68 FLRA No. 55

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS 33
(Union)

0-AR-5050

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DECISION

February 27, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting)

I. Statement of the Case

Arbitrator Edmund Gerber (the Arbitrator) found that the Agency violated the parties' collective-bargaining agreement by assigning certain employees to posts lasting longer than three months. There are four substantive questions before us.

The first question is whether the award fails to draw its essence from the parties' agreement either because the Agency's right to assign longer posts is "covered by" the agreement or because the Arbitrator's interpretation of Article 18 of the agreement (Article 18) is deficient. Because the covered-by doctrine applies only to the duty to bargain under the Federal Service Labor-Management Relations Statute (the Statute), which is not at issue here, the Agency's reliance on that doctrine is misplaced. And because the Agency does not demonstrate that the Arbitrator's interpretation of Article 18 is irrational, unfounded, implausible, or in manifest disregard of the agreement, we find that the award does not fail to draw its essence from the parties' agreement.

The second question is whether the Arbitrator erred as a matter of law by finding that the doctrine of collateral estoppel did not bar the Union's grievance. The Arbitrator had discretion to determine whether collateral estoppel applied, and he made factual findings to support his determination that collateral estoppel did not apply here. As the Agency does not challenge those findings as nonfacts – and, thus, the Authority defers to them – we find that the Agency's argument regarding collateral estoppel provides no basis for finding the award contrary to law.

The third question is whether the award is contrary to law because it "bars the Agency from making changes that are covered by" Article 18.[1] As stated above, the covered-by doctrine applies only to the duty to bargain under the Statute, which is not at issue here. Accordingly, we find that the Agency's reliance on the covered-by doctrine provides no basis for finding the award contrary to law.

The fourth question is whether the award is contrary to law because it allegedly abrogates management's rights to assign work, assign employees, and determine the Agency's internal-security practices under § 7106(a) of the Statute.[2] The Agency does not dispute that the provisions of Article 18 that the Arbitrator enforced are procedures within the meaning of § 7106(b)(2) of the Statute.[3] As § 7106(b)(2) is an exception to § 7106(a), we find that the Agency's management-rights arguments provide no basis for finding the award contrary to law.

II. Background and Arbitrator's Award

The Agency lengthened, from three months to either six or nine months, the assignments of correctional officers (officers) to certain posts. The Union filed a grievance, which went to arbitration.

At arbitration, the parties stipulated to the following issues:

> 1. Should the doctrine of collateral estoppel be applied to this matter in light of [a]rbitrator Robert T. Simmelkjaer[']s [a]ward dated July 9, 1999 [(the Simmelkjaer award),] and are the parties otherwise bound by the provisions of the parties' . . . agreement?
>
> 2. Did the [Agency] violate the seniority rights of [the officers] when it expanded quarterly . . . posts of duty to six or nine months? Or, did it properly exercise its statutory rights under . . . § 7106(a)(1) and (a)(2)([B]) [of

[1] Exceptions at 9.
[2] 5 U.S.C. § 7106(a).
[3] *Id.* § 7106(b)(2).

> the Statute] in assigning posts longer than three months pursuant to the contract?
>
> If the [Agency] did not properly exercise its statutory rights and violated the seniority rights [of the officers], as set forth in question two, what shall be the remedy?[4]

Addressing the first issue, the Arbitrator discussed two previous grievances in which the length of assignments to posts under Article 18 was at issue. The Arbitrator noted that approximately fifteen years earlier, Arbitrator Simmelkjaer had found, based on an Agency past practice, that the Agency had not violated the parties' agreement when it assigned officers to posts that last longer than three months. Neither party filed exceptions to the Simmelkjaer award.

Then, about five years after the Simmelkjaer award, one of the Union's locals – Local 171 – brought the issue of posts lasting longer than three months before Arbitrator Patrick Zembower. In his award (the Zembower award), Arbitrator Zembower found that the parties' agreement superseded the Agency's past practice of assigning officers to posts that last longer than three months, noting that Article 18 expressly provides for quarterly rosters and does not refer to longer assignments. In exceptions to the Zembower award, the Agency argued that Arbitrator Zembower's enforcement of Article 18 directly interfered with its right to assign work and determine its internal-security practices, and, thus, the pertinent contract provisions could not constitute either procedures under § 7106(b)(2), or appropriate arrangements under § 7106(b)(3), of the Statute. In *U.S. DOJ, Federal BOP, Federal Transfer Center, Oklahoma City, Oklahoma* (*Local 171*),[5] the Authority denied the Agency's exceptions.[6]

