68 FLRA No. 6

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS
LOCAL 4052
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
METROPOLITAN DETENTION CENTER
GUAYNABO, PUERTO RICO
(Agency)

0-AR-4650
(65 FLRA 734 (2011))
(66 FLRA 688 (2012))

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DECISION

October 28, 2014

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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

On remand from the Authority,[1] Arbitrator Mark I. Lurie determined that the Agency had not shown that complying with a previous settlement agreement concerning assignment of correctional officers in situations involving inmate overcrowding would abrogate its rights to determine its internal-security practices and to assign employees. Accordingly, the Arbitrator directed the Agency to comply with the settlement agreement.

Both the Agency and the Union filed exceptions to the award on remand (remand award), and these exceptions present us with two questions.

The first question is whether we should reconsider and reverse the Authority's determinations in *AFGE, Council of Prison Locals, Local 4052* (*Local 4052*)[2] that: (1) abrogation – not excessive interference – is the proper standard to apply in determining whether the settlement agreement is enforceable in arbitration; and (2) the settlement agreement does not abrogate management's rights. We find that the answer is no, because the Agency is collaterally estopped from relitigating these issues in this case.

The second question is whether the remand award is contrary to the Back Pay Act[3] because the Arbitrator did not provide backpay to certain employees. As the record does not demonstrate that any employees suffered a loss of pay as a result of the Agency's failure to comply with the settlement agreement, the answer is no.

II. Background and Arbitrator's Award

The Agency, a detention center, contains several housing units that are each designed to hold up to 140 inmates. Over the years, issues concerning overcrowding of inmates – which the parties agree occurs when more than 150 inmates are assigned to a housing unit – have arisen between the parties. In fact, the Arbitrator has issued four, separate awards involving the grievance in this case. They are: the preliminary award on the merits (preliminary merits award),[4] the initial merits award,[5] the preliminary remand award,[6] and the remand award,[7] which is now before the Authority for review.

The grievance in this case finds its genesis in the resolution of a different grievance filed over thirteen years ago concerning inmate overcrowding in the Agency's housing units. In connection with that grievance, the then-warden of the Agency sent a memorandum in July 2001 to a Union official stating as following, in pertinent part:

> I am writing in response to your request for informal resolution . . . regarding the housing of more than 140 inmates in the housing units. As you know, . . . [the] Union [p]resident and I met . . . to discuss this issue[,] and we agreed to the limit of 150 inmates per unit, before a number[-]two officer was assigned . . . . [Y]ou indicate that the count was surpassed in unit A-C[] on June 4, 2001, during the evening watch shift, as well as[] on June 5, on both day and evening watches. In an effort to

[1] *AFGE, Council of Prison Locals, Local 4052*, 65 FLRA 734 (2011).
[2] *Id.*
[3] 5 U.S.C. § 5596.
[4] Union's Exceptions, Attach. 13 (Preliminary Merits Award).
[5] Union's Exceptions, Attach. 2 (Initial Merits Award).
[6] Union's Exceptions, Attach. 1 (Preliminary Remand Award).
[7] Union's Exceptions, Attach. 11 (Remand Award).

> resolve this issue, it will be necessary to identify and pay the overtime to the officer(s) who would [have] been directed to assume th[ose] post[s]. Therefore, I recommend that you make arrangements . . . to identify those individual(s) so that the appropriate time and attendance records can be corrected to reflect overtime pay.[8]

Several years later, in 2008, the Agency notified the Union that it would no longer assign a second correctional officer to housing units containing more than 150 inmates. The Union then filed the grievance in this case, which, when it remained unresolved, was submitted to the Arbitrator. The parties agreed to submit pre-hearing briefs to the Arbitrator and that the Arbitrator would determine, based on those briefs, whether a hearing was necessary.

In the preliminary merits award, the Arbitrator concluded that a hearing was necessary. In so doing, the Arbitrator made several determinations. To begin, the Arbitrator set forth the issue to be resolved (in the face of competing issues submitted by the parties) as: "Is the 2001 settlement a grievance settlement that is currently in effect, lawful in its purpose (contingent staffing)[,] and enforceable according to its terms? . . . [I]f so, can its prescribed remedy be lawfully enforced by the Arbitrator[,] and, if the remedy cannot be lawfully enforced, what should the remedy be?"[9]

In addition, assuming for the sake of argument that the 2001 settlement was "a contractually binding agreement," the Arbitrator found that the agreement was not reached under § 7106(b)(1) or (2) of the Federal Service Labor-Management Relations Statute (the Statute) and, instead, "was an agreement [reached] under the auspices of § 7106(b)(3) alone."[10] Section 7106(b)(3) provides for negotiations over "appropriate arrangements for employees adversely affected by the exercise of any authority under" § 7106.[11] Further, the Arbitrator found that the objective of the 2001 settlement was "not the remedy prescribed – the payment of overtime to certain employees – but, rather, the sufficiency of staffing to achieve employee safety."[12] According to the Arbitrator, the 2001 settlement "contains no promise of overtime, and no claim has been made that the purpose of the settlement was the amelioration of the adverse impact on overtime of a [m]anagement action."[13]

Ultimately, the Arbitrator found the record insufficient to determine whether the 2001 settlement was enforceable under § 7106(b)(3). Accordingly, the Arbitrator scheduled a hearing to resolve that issue. The Arbitrator added that "if the Union is going to pursue its Back Pay Act claim, the parties should be prepared to argue the merits."[14]

After a hearing, the Arbitrator issued the initial merits award reviewed by the Authority in *Local 4052*.[15] In that award, the Arbitrator found that the July 2001 memorandum constituted a binding settlement agreement. Specifically, the Arbitrator concluded that the 2001 memorandum (settlement agreement) constituted "a binding grievance settlement"[16] that did not have a "prescribed duration"[17] and was "extant in . . . 2008,"[18] when the Agency notified the Union that it would no longer comply with the agreement.

