% wording failed to draw its essence from the 2014 procedures.

The Labor Relations Board chose to limit its examination of the dispute to the plain wording of the disputed provision, which stated that "[n]o more than [10%] of members in a competition group shall receive MSIs."[7] Relying on the dictionary definition of "'no more than' as 'a stated number or fewer,'" the Labor Relations Board held that "the plain meaning of the [disputed provision] is that the Agency may award MSIs to 10% *or less* of the eligible employees."[8] Therefore, the Labor Relations Board granted the Agency's exception and set aside the Grievance Board's interpretation of the 10% wording as failing to draw its essence from the 2014 procedures.

While the implementation dispute about the 2014 procedures was still being resolved, the Union also filed complaints with the Grievance Board over the Agency's application of the 2015 and 2016 procedures. Once again, the point of contention for both years was the 10% wording. After receiving the 2015 and 2016 complaints, the Grievance Board stayed any further proceedings until the dispute over the 2014 procedures concluded.

Following the Labor Relations Board's conclusion that the 10% wording in the 2014 procedures meant 10% *or less*, the Agency asked the Grievance Board to consolidate and deny the Union's 2015 and 2016 complaints. The Agency contended that the Labor Relations Board's decision on the 2014 procedures controlled the resolution of the complaints over the 2015 and 2016 procedures. The Union opposed the Agency's request, arguing that (1) the Labor Relations Board's decision on the 2014 procedures was erroneous and (2) even if that decision had not been erroneous, the Grievance Board was not obligated to follow it.

The Grievance Board found that, because the Labor Relations Board's decision on the 2014 procedures was "based solely on the plain language" of those procedures,[9] and

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[6] *State II*, FS-AR-0007 (2016).
[7] *State III*, FS-AR-0007 (2018) at 1 (alterations in original).
[8] *Id.* at 4.
[9] Order to Consolidate & Dismiss (Grievance Board Order) at 5; *see also id.* at 6-7 (describing the Labor Relations Board's decision on the 2014 procedures as "based solely on the 'plain meaning' of the [procedures'] language"), 9 ("[I]t is important to emphasize that the [Labor Relations Board] explicitly based its decision on the 'plain meaning' of the 10% language . . . .").

as that language had not changed for 2015 or 2016,[10] the Labor Relations Board's decision on the 2014 procedures controlled the outcome of the 2015 and 2016 complaints. In this regard, the Grievance Board noted that it had previously relied on "bargaining history, past practice, which party's interpretation of the disputed language was more plausible, and a consideration of the 10% language in the context of the agreement taken as a whole" to arrive at a conclusion different from that of the Labor Relations Board.[11] However, the Grievance Board stated: "we find that we are bound to act consistently with the [Labor Relations Board's] decision, and we are not free to disregard parts of that decision with which we do not agree."[12] Thus, the Grievance Board granted the Agency's request to consolidate and deny the 2015 and 2016 complaints.

On October 28, 2019, the Union eFiled exceptions to the Grievance Board's order, and on November 27, 2019, the Agency filed an opposition to those exceptions.

III. Preliminary Matter: We will consider the eFiled exceptions.

Parties that are subject to the Federal Service Labor-Management Relations Statute (the Statute) have the option, under regulations adopted by the Federal Labor Relations Authority (the Authority, or FLRA), to submit certain documents to the Authority through an eFiling system.[13] But because the Foreign Service Act (the Act), rather than the Statute, governs the unique adjudicatory functions of the Labor Relations Board, there are distinct regulations that govern submissions to the Labor Relations Board.[14] And those distinct regulations under the Act do not afford parties an option to submit documents through an eFiling system.[15] Nevertheless, the Union eFiled its exceptions. In response, the Labor Relations Board ordered the Union to show cause why the eFiled exceptions should be considered.[16]

The Union timely responded to the order, offering several arguments. First, the Union observed that, at one time, the Authority's regulation on submitting documents under the Statute was very similar to the Labor Relations Board's regulation under the

