72 FLRA No. 50

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
KANSAS CITY, MISSOURI
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 906
(Union)

0-AR-5512

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DECISION

May 10, 2021

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

I. Statement of the Case

Arbitrator Danielle L. Carne issued an award finding that the Agency violated the parties' master collective-bargaining agreement, and an incorporated memorandum of understanding (MOU),[1] when it stopped participating in joint labor-management meetings to comply with Executive Order No. 13,812 (the rescission EO).[2] The Arbitrator determined that Office of Personnel Management (OPM) guidance implementing the executive order did not allow the Agency to nullify the contractual provisions in the master agreement concerning labor-management meetings.

The Agency argues that the award fails to draw its essence from the master agreement and MOU, and is contrary to the rescission EO. Because the award does not represent a plausible interpretation of the master agreement and MOU, and is inconsistent with the OPM guidance concerning the rescission EO, we vacate the award.

II. Background and Arbitrator's Award

In 2009, President Obama issued Executive Order No. 13,522 (the forum EO),[3] ordering agencies to "establish department- or agency-level labor-management forums."[4] These forums allowed unions "to have pre-decisional involvement in all workplace matters,"[5] including permissive subjects covered by § 7106(b)(1) of the Federal Service Labor-Management Relations Statute (the Statute).[6] While the forum EO was in effect, the American Federation of Government Employees and the Department of Veterans Affairs (the VA) – the parent organizations of the Union and Agency – negotiated their master agreement.

Article 3 of the master agreement (Article 3) concerns, among other things, the forum EO:

> Pursuant to the spirit of [the forum EO] and this [m]aster [a]greement, the [VA] shall allow employees and their Union representatives to have predecisional involvement in all workplace matters to the fullest extent practicable[;] . . . and make a good-faith attempt to resolve issues concerning proposed changes in conditions of employment, including those involving the subjects set forth in 5 [U.S.C. §] 7106(b)(1), through discussion in its [l]abor-[m]anagement [f]orums.[7]

Specifically, Article 3 encourages the parties to engage on topics such as "personnel policies, practices and working conditions; . . . [n]umbers, types and grades of employees[,] as well as methods, means and technology of the work,"[8] but the parties intend for its provisions "to be interpreted as suggestions, not prescriptions."[9]

In 2015, the Union and the Agency negotiated an MOU as a local supplement to Article 3 that established procedural guidelines[10] for joint labor-management

[1] Exceptions, Joint Ex. 2 (MOU).
[2] Revocation of Executive Order Creating Labor-Management Forums, 82 Fed. Reg. 46,367 (Sept. 29, 2017) (Rescission EO).
[3] Creating Labor Management Forums to Improve Delivery of Government Services, 74 Fed. Reg. 66,203 (Dec. 9, 2009) (Forum EO).
[4] *Id.* at 66,204-05.
[5] *Id.* at 66,205.
[6] 5 U.S.C. § 7106(b)(1).
[7] Exceptions, Joint Ex. 1, Collective-Bargaining Agreement (CBA) Art. 3, § 2(B) at 9.
[8] CBA Art. 3, § 5(A)-(B) at 10; CBA Art. 3, § 5(A) at 10 (providing that "the parties may discuss any topic," including listed items); CBA Art. 3, § 5(B) at 10 (allowing parties to bargain over these issues "using cooperative methods").
[9] CBA Art. 3, § 1 at 9.
[10] *See* MOU at 1-2 (detailing number of participants; meeting dates, times and locations; process for placing items on agenda; and process for recording actions and decisions).

meetings (joint meetings), but did not specify the topics that the parties must address.[11]

In 2017, President Trump issued the rescission EO, which rescinded the forum EO, because the forums created by that EO "consumed considerable managerial time and taxpayer resources," did not achieve "collaboration," and "produced few benefits to the public."[12] The executive order directed OPM and federal agencies to promptly rescind "any orders, rules, regulations, guidelines, programs or policies" that were implemented under the forum EO, but to not "abrogate any collective[-]bargaining agreements in effect."[13]