In fashioning a remedy for the Agency's violation of the settlement agreement, the Arbitrator purported to "reconstruct what [m]anagement would have done" if it had not violated the settlement agreement.[19] And he reiterated (from the preliminary merits award) that the settlement agreement was not enforceable if it would "excessively interfere with the exercise of one or more Agency mission-related purposes."[20] In "[r]econstructing" management's actions, the Arbitrator found that the Agency would have assigned a second correctional officer only where inmate overcrowding was "accompanied by what [m]anagement assessed to be additional, aggravating risk elements."[21] And he stated that enforcing the settlement agreement would excessively interfere with the Agency's rights to determine its internal-security practices and to assign employees. Thus, he held that "no remedy can be or is awarded."[22]

The Union filed exceptions to the initial merits award, and, in *Local 4052*, the Authority set aside the award.[23] The Authority noted that it had revised the analysis that it applied to resolve exceptions claiming that arbitration awards are contrary to management rights under § 7106(a) of the Statute.[24] Specifically, the Authority pointed out that, in deciding whether an award enforces a contract provision negotiated under

[8] Preliminary Remand Award at 1.
[9] Preliminary Merits Award at 8.
[10] *Id.* at 19.
[11] 5 U.S.C. § 7106(b)(3).
[12] Preliminary Merits Award at 19.
[13] *Id.*
[14] *Id.* at 21 (citation omitted).
[15] 65 FLRA 734.
[16] Initial Merits Award at 19.
[17] *Id.* at 5.
[18] *Id.* at 19.
[19] *Id.*
[20] *Id.*
[21] *Id.* at 20.
[22] *Id.* at 21.
[23] 65 FLRA at 737.
[24] *Id.* at 736.

§ 7106(b)(3), it no longer determined whether the provision excessively interfered with a management right but, instead, asked whether the provision abrogated the exercise of the right.[25] And, the Authority noted, it also had rejected application of the "reconstruction" requirement that previously had applied in cases involving management-rights challenges to arbitral remedies.[26]

Reviewing the Arbitrator's interpretation of the settlement agreement, the Authority held that the agreement "d[id] not abrogate"[27] the Agency's rights to determine its internal-security practices and assign employees because the agreement required the Agency to assign an additional correctional officer only when the inmate population in a housing unit exceeded 150 inmates – not "in all cases."[28] As a result, the Authority concluded that the Arbitrator erred in determining that he could not "enforce [the settlement agreement] and provide a remedy."[29] The Authority set aside the award and remanded the matter to the parties "for resubmission to the Arbitrator . . . to determine an appropriate remedy."[30]

On remand, the Arbitrator issued the preliminary remand award, holding, among other things, that the Agency was "bound" by the terms of the settlement agreement.[31] And the Arbitrator stated that because the subject of the settlement agreement "was personnel safety, not overtime[,] . . . [n]o financial award is made."[32] However, the Arbitrator found that the record was insufficient to resolve the dispute, and he stated:

> The Union has the burden of proof. Should the Union wish to proceed, the next step will be a further hearing on the question, now raised by the [Authority], of whether current staffing is such that an order from the Arbitrator compelling Agency compliance with the 2001 [s]ettlement will, in substance, abrogate management's § 7106(a) rights to assign work and determine internal security.[33]

The Union filed exceptions to the preliminary remand award, which the Authority dismissed as interlocutory.[34]

Ultimately, the Arbitrator issued the remand award now under review. In that award, the Arbitrator stated the Agency's submission "show[ed]" that: (1) there are ninety-seven correctional officers available to fill ninety-seven posts; and (2) eight housing units "nearly always" exceed 150 inmates.[35] The Arbitrator noted the Agency's claim that complying with the settlement agreement would require, on each day, that twenty-four officers (eight officers multiplied by three shifts) be "taken off their regular posts[,] . . . [which] would effectively abrogate management's right to assign its correctional officers."[36] The Arbitrator concluded: "The Agency has not shown that compliance with the 2001 [s]ettlement through the assignment of officers on overtime will result in such abrogation."[37] As a remedy, the remand award "directs the Agency to comply" with the settlement.[38]

As stated previously, both the Agency and the Union filed exceptions to the remand award. Additionally, the Union and the Agency filed oppositions to each other's exceptions.

III. Analysis and Conclusions

A. The doctrine of collateral estoppel precludes the Agency from relitigating whether the settlement agreement is enforceable.

The Agency claims that the remand award is deficient because it abrogates management's rights to determine internal-security practices and assign work.[39] According to the Agency, the remand award requires compliance with the settlement agreement

> no matter what emergency or disaster occurs that impacts the operation of [the Agency,] which houses hundreds of detainees awaiting sentencing for committing federal criminal offenses, and that requires flexibility on the part of management to assign work to its officers and determine internal[-]security practices in a manner that maximizes the safety of its employees, as well as the safety and security of the

[25] *Id.* (citing *U.S. EPA*, 65 FLRA 113 (2010) (Member Beck concurring)).
[26] *Id.* (citing *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102 (2010) (Chairman Pope concurring in part)).
[27] *Id.* at 737.
[28] *Id.* at 736 (citing *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Atlanta, Ga.*, 57 FLRA 406, 411 (2001) (Chairman Cabaniss dissenting)).
[29] *Id.* at 737.
[30] *Id.*
[31] Preliminary Remand Award at 4.
[32] *Id.*
[33] *Id.*
[34] *AFGE, Council of Prison Locals, Local 4052*, 66 FLRA 688 (2012).
[35] Remand Award at 1.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] Agency's Exceptions at 7.