[10] *Id.* at 8 (finding "no question that the 10% language that the [Labor Relations Board] interpreted in [*State III*] is at issue in both of the implementation dispute complaints at issue here").
[11] *Id.* at 9.
[12] *Id.* at 7; *see also id.* ("While we may not agree fully with the [Labor Relations Board's] decision . . . we are not at liberty to disregard its decision."); *id.* at 10 (stating that "whatever may be the equities of [the Union's] situation, we are not at liberty to recognize them in a decision that directly contradicts the [Labor Relations Board's] precedent").
[13] *See* 5 C.F.R. chapter XIV, subchapter C (Authority's filing regulations).
[14] *See* 22 C.F.R. chapter XIV, subchapter C (Labor Relations Board's filing regulations); *see also* 22 U.S.C. § 4107(c)(1) ("In order to carry out its functions under this subchapter . . . the [Labor Relations] Board *shall* by regulation adopt procedures to apply in the administration of th[e Act]." (emphasis added)).
[15] 22 C.F.R. § 1429.24(e) ("All documents filed . . . shall be filed by certified mail or in person, or if the filing party is outside the United States, by the most appropriate available means.").
[16] Order to Show Cause at 1-2.

Act,[17] but only the Authority's regulation was ever updated.[18] In a case decided under the Authority's previous regulation, the Authority excused a party's failure to submit a filing to the Authority's docket room (as the regulation required) because the party submitted the document to the General Counsel's Washington Regional Office, which then transferred the document to the docket room.[19] Relying on that decision, the Union argues that the Labor Relations Board should excuse the Union's failure to file by mail or in person because the eFiled exceptions were, in fact, transferred to the Board.[20]

Second, the Union notes that it would be impossible to comply strictly with the Labor Relations Board's filing regulation because the regulation requires that filings be submitted using an address where the Labor Relations Board has not been located for decades.[21] Thus, the Union asserts that the Labor Relations Board cannot require strict compliance with this particular regulation.

Third, the Union provides evidence, including copies of previous filings and an accompanying sworn statement, that shows that the Union has eFiled submissions with the Labor Relations Board twice before, and neither of those submissions prompted an order to show cause. As a result, the Union asserts that the Labor Relations Board's past actions led the Union to believe that eFiling was permitted.[22]

Fourth, the Union contends that the Agency has not suffered prejudice due to the Union's eFiling.[23]

We find the Union's arguments persuasive. Based on this confluence of factors – the similarity to a previous Authority decision under a comparable regulation, the impossibility of strict compliance, the Union's previously accepted eFiling submissions, and the lack of prejudice to the Agency – we will consider the eFiled exceptions.

IV. Mission

Most federal employees fall under the Civil Service Reform Act of 1978 and labor management disputes are ultimately resolved by the FLRA. Members of the foreign affairs agencies, however, fall under the Foreign Service Act of 1980 and have

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[17] *Compare* 5 C.F.R. § 2429.24(e) (1989) (Authority's "[p]lace and method of filing" regulation states that "[a]ll documents filed . . . shall be filed in person or by mail"), *with* 22 C.F.R. § 1429.24(e) (Labor Relations Board's "[p]lace and method of filing" regulation states that "[a]ll documents filed . . . shall be filed by certified mail or in person, or if the filing party is outside the United States, by the most appropriate available means").
[18] Resp. at 3.
[19] *U.S. DOJ, INS, Balt., Md.*, 34 FLRA 79, 80 (1989). As explained more fully in the next section, the Labor Relations Board follows Authority precedent unless "special circumstances . . . require otherwise." 22 U.S.C. § 4107(b).
[20] Resp. at 3.
[21] *Id. See* 22 C.F.R. § 1429.24(a) ("A document submitted to the Board . . . *shall be filed* with the Board *at the address* set forth in appendix A . . . ." (emphases added)); *id.* ch. XIV app. A § (a) ("The Office address of the Board is as follows: 1900 E Street, NW., Room 7469, Washington, D.C. 20424.").
[22] Resp. at 4; *id.*, Attach. F, Sworn Statement of Union's Deputy General Counsel.
[23] Resp. at 4.

very different rules and regulations regarding many aspects of their service, including entry on duty, assignments, pay, promotion, tenure and separation. Because of the unique aspects of the Foreign Service, Congress created the FSLRB. The FSLRB ensures that the special circumstances faced by both the Agencies and their employees that come from being in a disciplined, competitive service living and working overseas are given appropriate consideration.[24] Like the FLRA, the FSLRB's mission is to protect rights and facilitate stable relationships among federal agencies, labor organizations, and employees while advancing an effective and efficient government.