Following that direction, OPM issued a guidance memorandum in December 2017 concerning the implementation of the rescission EO. The memo stated that agencies should rescind labor-management partnership councils, committees, and forums established under the forum EO and renegotiate provisions that embedded them into any agreement.[14] The OPM guidance memo also specified that, if a provision in an agreement or MOU was "explicitly agreed upon [(1)] for the purpose of creating and supporting a forum" or (2) "to require or promote '[5 U.S.C. § 7106](b)(1)' bargaining and pre-decisional involvement," then the rescission EO "may also grant agencies the authority to declare such agreements [un]enforceable and thus null and void absent the need to renegotiate these agreements."[15]

In January 2018, the Agency stopped participating in joint meetings, and the Union filed a grievance. The parties resolved the grievance by agreeing to continue those meetings once a month, rather than the twice specified in the MOU. But, in July 2018, the Agency notified the Union that it would no longer participate in any joint meetings.[16] The Union filed another grievance, which led to the instant arbitration. The parties stipulated that the issues to be resolved were whether the Agency violated Article 3 or the MOU when it "discontinued participating in [joint] meetings" and, if so, what should the remedy be.[17]

In her award, the Arbitrator determined that, under the OPM guidance, the Agency could nullify Article 3 only if it was "merely a contractual acknowledgement of the existence and applicability of [the forum EO]."[18] Conversely, she asserted that if Article 3 reflected a "general intent" to incorporate the forums, without "explicit regard" to the forum EO, then the Agency could not nullify the provision.[19] On this point, the Arbitrator noted that Article 3 made "express reference" to the forum EO and exhibited "an intention to incorporate the concept behind [that executive order]" into the master agreement.[20] She also determined that the sole or primary purpose of Article 3 was not just to "acknowledge and incorporate" the forum EO[21] but was drawn from "sources broader than" the EO, including other portions of the master agreement.[22] She nonetheless acknowledged that it was ambiguous as to the "intended or perceived *influence*" of the forum EO.[23]

In an attempt to resolve this ambiguity, the Arbitrator credited testimony from the Union president that the MOU was not established solely to implement the forum EO. She also found that the Agency's continued adherence to the MOU immediately following the rescission EO indicated that the Agency recognized that it had a contractual mandate to do so.

Accordingly, the Arbitrator concluded that the rescission EO did not nullify the terms of Article 3 or the MOU, and that the Agency violated those provisions. As a remedy, the Arbitrator directed the Agency to continue to comply with the joint-meeting requirements from Article 3 and the MOU.

On June 2, 2019, the Agency filed exceptions to the award and, on June 26, 2019, the Union filed an opposition to the exceptions.

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[11] *Id.* at 1.
[12] Rescission EO, 82 Fed. Reg. at 46,367.
[13] *Id.*
[14] OPM, "Guidance for Implementation of Executive Order 13812" (OPM Guidance) (2017), *available at* https://www.chcoc.gov/content/guidance-implementation-executive-order-13812.
[15] *Id.*
[16] Award at 11-12.
[17] *Id.* at 13.
[18] *Id.* at 15.
[19] *Id.*
[20] *Id.* at 15, 16.
[21] *Id.* at 16.
[22] *Id.*
[23] *Id.* (emphasis added).

III. Analysis and Conclusions

A. The award fails to draw its essence from the master agreement and MOU.

The Agency argues that the award does not draw its essence from the master agreement or the MOU because it does not adequately acknowledge the foundational role of the forum EO in those agreements.[24] As relevant here, an award fails to draw its essence from a collective-bargaining agreement when the award does not represent a plausible interpretation of the agreement.[25]