> inmates, the public, and the detention center's physical structure[.][40]

In addition, the Agency asks the Authority to "revisit"[41] the decision in *U.S. EPA* (*EPA*)[42] and either "return to the excessive[-]interference standard"[43] or apply the abrogation standard in a manner that inquires whether the award "effectively abrogates"[44] management rights. The Agency claims that, under either of these alternatives, the award is deficient because it "effectively eliminates all possible exercises"[45] of its rights to determine internal-security practices and assign work.

The Union counters that the enforceability of the settlement agreement was resolved in *Local 4052*, and, as a result, the Agency's arguments regarding abrogation, excessive interference, and effective abrogation are precluded by principles of res judicata,[46] collateral estoppel,[47] "law of the case,"[48] and stare decisis.[49] Further, the Union claims that the settlement agreement does not abrogate management's rights.[50] The Union points out that, on remand, the Agency sought an opportunity to provide only documentary (not testimonial) evidence and that the documentary evidence it submitted does not substantiate its claims regarding "some extremely rare exigency."[51] According to the Union, "the placement of a second officer in a unit and/or placement on overtime does not preclude management from exercising its rights or preclude management from supplementing its internal[-]security practices by adopting other measures to address inmate control or acting within an emergency."[52]

As an initial matter, it is necessary to resolve whether the Agency's claims that the settlement agreement is unenforceable – because it abrogates, effectively abrogates, or excessively interferes with management's rights – are precluded by the Authority's determination in *Local 4052* that the settlement agreement does not abrogate those rights. Applying the doctrine of collateral estoppel, we find that the Agency's claims are barred. In this regard, collateral estoppel (also known as "issue preclusion") "prevents a second litigation of the same issues of fact or law even in connection with a different claim or cause of action."[53] The doctrine applies to bar subsequent litigation when: (1) the same issue was involved in an earlier proceeding; (2) the issue was actually litigated in that proceeding; (3) the resolution of the issue was necessary to the decision in the first case; (4) the decision in the first case – on the issue to be precluded – was final; and (5) the party attempting to re-raise the issue was fully represented in the first case.[54]

There is no question that *the issue of whether the settlement agreement is enforceable (encompassing what standard to apply in making that determination) was* actually litigated and resolved in *Local 4052*. As stated in *Local 4052*, the Union claimed in its exceptions (to the initial merits award) both that the Arbitrator should have applied the abrogation standard – not the excessive-interference standard – in deciding whether the settlement agreement was enforceable, and that the settlement agreement did not abrogate management's rights.[55] The Agency responded that applying the excessive-interference – not the abrogation – standard was the appropriate way to determine the enforceability of the settlement agreement and that, *under either standard*, the settlement agreement was unenforceable.[56] The Authority held in *Local 4052* – a unanimous decision – both that under *EPA*,[57] enforceability of the settlement agreement must be determined by assessing whether it abrogated the exercise of management rights,[58] and that "the [s]ettlement [a]greement does not abrogate . . . management rights."[59] Given the parties' arguments, deciding the proper standard to apply in determining whether the settlement agreement was enforceable and applying that standard to reach a conclusion on enforceability were necessary to the decision in *Local 4052*. And there is no dispute that the Agency was fully represented in the proceedings leading to that decision. For these reasons, the first, second, third, and fifth collateral-estoppel requirements are satisfied here.

[40] *Id.* at 11.
[41] *Id.* at 12.
[42] 65 FLRA 113.
[43] Agency's Exceptions at 12.
[44] *Id.* at 16.
[45] *Id.* at 19.
[46] Union's Opp'n at 4 (citations omitted).
[47] *Id.* (citation omitted).
[48] *Id.* (citation omitted).
[49] *Id.* at 4-5 (citation omitted).
[50] *Id.* at 7.
[51] *Id.* at 5.
[52] *Id.* at 7.
[53] *Nat'l Mediation Bd.*, 54 FLRA 1474, 1478 (1998) (Member Wasserman concurring) (quoting *U.S. Dep't of the Air Force, Scott Air Force Base, Ill.*, 35 FLRA 978, 982 (1990) (*Scott AFB*)).
[54] *U.S. Dep't of Energy, W. Area Power Admin., Golden, Colo.*, 56 FLRA 9, 11 (2000) (citing *Scott AFB*, 36 FLRA at 982)).
[55] 65 FLRA at 735.
[56] *Id.* at 735-36.
[57] 65 FLRA 113.
[58] 65 FLRA at 736.
[59] *Id.* at 736-37.

As for the fourth collateral-estoppel requirement – whether the decision in *Local 4052* that the abrogation standard is the appropriate standard for determining the enforceability of the settlement agreement is final – *Local 4052* remanded the matter "to the parties for resubmission to the Arbitrator, absent settlement," *only* "to determine an appropriate remedy."[60] That the remand was limited to determining a remedy for the Agency's repudiation of the settlement agreement is confirmed not only by the express wording of the decision in *Local 4052*, but also by the subsequent decision in *AFGE, Council of Prison Locals, Local 4052* (*Local 4052 II*),[61] dismissing as interlocutory the Union's exceptions to the Arbitrator's initial remand award (determining that a further hearing was necessary to decide whether the settlement agreement abrogated management's rights). In particular, in *Local 4052 II*, the Union contended that the Arbitrator's determination to hold a hearing on the issue of whether the settlement agreement abrogated management's rights was deficient because the Authority had already resolved that issue.[62] In dismissing the Union's exceptions, the Authority both noted that the remand to the Arbitrator was limited to determining a remedy[63] and emphasized that interlocutory review was available only where exceptions raise a plausible jurisdictional defect, the resolution of which will advance the ultimate disposition of the case.[64] According to the Authority, "[e]ven if" the Arbitrator sought to hold a hearing on a matter already resolved in *Local 4052*, "the Arbitrator did not determine an appropriate remedy for the Agency's violation of the settlement agreement, as instructed by the Authority."[65] Therefore, the Authority held, "resolution of the interlocutory issue would not . . . advance the ultimate disposition of the case[,] because the Arbitrator still [was required to] determine an appropriate remedy."[66] Indeed, the *Agency conceded* in a post-*Local 4052* brief to the Arbitrator that "the scope of [the Authority's remand was] *solely to determine an appropriate remedy*."[67] In these circumstances, the decision in *Local 4052* on the issue of whether the 2001 settlement was enforceable (including what standard applies in making that determination) is final. Accordingly, the fourth collateral-estoppel requirement also is satisfied.