Background

For the thirty years prior to 2013, Selection Boards routinely rank ordered employees for eligibility for promotion or an MSI and the Agency routinely and without exception awarded an MSI to employees who were recommended, but not reached, for promotion up to the percentage limitation specified in the precepts.[25] And MSIs were awarded from 2003 to 2012[26] under the "no more than 10%" wording with no dispute as to that phrase's meaning. There were five different Directors General of the Foreign Service during this time period and there is no indication that either the Agency or the Union took issue with the language or the interpretation of "no more than 10%" as meaning that 10% of the class would be awarded an MSI, assuming a sufficient number of employees were eligible for consideration.

In 2013, the sequestration imposed a one-time condition on the payment of MSIs (but not on promotions or other actions of the Selection Boards). When funding was restored the next year, the Agency sought to reinterpret the precept language, long after the precepts had been negotiated and signed and despite undisputed past practice over many years. Failing to reach agreement on this change of policy, the issue was referred to the Grievance Board, which investigated and found in favor of the Union.

The ambiguity which is central to this matter was introduced when the Agency sought to interpret language differently from what had been previously accepted and implemented by both parties. It is established procedure that the drafter of a document or a proponent of a change is responsible for clarifying ambiguous words or phrases. The Agency has sought to change the existing practice in 2013 and subsequent years. The Agency certainly has a right to seek this, but the proper approach would have been to remove or amend any ambiguous language through the collective bargaining process.

In 2014, the issue of interpretation again was disputed and eventually the case was again referred to the Grievance Board. And, again, the Grievance Board resolved the 10% ambiguity by finding the language mandated MSIs for the top 10% of eligible

[24] *See* 22 U.S.C. § 4107.
[25] Although the precept wording at issue has varied over that time period, the Grievance Board found in 2015 that, prior to the dispute about the 2013 precepts, "the parties had a past practice for at least 30 years of paying MSIs to whatever number of employees the selection Board has recommended, up to the percentage limitation specified in the Precepts." 2015 Grievance Board Decision at 18.
[26] *Id.* at 15 ("From 2003 to 2013, the Precepts contained virtually the same language at issue in this case[.]").

employees. In negotiations of the 2015 and 2016 Selection Board precepts, the same ambiguity over who determined the number of MSIs to be awarded continued unresolved. It is significant to note that during these negotiations the then-standing opinions of the Grievance Board supported the Union's position on the interpretation of "no more than 10%" although the Agency had appealed the 2014 Grievance Board decision to the FSLRB. The precepts in both years were agreed to and signed by both parties with the language of the past decade unchanged.

The Agency, however, then moved to achieve what it hadn't attained at the negotiating table by issuing administrative orders limiting the number of MSIs to be awarded to 5% of each class. In 2015, the precepts were signed on May 28, 2015 and the administrative order was issued four and a half months later on October 16, 2015. In 2016, the precepts were signed on June 9, 2016 while the administrative order was issued on September 19, 2016.

During negotiations on the 2016 Selection Board precepts the Agency offered a new proposal, seeking the Union's agreement to separate MSIs from the Selection Boards and to institute a different administrative procedure for their issuance. After negotiation, the two parties agreed to leave the 2016 precepts' wording unchanged, but to meet after they were signed to discuss the Agency's proposal to treat MSIs differently in the future than they had in the past (and then present).

These follow-on negotiations were held and agreement on a new system for awarding MSIs was reached. The issue of the ambiguity over not more than 10% was therefore rendered moot going forward. Agreement had been reached through the collective bargaining process and both sides were satisfied. There remained, however, the question of who would be awarded MSIs in prior years. In 2018 the Agency's appeal of the Grievance Board's decision on the 2014 precepts reached the FSLRB. At that time, the Board approached the issue from the perspective of what was the "plain language" definition of the phrase in question,[27] and in a split decision ruled the Agency's interpretation of "no more than 10%" allowed for the administrative discretion to issue MSIs to fewer than 10% of the eligible population.[28]

V. Analysis

A. Role of the FSLRB

A key function of the FSLRB is to encourage labor and management to work together to resolve their differences through the collective bargaining process. The FSLRB is a "body of review, not first view"[29] and, as such, should give weight to the opinions of the authorities closest to the issue, particularly when those authorities have

[27] *State III*, FS-AR-0007 (2018) at 4 (citing *U.S. Small Bus. Admin.*, 70 FLRA 525, 528 (2018) (Member DuBester concurring, in part, and dissenting, in part)).
[28] *Id.* at 4-5; *see also id.* at 6-7 (Dissenting Opinion of Member Cohen).
[29] Dissent at 13.

individuals with firsthand knowledge of the issue and the history and circumstances behind it.