Referencing the standard set by the OPM guidance, the Arbitrator found no support for "the conclusion that Article 3 . . . was 'explicitly agreed upon for the purposes of creating and supporting a forum pursuant to [the forum EO].'"[26] She came to this conclusion despite finding that Article 3 "express[ly] reference[d]," "incorporated the concept behind," and "dr[ew] from" the forum EO.[27] We note that a significant portion of Article 3 is drawn verbatim from that executive order. Specifically, quoting from the forum EO, Article 3 allows the Union to have "predecisional involvement in all workplace matters to the fullest extent practicable"[28] and allows for discussions "concerning proposed changes in conditions of employment . . . *through* . . . *its* [*l*]*abor*-[*m*]*anagement* [*f*]*orums*."[29] In addition, Article 3 allows the parties to discuss "any topic," including permissive subjects of bargaining found in § 7106(b)(1) of the Statute.[30] As these are all critical elements of the forum EO, the plain wording of Article 3 establishes that the parties agreed to incorporate that executive order in their master agreement. To the extent that the Arbitrator found otherwise, her findings do not represent a plausible interpretation of the agreement.[31]

Turning to the MOU, the parties agree that it does not "reference" the forum EO[32] or "state [that] it establishes a labor-management forum."[33] Instead, the MOU merely sets out the "logistical items" governing the parties' joint meetings.[34] But, as the Union concedes, establishing such logistics is "in line with the establishment of forums."[35] Moreover, while the MOU does not indicate any topics to be addressed in the joint meeting, it is incorporated into Article 3.[36] And, as established above, Article 3 allows for the creation of forums under the forum EO. Absent evidence that the parties intended for their joint meetings under the MOU to be more circumscribed than what is allowed in Article 3 forums,[37] we find the Arbitrator's interpretation of the MOU is not plausible to the extent that she found it did not involve the forum EO.

Based on the above, we find that the award does not draw its essence from the master agreement or the

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[24] Exceptions Br. at 8.

[25] When reviewing an arbitrator's interpretation of a collective-bargaining agreement, the Authority will find that an arbitration award is deficient as failing to draw its essence from the agreement when the appealing 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. *Indep. Union of Pension Emps. for Democracy & Just.*, 71 FLRA 965, 967 n.34 (2020) (citing *U.S. Dep't of VA, Gulf Coast Med. Ctr., Biloxi, Miss.*, 70 FLRA 175, 177 (2017)). The Authority will find that an arbitration award is deficient as failing to draw its essence from the collective-bargaining agreement when the appealing party establishes that the award does not represent a plausible interpretation of the award. *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).

[26] Award at 16 (quoting OPM Guidance).

[27] *Id.* at 15-16.

[28] *Compare* CBA Art. 3, § 2(B) at 9 (allowing "predecisional involvement in all workplace matters to the fullest extent practicable"), *with* Forum EO, 74 Fed. Reg. at 66,205 (allowing "pre-decisional involvement in all workplace matters to the fullest extent practicable").

[29] *Compare* CBA Art. 3, § 2(B) at 9 (allowing the VA to "attempt to resolve issues concerning proposed changes in conditions of employment . . . *through* . . . *its* [*l*]*abor*-[*m*]*anagement* [*f*]*orums*" (emphasis added)), *with* Forum EO, 74 Fed. Reg. at 66,205 (stating that agencies should "attempt to resolve issues concerning proposed changes in conditions of employment . . . through its labor-management forums").

[30] *Compare* CBA Art. 3, § 5(A) at 10 (allowing parties to discuss "[n]umbers, types, and grades of employees[,] as well as methods, means and technology of the work"), *with* Forum EO, 74 Fed. Reg. at 66,205 (stating that agencies should "attempt to resolve issues . . . including those involving the subjects set forth in 5 U.S.C. [§] 7106(b)(1)"); *see also* 5 U.S.C. § 7106(b)(1) (authorizing agencies to negotiate – at their election – the "numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or . . . the technology, methods, and means of performing work").

[31] *See U.S. DHS, U.S. CBP, U.S. Border Patrol, Laredo, Tex.*, 71 FLRA 106, 107 (2019) (then-Member DuBester dissenting) (finding arbitrator's interpretation of contract provision implausible when based on factors outside of provision's language). We also note that, in considering the forum EO's influence on Article 3, the Arbitrator looked to evidence of the parties' past practice concerning the MOU. *See* Award at 16-17. But, as neither party to the MOU was involved in the negotiation of Article 3, this evidence is not relevant.

[32] Opp'n Br. at 6.

[33] Exceptions Br. at 4.

[34] *See id.*; Opp'n Br. at 6.