Taking the foregoing as a whole, we find that the doctrine of collateral estoppel precludes the Agency from relitigating the issue of whether the 2001 settlement is enforceable (which includes the standard for making that determination). In taking the contrary position, the dissent argues that collateral estoppel is "inappropriate" here because "there has been a change in the legal context."[68] Specifically, the dissent cites an exception to the collateral-estoppel doctrine that applies when there has been "an intervening change in the law."[69]

In support of its argument, the dissent cites *Morgan v. Department of Energy*,[70] and *Pharmaceutical Care Management Ass'n v. District of Columbia* (*Pharm. Ass'n*).[71] But the analysis of the United States Court of Appeals for the Federal Circuit (the court) in *Morgan* shows why the cited exception to the collateral-estoppel doctrine is inapplicable here.[72] As the court explained, "where a party seeks to establish the legal consequences of *new facts* that are identical to facts previously adjudicated, collateral estoppel will not bar relitigation of the legal consequences of those facts if an intervening change in law has altered the applicable legal test."[73] But this exception to collateral estoppel does *not* apply where, as here, "a party is seeking relitigation of the legal consequence of the *very same set of facts as were previously adjudicated*" because broadening the exception in that manner would "effectively gut the doctrine of collateral estoppel."[74] As the court elaborated, "barring collateral estoppel when the very same acts are at issue . . . would be in contravention of the fundamental concept of collateral estoppel, that 'a fact, question[,] or right distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law.'"[75] Here, contrary to the analysis in *Morgan*, the dissent would have us permit relitigation of "the very same set of facts as were previously adjudicated."[76] And in *Pharm. Ass'n*, the United States Court of Appeals for the District of Columbia Circuit held that collateral estoppel did not bar a plaintiff's challenge to a District of Columbia law based on the plaintiff's unsuccessful challenge to a very similar Maine law.[77] As that factual scenario is nothing like the one before us, *Pharm. Ass'n* is distinguishable. Thus, neither of the decisions cited by the dissent establishes that collateral estoppel should not apply here.

[60] *Id.*
[61] 66 FLRA 688 (2012).
[62] *Id.* at 689.
[63] *Id.*
[64] *Id.* at 690.
[65] *Id.* at 689.
[66] *Id.* at 690.
[67] Union's Exceptions, Attach. 6 at 12.
[68] Dissent at 16 (quoting *Pharm. Care Mgmt. Ass'n v. District of Columbia*, 522 F.3d 443, 447 (D.C. Cir. 2008)) (internal quotation marks omitted).
[69] *Id.* at 16 n.46 (quoting *Morgan v. Dep't of Energy*, 424 F.3d 1271, 1275 (Fed. Cir. 2005)) (internal quotation marks omitted).
[70] 424 F.3d 1271.
[71] 522 F.3d 443.
[72] *See* 424 F.3d at 1275-76.
[73] *Id.* at 1276 (emphasis added).
[74] *Id.* (emphasis added).
[75] *Id.* (quoting *United States v. Moser*, 266 U.S. 236, 242 (1924)).
[76] *Id.*
[77] 522 F.3d at 445-47.

Moreover, where the Authority remands a matter to an arbitrator and limits the remand to a particular issue – and the parties do not jointly agree to place any additional issues before the arbitrator – the arbitrator is limited to resolving the remanded issue.[78] And if the arbitrator resolves additional issues, then the arbitrator exceeds his or her authority by doing so.[79] Thus, here, where the Authority's remand was limited to determining a remedy, the Arbitrator would have exceeded his authority if he had reopened the issue of the enforceability of the agreement and declared it unenforceable.[80]

Based on the foregoing, we deny the Agency's exceptions.

B. The remand award is not contrary to the Back Pay Act.

The Union claims that if the Agency had complied with the settlement agreement, then the Agency "would have assigned a second officer" to the overcrowded housing units, and "that officer would have received overtime."[81] Thus, according to the Union, the Arbitrator's refusal to award backpay in the remand award is contrary to law – specifically, the Back Pay Act (the Act).[82] The Union states that its position is buttressed by the wording of the settlement agreement as well as the Arbitrator's statement in the preliminary merits award "that the remedy prescribed" in the settlement agreement "was overtime."[83]

The Agency, on the other hand, claims that the Arbitrator did not find a causal connection between the Agency's violation of the settlement agreement and any employee's loss of pay.[84] According to the Agency, the Arbitrator specifically found in the preliminary merits award that there was "no promise of overtime" in the settlement agreement.[85] The Agency notes, in this regard, that in complying with the settlement agreement, "it might have filled the second officer positions by reassigning employees from other positions rather than paying overtime."[86]