The Foreign Service Grievance Board was in the best position to assess all aspects of this issue and the Grievance Board twice clearly and definitively found the body of evidence supported the Union's contention that the longstanding precedent, prevailing practice, and the negotiating history between the parties supported continuity absent a negotiated change.

B. Common Understanding

Referral to a dictionary can be useful in determining one meaning of a word, but doesn't take into consideration that words can have multiple meanings and that words, and particularly phrases, often accumulate new meanings and shades of interpretation over time. Using solely the standard of "plain language" would make the need for many labor relations board reviews obsolete as a simple referral to a standard dictionary would resolve most disputes. In this case the phrase in question had long been understood in practice BY ALL PARTIES to mean that 10% of the population eligible would, in fact, be awarded an MSI.

C. Negotiating History

In 2013, the Agency sought to make a change to longstanding procedure but didn't use the process available to it - the collective bargaining process - to effect the change. In each subsequent year under discussion the Agency had opportunities to seek resolution of the dispute through negotiations but didn't. During this time, the Agency was aware of the Union's understanding of the phrase "no more than 10%" and was further aware that the Grievance Board had twice concurred in the Union's interpretation of what was required. Instead, the Agency went outside the collective bargaining process to attempt to make the change through administrative fiat.

The Agency eventually came to understand that the collective bargaining process was the appropriate way to resolve this issue. After the 2016 precepts were signed and implemented the two parties met and agreed on the new procedures for the awarding of MSIs. The Agency should be commended for finally reaching this point but it doesn't absolve them of taking four years to get there. The Agency's decision to enter into direct negotiating indicates they understood their previous position was unsupportable.

D. FSLRB Precedent

The FSLRB precedent that most closely matches this case involves a matter addressed by the Board in 2017.[30] In that case, the issue was whether, under 22 U.S.C. § 4118(b), the Agency should be required to continue to automatically deduct Union dues

[30] *Am. Foreign Serv. Ass'n*, FS-PS-0002 (2017).

after an employee retired from the Service and no longer received a salary.[31] The Union asserted that the statute's reference to "salary" encompassed other forms of compensation including an "annuity" and thus deductions should continue automatically into retirement.[32] However, the Union was unable to show any precedent to support their contention. In the absence of any precedent supporting the Union's interpretation of "salary," the Board determined that under these circumstances, a "dictionary" definition was appropriate and the Board adopted the Agency's interpretation of § 4118(b).

In the current case, however, the Union has shown that precedent, past practice, common acceptance by all parties over many years, the parties' negotiating history, and the considered opinions of two Grievance Boards all support the position that using a "plain language" standard by itself is incomplete and insufficient.

The Board went further in 2017, stating in its decision, "The preceding opinion regarding the applicability of relevant statues with respect to the deduction of union dues on behalf of Foreign Service employees notwithstanding, the Board believes that the continued membership of these employees in the bargaining unit, into retirement, argues for a special transitional procedure that management should adopt. The Board *strongly* wishes management and the Union to jointly agree to this procedure."[33]

Again, resolution through negotiation is stressed.

VI. Findings

We find that the Board erred in 2018 in relying solely on a plain language definition of a contested phrase without considering all the pertinent additional information that was readily available.

We find that as a "body of review" the Board in 2018 should have given greater weight to the considered opinions of the Foreign Service Grievance Board.

We find that there was a long-established procedure for the awarding of MSIs that was well understood and fully accepted by both parties.[34] We specifically find that past practice, a common interpretation of the language, the negotiating history and the Grievance Board decisions overwhelmingly support the contention that "not more than ten percent" mandated the Agency to award MSIs to 10% of the eligible members of a class – until the parties successfully negotiated an alternative procedure for awarding MSIs.