[35] Opp'n Br. at 6.

[36] *See* MOU at 1.

[37] While the Arbitrator accepted the Union president's testimony that the MOU was not negotiated "for the particular purpose of supporting the implementation of [the forum EO]," Award at 16, there is no evidence that the parties intended a different scope of discussion than that allowed by Article 3. *See id.*

MOU because it does not represent a plausible interpretation of either agreement.

B. The award is contrary to the rescission EO and OPM guidance.

The Agency also argues that the award is contrary to law because it contravenes the rescission EO, as clarified by OPM guidance, which allows agencies to declare certain provisions, such as Article 3 and the MOU, "[un]enforceable and thus null and void absent the need to renegotiate these agreements."[38] When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo.[39] In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[40]

The Arbitrator's award hinges on her application of the OPM guidance concerning the rescission EO. The parties do not dispute that this guidance is controlling.[41] OPM stated that the rescission EO may grant agencies the authority to nullify an article of a collective-bargaining agreement – without the need to renegotiate – if it was "explicitly agreed upon for the purpose of [(1)] creating or supporting a forum" or (2) "promot[ing] '[5 U.S.C. § 7106](b)(1)' bargaining and pre-decisional involvement."[42]

As noted above, in Article 3, the parties used language directly from the forum EO to permit "[l]abor-[m]anagement [f]orums" and the Union's "predecisional involvement in all workplace matters."[43] Additionally, in Article 3, the parties allowed for discussion and bargaining of "any topic," including permissive subjects of bargaining found in § 7106(b)(1) of the Statute.[44] Accordingly, the evidence establishes that Article 3 was explicitly agreed upon to allow for both (1) the creation and support of forums and (2) the promotion of bargaining under § 7106(b)(1) of the Statute. Thus, we find that Article 3, and the incorporated MOU,[45] fall within the ambit of the OPM guidance, and, as such, the Agency was permitted to declare them unenforceable.

The Arbitrator determined that the Agency could not nullify Article 3 because that article was not based *solely* on the forum EO.[46] In this regard, she found that Article 3 was also based on other provisions of the master agreement.[47] However, nothing in the OPM guidance memo requires that the forum EO be the *sole* impetus for an article that establishes labor-management forums.[48] Therefore, we find that the Arbitrator misinterpreted the OPM guidance when she found that Article 3 – which directly references the forum EO[49] – was not "explicitly agreed upon" to create or support the forums created by that executive order.[50]

The Union argues that the rescission EO does not allow for the abrogation of existing collective-bargaining agreements.[51] To the extent that the Agency's decision to stop participating in labor-management forums could be considered an improper abrogation of the master agreement that was in effect at the time the rescission EO was issued – as opposed to a permissible nullification of Article 3 and the MOU under the OPM guidance implementing that executive order – we note the following.

First, Article 3, Section 1 states that the "following sections should be interpreted as suggestions, not prescriptions."[52] The Agency referenced this section in arbitration when it argued that "the non-prescriptive thrust" of Section 1 gave the Agency "the ability to forgo participation" in joint meetings.[53] Although the Arbitrator did not interpret Section 1,[54] the plain wording of that section suggests that the entirety of Article 3 is voluntary,