In the case that is now before the Authority, the Agency argued to the Arbitrator that the doctrine of collateral estoppel applied because the parties are bound by the Simmelkjaer award. Specifically, the Agency asserted that the doctrine of collateral estoppel prevented relitigating an issue that was already "fully and fairly arbitrated" before Arbitrator Simmelkjaer.[7] In response to the Agency's argument, the Arbitrator explained that arbitration awards are not binding on subsequent arbitrators, but he nevertheless considered whether the elements of collateral estoppel were met. In that regard, the Arbitrator stated that one of the requirements for collateral estoppel is that "determination of the [presently contested] issue was essential to resolution of the prior proceeding."[8] And the Arbitrator found that this requirement was not satisfied, because the Simmelkjaer award was based on the Agency's past practice – instead of the wording of Article 18 – and had been "discredited" by the Zembower award and the Authority's decision in *Local 171*.[9] Further, the Arbitrator also found that if he were to apply collateral estoppel, then the parties' agreement "would be subject to two disparate arbitration awards and interpretations," such that the bargaining-unit employees in the location at issue in this case would be treated differently "from all other unit members" in other locations.[10] Consequently, the Arbitrator declined to apply collateral estoppel.

On the merits of the grievance, the Arbitrator quoted § 7106(b)(2) of the Statute and found that "once procedures for . . . assignments were negotiated into the agreement[,] those procedures are not challengeable as impinging on management rights unless they abrogate those rights."[11] Referencing *Local 171*, the Arbitrator then found that the provisions at issue "do not abrogate management's rights to assign work" and, therefore, are enforceable.[12] As quoted by the Arbitrator, Article 18(d) states, in pertinent part, that "[q]uarterly rosters for [the officers] will be prepared in accordance with the below[-]listed procedures," and that "[s]even . . . weeks prior to the upcoming quarter, the [Agency] will ensure that a blank roster for the upcoming quarter will be posted in an area that is accessible to all correctional staff, for the purpose of giving those employees advance notice of assignments . . . that are available[.]"[13]

The Agency argued before the Arbitrator that Article 18 merely requires posting a roster quarterly. According to the Agency, it has unrestrained discretion to modify the lengths of assignments to posts, and has a past practice of assigning officers to posts that last longer than three months. As stated previously, the Arbitrator acknowledged the Simmelkjaer award's finding of a past practice, but he rejected the Agency's reliance on that award. Instead, the Arbitrator found that because Article 18(d) "expressly addresses the length of [assignments to] posts, any past practice to the contrary cannot be controlling."[14]

Ultimately, the Arbitrator found that the Agency violated the parties' agreement by assigning officers to posts that lasted longer than three months. As a remedy,

[4] Award at 1-2.
[5] 57 FLRA 158 (2001) (Chairman Cabaniss dissenting).
[6] *Id.* at 160-61.
[7] Exceptions, Attach. C, Agency's Post-Hr'g Br. at 7.
[8] Award at 6.
[9] *Id.*
[10] *Id.*
[11] *Id.* at 7.
[12] *Id.* (citing *Local 171*, 57 FLRA at 161).
[13] *Id.* at 3 (quoting Article 18(d)).
[14] *Id.* at 8.

he directed the Agency to open "all posts to bid on a quarterly duration basis."[15]

The Agency filed exceptions to the award, and the Union filed an opposition to the Agency's exceptions.

III. Preliminary Matter: One of the Agency's exceptions is subject to dismissal under § 2425.6 of the Authority's Regulations for failing to raise a recognized ground for review.

The Authority's Regulations enumerate the grounds upon which the Authority will review arbitration awards.[16] In addition, the Regulations provide that if exceptions argue that an arbitration award is deficient based on private-sector grounds not currently recognized by the Authority, then the excepting party "must provide sufficient citation to legal authority that establishes the grounds upon which the party filed its exceptions."[17] Further, § 2425.6(e)(1) of the Regulations provides that an exception "may be subject to dismissal . . . if . . . [t]he excepting party fails to raise" a ground listed in § 2425.6(a)-(c), or "otherwise fails to demonstrate a legally recognized basis for setting aside the award."[18]