The Act authorizes an award of backpay when an arbitrator finds that: (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) the personnel action directly resulted in the withdrawal or reduction of the employee's pay, allowances, or differentials.[87] A violation of a collective-bargaining agreement or a law, rule, or regulation constitutes an unjustified or unwarranted personnel action under the Act.[88] And the second requirement for an award of backpay is "only met where there is a causal connection between" the violation and a loss of pay.[89] The required causal connection, in turn, "is shown only where 'it is clear that the violation . . . resulted in the loss of some pay.'"[90]

Here, it is unnecessary to determine whether the first requirement for an award of backpay has been satisfied because, even assuming that it has been, the second requirement has not been satisfied. In this regard, the Arbitrator found not once, but twice, that the 2001 settlement did not entitle employees to overtime. Specifically, in the preliminary merits award, the Arbitrator found that the objective of the settlement agreement was "not the remedy prescribed – the payment of overtime to certain employees – but, rather, the sufficiency of staffing to achieve employee safety."[91] The Arbitrator added that the settlement agreement "contains no promise of overtime, and no claim has been made that the purpose of the settlement was the amelioration of the adverse impact on overtime of a [m]anagement action."[92] And the Arbitrator reiterated this in the preliminary remand award, holding, among other things, that because the subject of the settlement agreement "was personnel safety, not overtime . . . [n]o financial award is made."[93]

As noted above, the Union relies on the Arbitrator's statement in the preliminary merits award that "the remedy prescribed" in the settlement agreement for failure to assign a second correctional officer to an overcrowded housing unit is overtime.[94] But that statement merely describes the settlement agreement itself, which provided overtime for the particular officers who had, in 2001, been denied overtime. It did not purport to require the Agency to *always* assign a second

[78] *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo San Juan, P.R.*, 67 FLRA 417, 419 (2014).
[79] *Id.*
[80] *See, e.g., id.* at 420.
[81] Union's Exceptions at 6.
[82] *Id.* at 5.
[83] *Id.* at 8 n.13.
[84] Agency's Opp'n at 7.
[85] *Id.* at 9 (citation omitted).
[86] *Id.*
[87] *AFGE, Local 446*, 58 FLRA 361, 361 (2003).
[88] *See, e.g., U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 105 (2012) (citation omitted) (stating that a violation of a collective-bargaining agreement is an unwarranted or unjustified personnel action); *AFGE, Local 1592*, 64 FLRA 861, 861-62 (2010) (stating that a violation of an "applicable law, rule, regulation, or collective[-]bargaining agreement" is an unwarranted or unjustified personnel action).
[89] *NTEU, Chapter 98*, 60 FLRA 448, 450 (2004) (Chairman Cabaniss dissenting).
[90] *Id.* (citation omitted).
[91] Preliminary Merits Award at 19.
[92] *Id.*
[93] Preliminary Remand Award at 4.
[94] Preliminary Merits Award at 19.

correctional officer on overtime. And common sense supports the Agency's claim that "it might have filled the second officer positions by reassigning employees from other positions rather than paying overtime."[95]

In these circumstances, the Union has not demonstrated that, as a matter of law, the Arbitrator erred in refusing to award backpay. Accordingly, we deny the Union's exceptions.

IV. Decision

We deny the Agency's and the Union's exceptions.

[95] Agency's Opp'n at 9.

Member Pizzella, dissenting:

In a recent case, I noted that parties "undermine the Authority's mandate to 'facilitate . . . the amicable settlement[] of disputes'" when they keep a "dead case on life support."[1] I am even more troubled when the Authority ignores a "do not resuscitate order" and resurrects a case that was effectively resolved two years earlier.

The federal detention facility in Guaynabo, Puerto Rico houses inmates, typically 140 in seventy cells (two to a cell), temporarily, either during detention awaiting a court date[2] or while awaiting sentencing before being sent to a federal prison.[3] Therefore, a detention facility is considered to pose less risk to officers than does a federal "penitentiary."[4] Because of the transitory nature of the inmates at this facility, the number of inmates in any of the thirteen housing units[5] "fluctuates from day to day and, occasionally, hour to hour."[6]

The detention facility experienced a temporary spike in the number of "detainees" housed at Guaynabo around June 2000 as the result of protests following the accidental killing of a Puerto Rican civilian at a naval facility in Vieques.[7] The protests spiked, a year later, in June 2001 when new protests occurred, and over 300 protesters were arrested and sent to the Guaynabo facility for "detention and processing."[8] Because a number of the temporary detainees included notable politicians, celebrities, and actors during these protests, Warden Jorge Pastrana[9] recognized that the Vieques issue was very sensitive and determined that it was necessary to house the protest detainees separately from the "general inmate population."[10]

Warden Pastrana's decision to isolate the protest detainees from the general population of the detention facility created a situation where the inmate population in some of the housing units increased to more than 150. AFGE, Council of Prison Locals, Local 4052 (Local 4052) expressed concern about this situation. The president of Local 4052, Fernando Blanco,[11] discussed these concerns with the warden, and they were able to avoid a potential grievance and agree to an "informal resolution."[12] The warden agreed to try to "limit" the number of inmates in any housing unit to 150 "before a [second] officer [would be] assigned."[13] Approximately one month later, Warden Pastrana sent the Union president a "memorandum"[14] asking the president to "identify" the individuals who should be paid overtime in order to effect the "resolution."[15]

Sometime after the "informal resolution" of this one-time circumstantial aberration, Local 4052 decided that the routine memorandum sent from Warden Pastrana to Local 4052 president, Fernando Blanco, had become an eternally, binding covenant that presumptively bound all wardens, present or future, for all time.[16]

Seven years later in 2008, Warden Anthony Haynes had to address new "budgetary constraints" (i.e., lower budget).[17] He, therefore, notified Local 4052 that he would no longer be able to assign second officers to housing units every time the number of detainees increased to 150.[18] The new president of Local 4052, Jorge Rivera, argued, however, that the 2001 memorandum (sent from the previous warden to the previous president) was a binding agreement that the new warden could not change.[19]