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[31] *See* 22 U.S.C. § 4118(b)(2) (providing that an assignment for deduction of union dues shall terminate when "the individual ceases to receive a salary from the Department as a member of the Service").
[32] *See Am. Foreign Serv. Ass'n*, FS-PS-0002 (2017) at 4.
[33] *Id.* at 5 (emphasis in original).
[34] 2015 Grievance Board Decision at 18; *see also State III*, FS-AR-0007 (2018) at 6 (Dissenting Opinion of Member Cohen) ("With this practice having been followed year after year, it is quite normal that the union had the right to believe that the number would never be less than ten percent pursuant to the negotiated precepts. Ten percent was not part of a sliding scale. It was an agreed amount.").

We find it unfortunate that focus has been placed on the definition of a phrase when the central issue here is the Agency's tardy acceptance that issues such as this should be resolved through labor management negotiations.

We find that in its exceptions, the Union argues that the Grievance Board exceeded its authority, and that the Grievance Board's decision fails to draw its essence from the 2015 and 2016 precepts. As relevant here, to demonstrate that an order fails to draw its essence from a collective-bargaining agreement, an excepting party must establish that the order does not represent a plausible interpretation of the agreement, or evidences a manifest disregard of the agreement.[35] For the reasons discussed above, we find that interpreting the 2015 and 2016 precepts as authorizing the Agency to confer MSIs to fewer than the 10% of eligible employees recommended by the Selection Boards manifests disregard for the parties' agreement, as exemplified through their past practice. Therefore, we grant the Union's essence exception and reverse the decision of the Grievance Board.[36]

Finally, we find it reassuring that the two parties eventually worked together through the collective bargaining process to resolve a contentious dispute.

[35] *See State I*, FS-AR-0006 (2016) at 7 (citing *NTEU, Chapter 32*, 67 FLRA 354, 355 (2014); *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).
[36] Because we grant the Union's essence exception, we need not reach its remaining arguments.

Chairperson Kiko, dissenting:

Initially, I disagree with the majority's decision because it has almost no connection to the arguments that the Union sets forth in its exceptions. But more significantly, and of much greater concern to me, the majority's decision ignores the law that governs our decision-making authority. Because Congress directed that all of our decisions must be consistent with applicable laws, and as the majority's decision is not consistent with either the Foreign Service Act or controlling precedent of the Federal Labor Relations Authority (the Authority), I dissent.

Under 22 U.S.C. § 4107, decisions of the Foreign Service Labor Relations Board (the Labor Relations Board) "shall be consistent with decisions rendered by" the Authority.[1] In other words, "Congress has directed the Labor Relations Board . . . to follow . . . Authority . . . precedent, except when the [Labor Relations Board] finds *special circumstances that require otherwise*."[2] The Labor Relations Board has *never* previously found that any circumstances unique to the Foreign Service "require[d]" disregarding Authority precedent.[3] Nevertheless, the majority invokes this exception in order to justify overturning our most recent decision on an identical matter of contract interpretation as the one presented in this case. Because invoking this exception is the majority's only acknowledgement that the law must control our decision here, this single reference would have to perform a great deal of analytical work to justify the majority's decision. Unfortunately, the majority abjectly misinterprets the exception and fails to justify any reliance on it here.

The starting and ending point of the majority's special-circumstances analysis is that the Foreign Service Act created the Labor Relations Board to "ensure[] that the special circumstances" of the Foreign Service "are given appropriate consideration."[4] This analysis is plainly insufficient, and it is troubling for several reasons besides the absence of any substantive content.

First, neither party has asserted that the special-circumstances exception applies here, so we are left to wonder why the majority has chosen to invoke that exception on its own motion. The majority provides no explanation for doing so, and does not even suggest that the Union's arguments are the basis for applying the exception.

Second, the majority fails to specify what special circumstances exist here. The majority does not identify a single circumstance that is unique to this case in order to justify invoking § 4107's exception. The fact that the Foreign Service Act created the Labor Relations Board in order to consider any special circumstances of the Foreign Service is a historical fact. And the differences in Foreign Service employees' "entry on duty, assignments, pay, promotion, tenure[,] and separation" exist in literally every case

[1] 22 U.S.C. § 4107(b).
[2] *USDA, Farm Serv. Agency, Foreign Agric. Serv.*, FS-AR-0004 (1998) at 6 (emphasis added) (citing 22 U.S.C. § 4107(b), (c)(2)(F)).
[3] *Id.*
[4] Majority at 6.

that the Labor Relations Board decides.[5] Rather than identifying a *special* circumstance, the majority cites *universal* circumstances, demonstrating that its penchant for ignoring plain wording extends not just to contracts, but to the law itself. If these universal circumstances were sufficient justification for disregarding Authority precedent, then Congress would have omitted § 4107 from the Foreign Service Act altogether, because the exception would apply in every case. Indeed, the majority's reasoning turns the exception into the rule.