The Agency contends that the Arbitrator "misapplied the doctrine of past practice."[19] This argument does not articulate a ground currently recognized by the Authority for reviewing an arbitration award, and the Agency does not cite any private-sector precedent that establishes it as a ground. Accordingly, we dismiss the Agency's exception under § 2425.6.[20]

IV. Analysis and Conclusions

A. The award does not fail to draw its essence from the parties' agreement.

The Agency argues that the award fails to draw its essence from Article 18(d) of the parties' agreement because the award states that the Agency must open "all posts to bid on a quarterly duration basis."[21] According to the Agency, Article 18(d) requires only that "available posts" be posted seven weeks in advance, and it contains "no language . . . requiring expressly or by implication that posts have to have a certain length."[22] Thus, the Agency claims that the Arbitrator "clearly misinterpreted Article 18(d)(2)."[23] Additionally, the Agency claims that "matters related to the posting of shifts/rosters and shift availability" are "covered by" Article 18(d)[24] and that the Arbitrator's interpretation of that provision fails to draw its essence from the parties' agreement.[25]

To demonstrate that an award fails to draw its essence from a collective-bargaining agreement, an excepting party must establish 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.[26]

The Arbitrator found that Article 18(d) "expressly" provides for posts lasting only three months.[27] Noting that Article 18(d) states that assignments are to be posted each "quarter,"[28] the Arbitrator found that posts are to be no longer than "one quarter," or three months.[29] The Agency's claim to the contrary provides no basis for finding that the Arbitrator's interpretation of Article 18(d) is irrational, unfounded, implausible, or in manifest disregard of the agreement.

With regard to the Agency's argument that "matters related to the posting of shifts/rosters and shift availability" are "covered by" Article 18 of the parties' agreement,[30] the Agency acknowledges[31] that the covered-by doctrine provides a defense to an alleged violation of the statutory duty to bargain.[32] The statutory duty to bargain is not at issue here. Therefore, the

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[15] *Id.*
[16] 5 C.F.R. § 2425.6(a)-(b); *see also NAIL, Local 17*, 68 FLRA 97, 98 (2014) (*Local 17*).
[17] 5 C.F.R. § 2425.6(c).
[18] *Id.* § 2425.6(e)(1); *see also Local 17*, 68 FLRA at 98.
[19] Exceptions at 4.
[20] *E.g., AFGE, Local 2041*, 67 FLRA 651, 652 (2014) (dismissing an exception for failure to raise a recognized ground for review).
[21] Exceptions at 5 (quoting Award at 8) (emphasis omitted) (internal quotation marks omitted).
[22] *Id.*
[23] *Id.*
[24] *Id.* at 7.
[25] *Id.* at 9.
[26] *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990); *e.g., NTEU, Chapter 32*, 67 FLRA 354, 355 (2014).
[27] Award at 8.
[28] *Id.* at 3 (quoting Article 18).
[29] *Id.* at 8.
[30] Exceptions at 7.
[31] *Id.* at 8.
[32] Member DuBester agrees that under current Authority precedent, the covered-by doctrine provides a defense to an alleged violation of the statutory duty to bargain, and that the Agency's reliance on that doctrine is misplaced in this case. However, Member DuBester also notes, as he has in previous cases, that the Authority's use of the covered-by doctrine warrants a "fresh look." *SSA, Balt., Md.*, 66 FLRA 569, 575-76 (2012) (Dissenting Opinion of Member DuBester); *see also NTEU, Chapter 160*, 67 FLRA 482, 487-88 (2014) (Dissenting Opinion of Member DuBester).

Agency's reliance on the covered-by doctrine is misplaced.[33]

For the foregoing reasons, we deny the Agency's essence exception.

B. The award is not contrary to law.

The Agency argues that the award is contrary to law in three respects, which are discussed separately below. When an exception involves an award's consistency with law, rule, or regulation, the Authority reviews any question of law de novo.[34] 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.[35] In making that assessment, the Authority defers to the arbitrator's underlying factual findings, unless the excepting party establishes that they are nonfacts.[36]

1. The award does not violate the doctrine of collateral estoppel.

The Agency argues that the Arbitrator erred in finding that collateral estoppel did not bar the Union's grievance.[37] Specifically, the Agency argues that the Arbitrator should have determined that the Simmelkjaer award – which, as stated previously, found that the Agency was permitted to assign officers to posts lasting more than three months – barred the Union's grievance.[38] The Agency also cites § 7121(b)(1)(C)(iii) of the Statute[39] for the proposition that the Arbitrator should have applied collateral estoppel.[40] That section of the Statute states that all collective-bargaining agreements must provide that "any grievance not satisfactorily settled under the [parties'] negotiated grievance procedure shall be subject to binding arbitration."[41]