[38] Exceptions Br. at 6-7 (quoting OPM Guidance).
[39] *AFGE, Loc. 2002*, 69 FLRA 425, 426 (2016).
[40] *Id.*; *POPA*, 71 FLRA 1223, 1224 (2020) (then-Member DuBester dissenting) (stating that "[EO]s issued pursuant to statutory authority are to be accorded the full force and effect of law").
[41] *See* Exceptions Br. at 7 (presenting argument based on OPM guidance); Opp'n Br. at 11 (same).
[42] OPM Guidance.
[43] CBA Art. 3, § 2(B) at 10.
[44] CBA Art. 3, § 5(A)-(B) at 10.
[45] The Union concedes that the terms of the MOU incorporated into Article 3 are "in line with the establishment of [l]abor[-m]anagement forums." Opp'n Br. at 6.
[46] Award at 16-17.
[47] *Id.* at 15-16.
[48] *See* OPM Guidance (advising that the rescission EO may authorize an agency to declare a provision void if it was "explicitly agreed upon" either to (1) create or support a forum or (2) require or promote bargaining of items under § 7106(b)(1) of the Statute).
[49] *See* CBA Art. 3, § 2(B) at 9 (stating that "[the forum EO] . . . creat[ed] [l]abor-[m]anagement [f]orums" and then allowing actions "pursuant to the spirit of [the forum EO]").
[50] *See* Award at 16 (concluding that a portion of Article 3 was "drawn from" other portions of the master agreement, which did not "support the conclusion" that Article 3 could be nullified).
[51] Opp'n Br. at 10; *see* Rescission EO, 82 Fed. Reg. at 46,367 ("Nothing in this order shall abrogate any collective[-]bargaining agreements in effect on the date of this order.").
[52] CBA Art. 3, § 1 at 9; *see also* CBA Art. 3, § 3 at 9 ("[T]he desire and intent of this article is to *describe* and *encourage* effective labor-management cooperation." (emphasis added)).
[53] Award at 14 (arguing that, because the rescission EO nullified the forum provisions, Art. 3 was voluntary).
[54] *Id.* at 17 (finding no "need to address" arguments concerning Art. 3, § 1).

and it establishes no *obligations or rights* for either party.[55] If Article 3, and the activities it authorizes, are only "suggestions,"[56] then the Agency was under no obligation to participate, or continue participating, in the joint meetings that the MOU incorporated into Article 3.[57] Accordingly, the Agency could not have abrogated the obligations of Article 3 when it took steps to comply with the rescission EO because there were none.

Second, although not argued before us, it appears that the rescission EO's bar on abrogation does not apply in this case because neither Article 3 nor the MOU were part of a contract "in effect on the date of th[e] order."[58] Since 2014, the parties' agreement has renewed automatically for one-year periods on March 15 of each year.[59] Under Authority precedent, this type of rollover contract constitutes the institution of a new agreement at each anniversary.[60] In July 2018, when the Agency sought to discontinue the joint meetings, the parties were operating under an iteration of the master agreement that came into effect in March 2018.[61] Thus, the rescission EO's decree that it did not abrogate any collective-bargaining agreement "in effect on the date of this order" did not apply to the parties' 2018 master agreement – as that agreement was not in effect on the date the executive order was issued in 2017.[62] Accordingly, even setting aside the OPM guidance, the Agency's actions in July 2018 could not have constituted an impermissible abrogation under the rescission EO.

For the foregoing reasons, we find that the award is contrary to the rescission EO.

IV. Decision

We vacate the award.

[55] *See AFGE, Nat'l Council of EEOC Locs. No. 216*, 71 FLRA 603, 606 (2020) (then-Member DuBester dissenting in part) (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla. v. FLRA*, 737 F.3d 779, 787 (D.C. Cir. 2013) (finding proposal that did not require anything from either party was "effectively meaningless")).

[56] CBA Art. 3, § 1 at 9.

[57] *See id.* (stating that "the following sections should [not] be interpreted as . . . prescriptions"); CBA Art. 3, § 3 at 9 (noting that the "desire and intent" of Article 3 was to "describe and encourage").

[58] *See* Rescission EO, 82 Fed. Reg. at 46,367 (barring abrogation of "collective[-]bargaining agreements *in effect on the date of this order*" (emphasis added)).

[59] *See* CBA, Duration of Agreement, § 2 at 301.

[60] *Kan. Army Nat'l Guard*, *Topeka, Kan.*, 47 FLRA 937, 942 (1993).

[61] *See id.* at 941 ("automatic[ally] renewed" contract renews itself on a fixed anniversary date).

[62] *See USDA, Off. of Gen. Counsel*, 71 FLRA 986, 987 (2020) (then-Member DuBester dissenting) ("[The] bar on implementing new government-wide regulations that conflict with a preexisting collective-bargaining agreement lasts only for the agreement's 'express term.' Once the agreement expires, all existing, applicable government-wide regulations govern the parties' conduct immediately by operation of law." (citations omitted)).