And that is the question that has made its way back to Arbitrator Mark Lurie *four* times and the Authority now *three* times, even though the Arbitrator effectively resolved this case in his second award in April 2010.[20]

Arbitrator Lurie disagreed with the Union. In his first award on October 5, 2009 (2009 award), he determined that the memorandum was nothing more than a "grievance settlement"[21] and that it fulfilled the requirement for the parties to try "informal resolution" before a formal grievance was filed.[22] In his second

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[1] *U.S. Dep't of the Air Force, Space & Missile Sys. Ctr., L.A. Air Force Base, El Segundo, Cal.*, 67 FLRA 566, 572 (2014) (Dissenting Opinion of Member Pizzella).
[2] Union's Exceptions, Attach. 12, Agency's Closing Brief (Agency's Br.) at 2 (citing Tr. at 220, 246, 282).
[3] Union's Exceptions, Attach. 2, Initial Merits Award (Initial Merits Award) at 4; *see also* Union's Exceptions, Attach 11, Remand Award (Remand Award) at 1 (The assignment of a "second officer" would result in overtime pay for the second assignee.); Agency's Br. at 2 (citing Tr. at 246).
[4] Initial Merits Award at 4.
[5] Union's Exceptions, Attach. 13, Preliminary Merits Award (Preliminary Merits Award) at 1.
[6] Agency's Br. at 2 (citing Tr. at 220-21).
[7] *Id.* at 3 (citing Supp. Tr. at 8, 17-19).
[8] *Id.* at 4 (citing Supp. Tr. at 10).
[9] Preliminary Merits Award at 5.
[10] Agency's Br. at 3 (citing Tr. at 9-10).
[11] *Id.* at 15.
[12] Preliminary Merits Award at 4 (citing Article 31, Section B.) ("The parties . . . will always attempt *informal resolution*.").
[13] Preliminary Merits Award at 5.
[14] *Id.* at 4.
[15] *Id.*
[16] Initial Merits Award at 5.
[17] *Id.* at 14.
[18] Preliminary Merits Award at 5.
[19] *Id.* at 14.
[20] *Id.* (April 12, 2010) at 21.
[21] *Id.* at 4.
[22] *Id.*

award on April 12, 2010 (2010 award), he also determined that the memorandum was not an enforceable agreement because it "excessively interfere[d]" with the Agency's right to determine its internal security practices under 5 U.S.C. § 7106(a).[23]

In other words, the Arbitrator determined that the Union could not use an informal settlement from 2001 to prevent a different warden from making necessary budgetary and staffing decisions seven years later in 2008. Therefore, it is inconceivable to me that anyone could look at these facts and argue that an informal "settlement" (that merely documents an oral discussion and resolves a single dispute and that never became a formal grievance) could effectively bind another warden seven years later from exercising his 5 U.S.C. § 7106(a) prerogatives.

Despite the fact that the Union never disputes that the Arbitrator correctly applied the standard that was in effect at the time of the grievance – excessive interference[24] – Local 4052, nonetheless, filed exceptions to the 2010 award. Unfortunately, the Authority (of which I was not a Member at the time) did not get around to addressing those exceptions until 2011. In the meantime, the majority decided that it no longer liked the sound of "excessive interference" (which, at the time, had been around for the better part of twenty years[25]) and came up with the clever idea to readopt a standard that had been discarded previously by the Authority – abrogation. [26] When the Authority remanded this case back to the parties in April 2011 (2011 remand) and ordered the Arbitrator to apply the abrogation standard,[27] the Arbitrator was ensured three more years of employment, representatives of Local 4052 were guaranteed hundreds of hours of additional official time, and Warden Haynes was delayed from adopting the cost-savings measures that were required by the Agency's changing budget picture.[28]

As I noted in *AFGE, Local 1164* (*Local 1164*), abrogation simply does not work.[29] The Authority has *never found* any provision, proposal, or award to abrogate a management right – "*it just doesn't happen*."[30] In many respects, determining what abrogation would look like, in the arbitral context, if it ever occurred, is nearly as futile as Vladimir and Estragon waiting for Godot in Samuel Beckett's play, *Waiting for Godot*.

Therefore, when the case was remanded by my colleagues to Arbitrator Lurie in 2011, he really had no choice in the matter. As he was bound to do, in his fourth award in October 2012 (2012 award), he fulfilled the wishes of the majority and determined that complying with the 2001 settlement did not abrogate management's rights.[31]

Now, we have a problem though. In January 2014, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) implicitly, if not plainly, rejected the majority's abrogation standard.[32] The court noted that the majority was wrong when it applied "two inconsistent interpretations of the very same statutory term" and remanded the case back to the Authority to give us one more chance to fashion a standard that is coherent.[33] But, in sending the case back to the Authority, the D.C. Circuit cautioned the Authority that the only reason it did not address the IRS's "contention [–] that the 'abrogation' standard . . . represents an impermissible construction of [5 U.S.C. §] 7106(b)(3)'s 'appropriate arrangements' language" – was "because the Authority *has given no indication* that it plans to *abandon* its '*excessive interference*' test."[34]

My colleagues have passed on four opportunities to settle this matter and, in this case, they once again ignore the D.C. Circuit's instruction to revisit and adopt "excessive interference."[35]

Therefore, I dissent.