The Agency does not cite any authority that supports its assertion that § 7121 requires arbitrators to apply collateral estoppel in particular circumstances, including those at issue in this case. Generally, an arbitrator is not bound by another arbitrator's award.[42] But the Authority has held that "an arbitrator has the discretion to decide [whether] an earlier award is binding," and the Authority defers to such a decision because the arbitrator is "making determinations that constitute factual findings and reasoning to which the Authority normally accords deference."[43] Here, the Agency does not challenge the Arbitrator's findings supporting his collateral-estoppel determination as nonfacts. Thus, the Arbitrator's decision not to give precedential effect to the Simmelkjaer award merits deference and does not provide a basis for finding the award contrary to law.[44] Accordingly, we deny the Agency's exception.

2. The award is not contrary to the covered-by doctrine.

The Agency relies on the covered-by doctrine to argue that the award is deficient because it "bars the Agency from making changes that are covered by" the parties' agreement.[45] This argument challenges the Arbitrator's interpretation of the agreement. The "essence" standard, discussed previously, applies to such challenges.[46] "Under the covered-by doctrine, questions about a party's compliance with agreed-upon contract provisions are properly resolved through the contractual grievance procedure."[47] The Arbitrator in this case did just that: he resolved questions about the Agency's compliance with the agreed-upon contract provision at issue here. Further, as discussed above, the covered-by doctrine operates only as a defense to an alleged violation of the statutory duty to bargain, which is not at issue in this case. Therefore, we conclude that the Agency's reliance on the covered-by doctrine provides no basis for finding the award contrary to law.[48]

3. The award is not contrary to management's rights to assign employees, assign work, or determine the Agency's internal-security practices.

The Agency argues that the award abrogates its rights to assign employees under § 7106(a)(2)(A), assign work under § 7106(a)(2)(B), and determine its

[33] *U.S. DOJ, Fed. BOP, Metro. Corr. Ctr., N.Y.C., N.Y.*, 67 FLRA 442, 449 (2014) (*Metro*); *SSA, Headquarters, Balt., Md.*, 57 FLRA 459, 460 (2001).
[34] *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).
[35] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[36] *U.S. DHS, U.S. CBP*, 66 FLRA 567, 567-68 (2012).
[37] Exceptions at 18.
[38] *Id.* at 21-22.
[39] 5 U.S.C. § 7121(b)(1)(C)(iii).
[40] Exceptions at 20.
[41] 5 U.S.C. § 7121(b)(1)(C)(iii).
[42] *AFGE, Local 2459*, 51 FLRA 1602, 1606 (1996) (*Local 2459*) (citing *IFPTE, Local 28, Lewis Eng'rs & Scientists Ass'n*, 50 FLRA 533, 536-37 (1995)).
[43] *U.S. Dep't of VA, Med. Ctr., Richmond, Va.*, 64 FLRA 619, 621 n.2 (2010) (quoting *Local 2459*, 51 FLRA at 1606-07).
[44] *Id.*
[45] Exceptions at 9.
[46] *Metro*, 67 FLRA at 449.
[47] *U.S. DOJ, Fed. BOP, Fed. Det. Ctr., Miami, Fla.*, 68 FLRA 61, 64 (2014) (internal quotation marks omitted).
[48] *Metro*, 67 FLRA at 449.

internal-security practices under § 7106(a)(1) of the Statute.[49] Where an exception alleges that an arbitrator's award is inconsistent with management rights under § 7106(a), the Authority first assesses whether the award affects the exercise of the asserted management rights.[50] If so, then, as relevant here, the Authority examines whether the award enforces a contract provision that was negotiated under § 7106(b).[51] As the management rights set forth in § 7106(a) are expressly "[s]ubject to" § 7106(b) of the Statute,[52] an arbitrator's award that enforces a contract provision that falls within one of the subsections of § 7106(b) cannot be contrary to law on management-rights grounds, even if the award affects a management right under § 7106(a) (unless the remedy is not reasonably related to the contract provision or the harm being remedied).[53] When an agency files management-rights exceptions to an award enforcing a contract provision, the agency must allege not only that the award affects management rights, but also that the relevant contract provision is not enforceable under § 7106(b).[54]