Chairman DuBester, dissenting:

I disagree with the majority's conclusion that the award fails to draw its essence from the parties' agreements. I also disagree that the award is contrary to law.

Both the Arbitrator's award, and the majority's rejection of that award, hinge upon their application of guidance for implementing Executive Order (EO) 13,812[1] (rescission EO) that was issued by the Office of Personnel Management (OPM) on December 13, 2017. The guidance advised agencies that in order to implement the rescission EO, they "should take steps to abolish existing [labor-management] forums, consistent with law and should move to rescind any agency-wide and local . . . labor-management forums formed pursuant to" EO 13,522.[2] It further advised that "[i]f a forum . . . has been embedded into a collective bargaining agreement or other memorandum of understanding with a collective bargaining agent for employees at the agency, the agency should seek to renegotiate those terms at the earliest practicable juncture."[3]

The guidance also advised, however, that "[i]f a term or article of a collective bargaining agreement or memorandum of understanding was explicitly agreed upon for the purpose of creating and supporting a forum pursuant to EO 13522, the rescission of EO 13522 may also grant agencies the authority to declare such agreements non-enforceable and thus null and void absent the need to renegotiate these agreements."[4]

It is this latter provision upon which the Arbitrator's decision, and the majority's analysis, turns. Accordingly, it is important to address a few aspects of this portion of OPM's guidance.

First, the guidance does not explain how such a declaration would be consistent with the plain language of the rescission EO itself, which explicitly states that "[n]othing in this order shall abrogate any collective bargaining agreements in effect on the date of this order."[5] Second, the guidance simply states that EO 13,522's rescission "*may*" also grant agencies the authority to declare such agreements non-enforceable.[6] And towards this end, it "recommend[s]" that agencies "consult with agency counsel to determine what steps may be necessary and appropriate" to effectuate such an action.[7]

As the majority notes, the Arbitrator interpreted this provision of the guidance to "indicate[] that immediate nullification would be appropriate" if a term of an agreement was explicitly agreed upon for the purpose of creating a forum under EO 13,522.[8] But even applying this interpretation, I would not disturb the Arbitrator's finding that the parties' agreements did not meet this criterion.

On this point, the Arbitrator noted that the master agreement's reference to EO 13,522 is contained in Article 3, Section 2(B), in which the parties set forth the "[h]istory" of EOs that have governed their labor-management relations.[9] And she found that Section 2(B), by referencing the parties' intent to abide by the "spirit" of EO 13,522, did not "signal an intention to merely incorporate [EO 13,522] into the [a]greement by reference, but rather an intention to incorporate the concept behind the [EO] into the [a]greement."[10] Additionally, she found that the parties' locally-negotiated memorandum of understanding (MOU) clearly did not meet the OPM criterion because it "does not reference [EO] 13522."[11]

Given the language of the OPM guidance, I do not agree with the majority that the Arbitrator's application of the guidance to Article 3 failed to draw its essence from the parties' agreement simply because Article 3 references EO 13,522 and labor-management forums.[12] And I certainly do not agree with the majority that the Arbitrator's interpretation of the MOU – which, as noted, contained no references to EO 13,522 – is implausible simply because it is "incorporated into Article 3."[13] Accordingly, I would deny the Agency's essence exception with respect to these issues.

More troubling, however, is the majority's conclusion that the award is contrary to law. As the basis for its conclusion, the majority concludes that the Agency "was permitted to declare" Article 3 and the MOU "unenforceable" because they "fall within the ambit of the OPM guidance."[14] But as even the majority acknowledges, the guidance simply states that "the rescission of EO 13522 may . . . grant agencies the authority to declare such agreements non-enforceable."[15] In other words, this provision of the OPM guidance simply

[1] Revocation of Executive Order Creating Labor-Management Forums, 82 Fed. Reg. 46367 (Sept. 29, 2017) (Rescission EO).
[2] OPM, "Guidance for Implementation of Executive Order 13812" (2017) (OPM Guidance), *available at* https://www.chcoc.gov/content/guidance-implementation-executive-order-13812.
[3] *Id.*
[4] *Id.*
[5] Rescission EO at 46367.
[6] OPM Guidance at 1 (emphasis added).
[7] *Id.*
[8] Award at 15.
[9] *Id.*
[10] *Id.* at 16.
[11] *Id.*
[12] Majority at 5-6.
[13] *Id.* at 6.
[14] *Id.* at 7.
[15] OPM Guidance at 1.

states that the rescission EO *may* grant agencies this authority, but it also may not.[16] Thus, even though the "parties do not dispute that this guidance is controlling,"[17] it simply does not follow – as the majority concludes – that the Agency was authorized to declare Article 3 and the MOU unenforceable by virtue of the guidance.