Unlike my colleagues I believe the instruction from the D.C. Circuit is crystal clear. I would, therefore,

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[23] Initial Merits Award at 20.
[24] *Id*. at 21.
[25] *U.S. Dep't of the Treasury, BEP, Wash., D.C.*, 53 FLRA 146, 151 (1997) (citing *IRS v. FLRA*, 494 U.S. 922 (1990).
[26] *U.S. EPA*, 65 FLRA 113 (2010) (Member Beck concurring).
[27] *AFGE, Council of Prison Locals, Local 4052*, 65 FLRA 734, 737 (2011).
[28] I would warn all our readers in the labor-management relations community that, if this scenario sounds familiar to you, you are not experiencing telepathic flashbacks to a previous life. At least six times, in the past fourteen years, AFGE, through the Council of Prison Locals, Council C-33, the brother of AFGE, Council of Prison Locals, Local 4052 (the Union in this case), has filed at least six grievances against various federal prison facilities *challenging, in each case, similar cost-savings initiatives*. *See U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Terre Haute, Ind*., 67 FLRA 697, 701 & n.2 (2014) (Dissenting Opinion of Member Pizzella).
[29] 67 FLRA 316, 321 (2014) (Concurring Opinion of Member Pizzella) (citing *NTEU*, 65 FLRA 509, 520 (2011) (*NTEU I*) (Dissenting Opinion of Member Beck)); *U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla*., 58 FLRA 109, 115 (2002) (Concurring Opinion of Member Armendariz)).
[30] *Id*. (citing *NTEU I*, 65 FLRA at 520 (Dissenting Opinion of Member Beck)) (emphasis added).
[31] Union's Exceptions, Attach. 11, Remedy Award (Remedy Award) at 1.
[32] *U.S. Dep't of the Treasury, IRS, Office of the Chief Counsel, Wash., D.C. v. FLRA*, 739 F.3d 13, 21 (D.C. Cir. 2014) (*IRS*).
[33] *Id*.
[34] *Id*. (emphases added).
[35] *NTEU*, 67 FLRA 705, 710 (Dissenting Opinion of Member Pizzella).

"embrace the excessive interference standard to determine whether a proposal[,] provision[,] [or award] impermissibly interferes with any § 7106(a) management right regardless of whether the matter is raised as an exception to an arbitrator's award, as a negotiability dispute involving proposals, or as the result of a negotiability appeal involving agency-head disapproval of contract provisions under § 7114(c)(2)."[36] As I noted in *NTEU* and in *Local 1164*, "the excessive interference standard has 'served the Authority well for [over] thirty years,'[37] has been upheld consistently by seven different federal circuits, and 'ha[s] been endorsed by numerous state courts.'"[38]

In its exceptions, the Agency argues that the Arbitrator's 2012 remand award abrogates its rights to determine internal security practices and to assign work.[39]

I agree with this point entirely, but, for reasons discussed below, my colleagues refuse to even consider it.

The Arbitrator's 2012 remand award effectively requires the Agency to reassign up to twenty-four officers from other posts whenever (and for any reason) the inmate population in any housing unit increases to 150. Besides the absurdity of the notion – that an *oral agreement* (that just happened to be documented by a routine memorandum and simply asked the Union president to identify the officers eligible for overtime in the *one-time "informal resoloution*"[40]) could forever bind subsequent wardens from exercising their right to adjust staffing as required by current budgets – it is difficult to imagine a scenario that more completely deprives the Agency of its 5 U.S.C. § 7106(a) prerogatives. The award does not simply "limit[]"[41] the Warden's prerogatives; it prevents the Warden from determining where he should assign, not assign, or how he will assign, up to twenty-four officers on any given day.

That interpretation permits the warden no flexibility and abrogates the Agency's prerogatives under 5 U.S.C. § 7106(a). Staffing and budget allocation, are clearly management prerogatives. It is not for the Union, the Arbitrator, or for the Authority, for that matter, to tell any agency how it should staff or allocate resources in order to fund its operations.

The Agency also argues that the Authority should "revisit" *EPA* and "return to the excessive[-]interference standard."[42]

Sounding much like former-NBA star, Charles Barkley, when he famously quipped: "I may be mistaken, but I'm never wrong,"[43] the majority determines that it need not even address that argument because the doctrine of collateral estoppel precludes any consideration of the argument.[44] According to the majority, they already considered the parties' arguments concerning abrogation and excessive interference in their 2012 remand.[45]

But, the majority is wrong in two respects.

As noted above, the D.C. Circuit has rejected the abrogation standard.[46]

Second, the majority misapplies the collateral-estoppel doctrine. Under long-standing judicial precedent, "[c]ollateral estoppel is generally inappropriate when . . . there has been a change in the legal context after the first decision."[47]

Under these circumstances, therefore, my colleagues may not simply avoid addressing the D.C. Circuit's rejection of the abrogation standard. Seven different federal circuits,[48] and numerous state