The Agency claims that the award affects its rights to assign work, assign employees, and determine its internal-security practices.[55] According to the Agency, because the award requires it to discontinue assigning officers to posts that last longer than three months, the award "clearly affects" those management rights.[56] The Union does not dispute the Agency's claims, and we assume that the award affects those management rights.[57]

With regard to whether the award enforces a contract provision that was negotiated under § 7106(b), as discussed previously, the Arbitrator quoted § 7106(b)(2) of the Statute and referred to the provisions of Article 18 as "procedures,"[58] which we interpret as finding that Article 18 is a procedure within the meaning of § 7106(b)(2). And even the Agency claims that Article 18 "sets forth a specific *procedure* for informing employees . . . of the assignments and shifts that are available on a quarterly basis, how those shifts will be filled[,] and what happens when employees or management needs to change assignments or shifts."[59] In that regard, the Agency acknowledges generally that Article 18 contains negotiated procedures for the exercise of management's rights.[60] The Agency also references *Federal BOP v. FLRA* (*BOP*)[61] – in which the U.S. Court of Appeals for the D.C. Circuit found that Article 18(d) represents an agreement concerning "the *procedures* by which [the Agency] . . . assigns officers to posts"[62] – to support its argument that Article 18 contains management rights "over which the [parties] already . . . negotiated."[63]

Even if the Agency's claims do not expressly concede that Article 18(d) is a procedure under § 7106(b)(2), the Agency makes no claim that Article 18(d), as interpreted and enforced by the Arbitrator, is *not* an enforceable procedure under § 7106(b)(2). Consequently, consistent with the principles set forth above, we find that the Agency's management-rights argument does not demonstrate that the Arbitrator's enforcement of Article 18(d) is contrary to § 7106 of the Statute.[64]

The Agency further argues that Article 18(d), "as interpreted by the Arbitrator, cannot be considered an appropriate arrangement because [that provision] clearly and completely abrogate[s]" its cited management rights.[65] The Agency also argues that the Authority's abrogation standard is contrary to law and should not be the standard used for determining whether a contract provision enforced at arbitration is an appropriate arrangement under § 7106(b)(3).[66] However, because the Agency does not argue that Article 18(d) is not a procedure negotiated under § 7106(b)(2) of the Statute,[67] we need not consider whether it is also an appropriate arrangement under § 7106(b)(3).[68] In this regard, if a contract provision is a negotiated procedure under § 7106(b)(2), then it is enforceable without regard to whether it is also an appropriate arrangement under

[49] Exceptions at 11-12.
[50] *Metro*, 67 FLRA at 447 (citing *U.S. Dep't of Transp., FAA*, 60 FLRA 159, 163 (2004) (*FAA*)).
[51] *U.S. Dep't of HHS, Ctr. for Medicare & Medicaid Serv.*, 67 FLRA 665, 666 (2014).
[52] 5 U.S.C. § 7106(a).
[53] *SSA, Office of Disability Adjudication & Review, Region VI, New Orleans, La.*, 67 FLRA 597, 602 (2014) (*SSA New Orleans*) (Member Pizzella dissenting).
[54] *Id.*
[55] Exceptions at 11-12.
[56] *Id.* at 14.
[57] *U.S. Dep't of the Treasury, IRS, Wage & Inv. Div.*, 66 FLRA 235, 242 (2011) (citing *SSA*, 65 FLRA 339, 341 (2010)) (assuming that an award affects the management rights cited by the excepting party when the opposing party does not dispute the claim).
[58] Award at 7.
[59] Exceptions at 14 (emphasis added).
[60] *Id.* at 9 (stating that "[i]n agreeing to the language of Article 18 . . . the parties negotiated many and extensive . . . *procedures*") (emphasis added).
[61] 654 F.3d 91 (D.C. Cir. 2011).
[62] *Id.* at 95 (emphasis added).
[63] Exceptions at 10 (citing *BOP*, 654 F.3d at 95).
[64] *SSA New Orleans*, 67 FLRA at 602.
[65] Exceptions at 17.
[66] *Id.*
[67] 5 U.S.C. § 7106(b)(2).
[68] *E.g.*, *NTEU*, 65 FLRA 509, 515 n.9 (2011) (once the Authority determined that a contract provision was an appropriate arrangement, it was unnecessary to determine whether the provision was also a procedure).