Third, the majority fails to specify which of the Authority's precedents it is "require[d]" to disregard owing to the alleged special circumstances that the majority invokes.[6] Because the majority never cites any of the Authority's case law, it would appear that the majority contends that the mere existence of "very different rules and regulations" in the Foreign Service justifies ignoring all of the Authority's precedent.[7] The majority sees fit to make its own law, rather than following the legal constraints that Congress prescribed to govern this case, and then the majority exacerbates that deeply inappropriate determination by applying its new law to its own self-developed set of facts.[8]

Next, the majority attempts to support its law-free decision-making by citing a policy statement that the Labor Relations Board issued in 2017.[9] Far from being the "precedent that most closely matches this case,"[10] that policy statement construed *statutory provisions*, not contract wording. And the standard for reviewing statutory interpretations differs markedly from the essence standard that governs contract interpretation.[11] Ironically, the only similarity between those standards is that neither permits the decision-maker to ignore the plain wording of the applicable text,[12] yet that is precisely what the majority's decision does in this case. The majority latches onto the policy statement's strong encouragement of negotiations, but ignores that the hortatory admonition in that case had no effect on the answer to the legal question that the Labor Relations Board decided.

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[5] *Id.*
[6] 22 U.S.C. § 4107.
[7] Majority at 5.
[8] *E.g.*, *id.* at 6 (describing the "proper approach" for the Agency to take, without citing any authority to justify that categorization); *id.* at 7 (holding the Agency to the "then-standing opinion" of the Grievance Board but not holding the Union to wording of the actual precepts); *id.* at 8-9 (defining "plain language" to mean something besides "plain language," again without citing any authority); *id.* at 8 (asserting the Agency attempted to obtain a certain result without relying on negotiations, but not acknowledging that the Union also failed to achieve in negotiations a written commitment from the Agency always to award MSIs to a full 10% of eligible employees).
[9] *Id.* at 8.
[10] *Id.*
[11] *Compare U.S. Dep't of State*, FS-AR-0007 (2016) at 5 (*State II*) (describing de novo review applicable to legal questions), *with U.S. Dep't of State*, FS-AR-0007 (2018) at 4 (*State III*) (describing essence standard applicable to review of contract interpretations).
[12] *E.g.*, *AFGE, Local 1709*, 57 FLRA 453, 455 (2001) (relying on plain wording to resolve a matter of statutory interpretation); *U.S. Dep't of the Air Force, Okla. City Air Logistics Command, Tinker Air Force Base, Okla.*, 48 FLRA 342, 348 (1993) (finding arbitration award deficient because the arbitrator's interpretation of the parties' agreement was incompatible with its plain wording).

The majority also attempts to gloss over its disregard for legal constraints by feigning respect for the principle that we are a body of review, not first view. Specifically, the majority asserts that the Foreign Service "Grievance Board was in the best position to assess all aspects of this issue."[13] But the majority's assertion, as applied in this case, suffers from two fatal flaws. As both federal courts and the Authority recognize, when interpreting a contract, a decision-maker may not "disregard[] the plain and unambiguous language of the governing . . . agreement."[14] Thus, the Foreign Service Act obligated the Labor Relations Board to set aside previous contract interpretations that were inconsistent with the plain wording of the "no more than 10%" clause of the MSI precepts. Additionally, the majority's assertion is contradictory on its own terms. On the one hand, the majority claims that the Grievance Board was in the best position to decide this case, and then, on the other hand, the majority overturns the decision of the Grievance Board here. Thus, the purported rationale undercuts the outcome of the decision.[15]

The majority also blames the Agency for not taking actions to "clarify[] ambiguous words or phrases" in the 2015 and 2016 precepts.[16] *But there are no ambiguous words or phrases at issue here*, and the majority fails to identify any such ambiguous words or phrases. The words "[n]o more than [10%]" are not ambiguous, as the Labor Relations Board recognized in the 2018 decision regarding the 2014 MSIs.[17] And the Foreign Service Act obligates us to follow the Authority's precedent that, no matter the length of any past practice, practices may not alter explicit contract wording.[18] I would adhere to that obligation, but the majority does not.