[36] *NAIL, Local 7*, 67 FLRA 654, 664 (2014) (*NAIL*) (Dissenting Opinion of Member Pizzella) (citing *Local 1164*, 67 FLRA at 321 (Concurring Opinion of Member Pizzella)).
[37] *Id.* at 710 (citing *Local 1164*, 67 FLRA at 320 (Dissenting Opinion of Member Pizzella)) (internal citations omitted).
[38] *NTEU*, 67 FLRA at 710 (citing *Local 1164*, 67 FLRA at 320 (Dissenting Opinion of Member Pizzella)) (internal citations omitted).
[39] Agency's Exceptions at 7-12.
[40] Union's Exceptions, Attach. 1 Preliminary Remand Award (Preliminary Remand Award) at 1 (emphasis added) (internal citations and quotation marks omitted).
[41] *EPA*, 65 FLRA at 118.
[42] Agency's Exceptions at 12.
[43] www.barkleyquotes.com (last visited September 30, 2014).
[44] Majority at 6-8.
[45] *Id.* at 7-8 (citing *AFGE, Local 4052*, 65 FLRA 734 (2011)).
[46] *IRS*, 739 F.3d at 21.
[47] *Pharm. Care Mgmt. Ass'n. v. District of Columbia*, 522 F.3d 443, 447 (D.C. Cir. 2008) (citing Restatement § 28(2)(B); *Morgan v. Dep't of Energy*, 424 F.3d 1271, 1275 (2005) ("[T]here is an exception to the applicability of collateral estoppel when there has been an intervening change in the law. ' . . . [A] new determination is warranted in order to take account of an *intervening change in the applicable legal context* or otherwise *to avoid inequitable administration* of the laws . . . .'") (citing Restatement (Second) of Judgments 28 (1982) (emphasis added)).
[48] *NTEU*, 67 FLRA 7 at 710 (Dissenting Opinion of Member Pizzella) (citing *U.S. INS, U.S. Border Patrol v. FLRA*, 12 F.3d 882, 884 (9th Cir. 1993) ("The Second, Fourth[,] and D.C. Circuits have adopted the [excessive interference] analysis[,] and we feel constrained to join them."); *U.S. INS v. FLRA*, 4 F.3d 268, 272 n.7 (4th Cir. 1993) ("The competing practical needs of employees and managers are weighed in the light of various factors, so as to determine whether, on balance, the impact of the proposal on management's rights is *excessive* when compared to the benefits afforded employees.") (quoting *Nuclear Regulatory Comm'n. v. FLRA*, 895 F.2d 152,

courts,[49] have embraced the excessive interference standard. Abrogation is simply an aberration that was *created* by the Authority,[50] and then *rejected* by the Authority,[51] before it was *readopted* by the Authority in 2010.[52] That is not exactly a solid legal foundation upon which to fashion a standard that has been so clearly denounced.

Therefore, I understand why the majority is reluctant to address the Agency's argument. By failing to do so, however, my colleagues ignore the explicit direction of the D.C. Circuit to apply a single standard – excessive interference. Even though the majority's decision is not reviewable by the D.C. Circuit,[53] that does not relieve the Authority from its obligation to resolve this matter directly and comply with, what is now, binding precedent on the Authority.

My colleagues have avoided this issue on *four* different occasions.[54] The Authority should not do so again for a *fifth* time.

Accordingly, I dissent.

Thank you.

155 (4th Cir. 1990) (internal quotation marks omitted)); *U.S DOJ, INS v. FLRA*, 975 F.2d 218, 225 (5th Cir. 1992) ("[W]e find the FLRA's interpretation of § 7106(b)(3) to be reasonable and thus we adopt the 'excessive interference' test."); *Overseas Educ. Ass'n v. FLRA*, 961 F.2d 36, 40 (2d Cir. 1992) ("[The] excessive interference standard properly adds flesh to the term 'appropriate' by employing a test that balances the competing needs of employees and managers."); *Horner v. Bell*, 825 F.2d 382, 389 (Fed. Cir. 1987) ("[T]he critical inquiry is whether the provision interferes with management prerogatives to 'an excessive degree.'") (quoting *AFGE, Local 2782 v. FLRA*, 702 F.2d 1183, 1188 (D.C. Cir. 1983)); *AFGE, Local 3748 v. FLRA*, 797 F.2d 612, 619 n.38 (8th Cir. 1986) (citing "excessive[e] interfere[nce]" as accepted test for negotiability cases) (quoting *NAGE, Local R14-87*, 21 FLRA 24, 30 (1986) (*KANG*))).

[49] *Local 1164*, 67 FLRA at 320-21 (Concurring Opinion of Member Pizzella) (citing *Baltimore v. Balt. Ass'n Fire Fighters, Local 734, I.A.F.F.*, 93 Md. App. 604, 618 (Md. Ct. Spec. App. 1992); *Int'l Assn' of Fighters, Local No. 672 v. City of Boise City*, 136 Idaho 162, 171 (Idaho 2001); *United Pub. Workers, Local 646 v. City & County of Honolulu*, No. 26347 2007 Haw. App. LEXIS 277 (Haw. Ct. App. April 17, 2007); *Springfield Police Ass'n v. City of Springfield*, 134 Ore. App. 26, 29 (Or. Ct. App. 1995); *City of Scranton v. Fire Fighters Local Union No. 60*, 20 A. 3d 525, 531 (Pa. Commw. Ct. 2011)).

[50] *EPA*, 65 FLRA at 116-17.

[51] *Id*. at 117.

[52] *Id*. at 118.

[53] 5 U.S.C. § 7123(a)(1) ("Any person aggrieved by any final order of the Authority other than an order under [] section 7122 [(exceptions to arbitral awards)], unless the order involves an unfair labor practice may. . . institute an action for judicial review . . . .").

[54] *NTEU*, 67 FLRA at 710 (Dissenting Opinion of Member Pizzella) ("[M]y colleagues have passed on three opportunities to settle this matter since the court issued its *IRS* decision in January 2014"); *NAIL*, 67 FLRA at 664 (Dissenting Opinion of Member Pizzella) ("I would take this opportunity to acknowledge the decision of [the court in *IRS*] and . . . embrace the excessive interference standard . . . ."); *SSA Office of Disability Adjudication & Review, Region VI, New Orleans, La*., 67 FLRA 597, 608 (2014) (Dissenting Opinion of Member Pizzella) ("After the recent decision of [the court in *IRS*], it is imperative that the Authority 'bring this matter to repose for the labor-management relations community.'") (internal citations omitted); *Local 1164*, 67 FLRA at 321(Concurring Opinion of Member Pizzella) ("I would use this case to embrace a single standard – excessive interference – . . . it is time for the Authority to bring this matter to repose for the labor-management relations community and to endorse the only standard that is fundamentally fair and that has been affirmatively embraced by the federal courts.").