§ 7106(b)(3).[69] And because the abrogation analysis applies only to contract provisions negotiated under § 7106(b)(3),[70] we find that we need not address the Agency's abrogation arguments.

V. Decision

We dismiss, in part, and deny, in part, the Agency's exceptions.

[69] *SSA New Orleans*, 67 FLRA at 603 (explaining that § 7106(b) contains more than one exception to the management rights in § 7106(a)).

[70] *See, e.g.*, *U.S. EPA*, 65 FLRA 113, 116-17 (2010) (explaining that the abrogation test applies to arbitral enforcement of contract provisions negotiated under § 7106(b)(3) of the Statute).

Member Pizzella, dissenting:

H.L. Mencken once said that "[f]or every complex problem there is an answer that is clear, simple, and wrong."[1] Apparently, Arbitrator Edmund Gerber did not read Mencken very carefully.

This is the eighth time that Council 33 has grieved and brought a variation of the same and similar arguments, concerning various sections of Article 18 of their collective-bargaining agreement (CBA), to the Authority.[2] In this case, Council 33 takes a remarkably clear and simple provision (Article 18(d)) and tries to turn it into something that does not even resemble the plain words it negotiated.

Article 18(d) requires the Bureau of Prisons (Bureau) to post, "seven weeks prior to [an] upcoming quarter . . . those . . . shifts that are ***available*** for which [the correctional officers] will be given the opportunity to submit their *preference* requests."[3] Despite this clear language, Council 33 now argues, that Article 18(d) requires all federal prisons to "open[]"[4] *all* posts for bidding *every* quarter without any concern as to whether those posts are actually "*available*."

As a practical matter, most posts in federal prisons are open for bidding each quarter and correctional officers have the opportunity to bid on (or, in other words, express their preference for) "available" posts and shifts.[5] Certain posts, however, require a longer "duration"[6] of six to nine months and are, therefore, not posted. Those posts are not considered "available" for bidding. This practice has continued for at least forty-five years[7] and was even incorporated into the parties' 2000 CBA.[8]

In this case, Council 33, Arbitrator Gerber, and now the majority ignore the plain language of Article 18(d) and effectively substitute the word "all" in place of the word "available."[9] (A cursory reading of Webster's Dictionary reveals that those two words have entirely different meanings.)

[1] http://www.brainyquote.com/quotes/quotes/h/hlmencke129796.html?src=t_clear.

[2] *U.S. DOJ, Fed. BOP, Fed. Det. Ctr., Miami, Fla.*, 68 FLRA 61, 66 (2014) (Dissenting Opinion of Member Pizzella).

[3] Award at 3 (citing Art. 18(d)(2)) (emphasis added).

[4] *Id.* at 8

[5] *Id*. at 3.

[6] *Id.* at 2.

[7] *Id*. at 8.

[8] *Id*. at 3.

[9] *Id*.

I dissent because that interpretation is not a plausible interpretation of the plain language of Article 18(d). The award is also contrary to law.

A small number of federal prisons maintain "protective custody units" that are part of the federal "[w]itness [s]ecurity [p]rogram."[10] These units house prisoners who "have cooperated with federal prosecutors and/or prison officials and their *safety* would be *at risk* if they were [housed] in the general prison population."[11] The Bureau has a responsibility to "control[]" the environment of these units and "maintain a level stability" in order "to protect the anonymity and location [of the inmates] for their safety."[12] A report, issued by the DOJ, Office of Inspector General in 2008, identified specific deficiencies in the flow of information into and out of the protective units and recommended that the Bureau extend the "rotation" of the correctional officers from three months (one quarter) to six to nine months to provide a measure of stability and to protect anonymity of the inmates.[13]

In other words, what is a matter of personal preference to the correctional officers is a matter of life and death to the inmates housed in those units.

I would conclude, therefore, that Arbitrator Gerber's conclusion – that the Bureau must "open[] *all* posts" for bidding every quarter[14] – is not a plausible interpretation of Article 18(d). His interpretation is plausible only if one ignores entirely the presence of the word "available." I must presume, as did the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit), that the parties understood the difference between "all" and "available" when they negotiated Article 18(d), and that Council 33 recognized that the Bureau was supposed to have discretion in determining which shifts would be posted each quarter.[15] Otherwise, the inclusion of the word "available" has no coherent meaning.

In this respect, I believe the award is also contrary to the court's decision in *BOP II*.