But perhaps most disturbing is the majority's conclusion that the Agency could not have abrogated Article 3, *as a matter of law*, because its wording "suggests that the entirety of Article 3 is voluntary."[18] More specifically, the majority – citing language in Article 3 stating that its "sections should be interpreted as suggestions, not prescriptions"[19] – concludes that the Agency was free to abrogate this provision because it "establishes no obligations or rights for either party."[20]

At the outset, I note that this conclusion is based upon an argument that was not even raised by the Agency in its exceptions. Moreover, the Agency took a *contrary* position on the binding nature of Article 3 before the Arbitrator, arguing that Section 2(B) of Article 3 contained a "mandate" that the Agency "'shall' allow employees and their Union representatives to have involvement in workplace matters."[21] As I have previously stated, the Authority should not decide cases based upon arguments that were not raised by the excepting party.[22] And the majority should certainly not be in the business of supplanting the parties' own interpretation of a provision in favor of an interpretation that better suits its own purpose.

Nor is the majority's erroneous conclusion supported by the sole Authority decision upon which it relies. In *AFGE, National Council of EEOC Locals No. 216* (*AFGE*),[23] the majority, relying upon its mistaken interpretation of a decision by the U.S. Court of Appeals for the D.C. Circuit, found that an agency was not required to bargain over a proposal because the proposal was "meaningless."[24] But even assuming the majority had correctly decided *AFGE*, nothing in that decision even suggests that an agency is free to *abrogate* such a proposal once it is incorporated into the parties' agreement. This is particularly true where, as here, the provision in question contains language that the parties themselves have interpreted to impose a mandate on the Agency.

Accordingly, for the reasons set forth in this opinion, I dissent.

[16] And, presumably, this is why the guidance directs agencies to consult with their legal counsel to assess the legality of any such declaration.

[17] Majority at 6.

[18] *Id.* at 8.

[19] *Id.* (quoting Art. 3, § 1 of the parties' collective-bargaining agreement (CBA)).

[20] *Id.*

[21] Award at 14 (quoting CBA Art. 3, § 2(B)). Section 2(B) states, in relevant part, that the Agency "*shall* allow employees and their Union representatives to have predecisional involvement in all workplace matters to the fullest extent practicable, without regard to whether those matters are negotiable subjects of bargaining under 5 [U.S.C. §] 7106" and to "make a good-faith attempt to resolve issues concerning proposed changes in conditions of employment, including those involving the subjects set forth in 5 [U.S.C. §] 7106(b)(1), through discussion in its Labor-Management Forums." *Id.* at 2 (emphasis added).

[22] *U.S. Dep't of the Air Force, 673rd Air Base Wing, Joint Base Elmendorf-Richardson, Alaska*, 71 FLRA 781, 784 (2020) (Dissenting Opinion of then-Member DuBester) ("Vacating an award on grounds that were not raised by a party in its exceptions violates fundamental principles of due process" because "[p]arties should be provided the opportunity to address and, if possible, rebut arguments presented for our review in exceptions from arbitration awards."). I would apply this same principle to reject the majority's conclusion that the "rescission EO's bar on abrogation does not apply in this case because neither Article 3 nor the MOU were part of a contract" that was in effect on the date of EO 13,812. Majority at 8 (further noting that this was "not argued before us").

[23] 71 FLRA 603 (2020) (then-Member DuBester dissenting).

[24] *Id.* at 606 (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla. v. FLRA*, 737 F.3d 779, 787 (D.C. Cir. 2013)).