Besides ignoring controlling Authority precedent, the majority's casting of blame is troubling for an additional reason: It flatly contradicts the Labor Relations Board's 2016 decision on the 2014 MSI precepts. In its first decision on the parties' implementation dispute concerning the 2014 precepts, the Grievance Board explained that, during the negotiations over the 2014 precepts, the Agency expressed its belief to the Union that the Agency had the discretion to award MSIs to less than 10% of eligible employees. To resolve a potential impasse stemming from the Agency's assertion, the Union proposed that the parties re-adopt their previous precept wording, and the Agency accepted the Union's offer. Viewing this bargaining history, the Grievance Board held that, because the Union did not take concrete steps to dispute the Agency's assertion about its discretion to award MSIs to less than 10% of eligible employees, the Grievance Board "'must conclude' that the Union chose the . . . path of subscribing to the Agency's

[13] Majority 8.
[14] *Patten v. Signator Ins. Agency, Inc.*, 441 F.3d 230, 235 (4th Cir. 2006).
[15] Majority at 9 (in setting aside the Grievance Board's dismissal order concerning the 2015 and 2016 MSI disputes, ironically contending that the Labor Relations "Board in 2018 should have given greater weight to the considered opinions of the Foreign Service Grievance Board").
[16] *Id.* at 6.
[17] *State III*, FS-AR-0007 at 1.
[18] *U.S. Small Bus. Admin.*, 70 FLRA 525, 528 (2018) (Member DuBester concurring, in part, and dissenting, in part). As I explained earlier, the majority's decision fails to articulate a reasoned basis for invoking § 4107's special-circumstances exception to permit a deviation from the Authority's precedent on this matter.

interpretation of the [2014 precepts'] wording on MSIs."[19] The Union filed exceptions to that Grievance Board holding, and the Labor Relations Board set it aside, finding that the Union had no obligation to take concrete steps to avoid the conclusion that it subscribed to the Agency's interpretation of disputed contract wording, even though the Union was the party that offered the draft wording for the 2014 precepts.[20]

Notwithstanding the Labor Relations Board's 2016 decision – and without acknowledging it at all – the majority resurrects the notion that disputed wording should be interpreted against a party, unless that party took concrete steps to contest any previously expressed views about the meaning of that wording.[21] To recap, in 2016, the Union won its challenge against a presumption that wording should be interpreted adversely to the drafting party. Yet the majority finds that the "proper approach" in the present dispute is to interpret the 2015 and 2016 precept wording adversely to the Agency because the Agency did not act more decisively to dispute the Union's interpretation of that wording.[22] In so concluding, the majority cavalierly overturns two previous decisions by the Labor Relations Board, which has only ever rendered seven such decisions before now.

As the preceding analysis makes clear, the majority demonstrates no understanding of the role of the Labor Relations Board, which is a decision-making body of limited review that must, in all but special cases, follow the precedent of the Authority. The majority's conclusions, to the limited extent that they cite any authority beyond the majority's "own personal notions of right and wrong,"[23] suggest that we are the first body ever to decide this case. The decision is untethered to the Grievance Board's dismissal order, and it springs from the minds of the majority, rather than the Union's arguments or the governing law. That is not how the Foreign Service Act envisions our task.[24]

In sum, the majority's decision lacks support in the Union's exceptions, ignores the Labor Relations Board's role as a body of limited review, misinterprets or wholly disregards applicable legal standards, and upsets the definitive resolution of an identical question from just over two years ago. Because the majority goes so far astray for so little apparent purpose,[25] I dissent.

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[19] *State II*, FS-AR-0007 at 4 (quoting Grievance Board's First Decision on 2014 Precepts at 19).
[20] *Id.* at 6-7.
[21] Majority at 6-7.
[22] *Id.* at 6.
[23] *Patten*, 441 F.3d at 235 (citing *Upshur Coals Corp. v. United Mine Workers of Am., Dist. 31*, 933 F.2d 225, 229 (4th Cir. 1991)) (setting aside interpretation of an agreement where arbitrator disregarded plain wording and implied additional terms based on his personal notions of right and wrong).
[24] 22 U.S.C. § 4114(b).
[25] As the majority acknowledges, the parties are testing new mechanisms for awarding MSIs.