As I have noted in several prior decisions, I do not agree with the application of the abrogation standard because it "does not work" and has been rejected by seven different federal circuits, including the D.C. Circuit, and numerous state courts.[16] However, that is the standard that is applied by my colleagues to determine whether an award impermissibly interferes with a management right.

Therefore, it is not surprising that the Bureau argues that the award abrogates its § 7106(a) rights. The majority, however, refuses to even address the Bureau's abrogation arguments. As I have discussed before, I do not agree that the Bureau *must* argue that

Article 18(d) is not a procedure negotiated under § 7106(b)(2) before it may argue that the award abrogates its § 7106(a) rights.[17]

When the Bureau negotiated Article 18(d), it agreed to a "procedure" that addressed how, when, and which shifts – those that are "available" − would be posted. But it certainly did not surrender its prerogative to run specific shifts longer than twelve weeks.

It is obvious to me, therefore, that when Arbitrator Gerber orders the Bureau to "open[] *all* posts"[18] for bidding each and every quarter, his award abrogates the Bureau's rights to determine its internal security practices, to assign employees, and to assign work.

In *AFGE, Council of Prison Locals, Local 4052* (*Local 4052 II*), the majority determined that the arbitrator's interpretation of an agreement, which "*required*" the Bureau to assign additional employees whenever the number of inmates exceeded a specific number in a housing unit, did not abrogate the Bureau's asserted § 7106(a) rights to determine internal security

[10] *Id*. at 2.
[11] *Id*. (emphasis added).
[12] Exceptions, Attach. C, Agency's Post-Hr'g Br. at 13 (citing Tr. at 120; 124).
[13] Award at 6; Agency's Post-Hr'g Br. at 14 (citing Tr. 123; 125).
[14] Award at 8 (emphasis added).
[15] *Fed. BOP v. FLRA*, 654 F.3d 91, 95 (D.C. Cir. 2011) (*BOP II*) ("In negotiation of the [m]aster [a]greement, [Council 33] secured from the Bureau a 'complete rewrite' of Article 18 . . . including the advance publication of *available* posts . . ." (emphasis added)).
[16] *AFGE, Council of Prison Locals, Local 4052*, 68 FLRA 38, 46 (2014) (*Local 4052 II*) (Dissenting Opinion of Member Pizzella).
[17] *SSA, Office of Disability Adjudication & Review, Region VI, New Orleans, La.*, 67 FLRA 597, 606 (2014) (Dissenting Opinion of Member Pizzella) (internal citations and quotation marks omitted) ("I do not agree that an agency is required, in all circumstances, to allege that a contract provision applied by an arbitrator is not the type of contract provision that falls within § 7106(b) of the Statute in order to argue that an award is contrary to law or fails to draw its essence from the parties' agreement. Such a prerequisite, as noted above, is not established by our precedent and is simply not flexible enough to accommodate all of the contexts in which an [a]gency may be forced to argue that an arbitral award is contrary to law . . .").
[18] Award at 8 (emphasis added).

and assign employees.[19] I did not agree with the majority's analysis in that case,[20] but my colleagues contrasted that award from one that would have required the Bureau to act in a particular manner "in *all* cases" and suggested that such an absolute order *would constitute an abrogation* of the Bureau's rights.[21]

Here, the arbitrator's award is absolute. It requires the Bureau to "open[] *all posts* to bid on a quarterly . . . basis."[22] It permits the Bureau "no flexibility." No ifs, ands, or buts to be found anywhere. All posts must be "open[ed]"[23] whether or not the Bureau has determined that specific posts must be extended to run for six or nine months because of legitimate security (or other) reasons.

That is abrogation.

To once again borrow from Mencken, Arbitrator Gerber's order may be "clear" and "simple." It is, nonetheless, "wrong."

Thank you.

[19] 68 FLRA at 40 (citing *U.S. DOJ, Fed BOP, U.S. Penitentiary, Atlanta, Ga.*, 57 FLRA 406, 411 (2001) (Chairman Cabaniss dissenting)).
[20] *Id*. at 47 (Dissenting Opinion of Member Pizzella) (An arbitrator's interpretation of an agreement, which "permits the warden no flexibility[,]. . . abrogates the [Bureau's] prerogatives under 5 U.S.C. § 7106(a).")
[21] *Id*. at 40 (emphasis added).
[22] Award at 8 (emphasis added).
[23] *Id.*