69 FLRA No. 37

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
EL PASO, TEXAS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL BORDER PATROL COUNCIL
LOCAL 1929
(Union)

0-AR-5125

_____

DECISION

March 24, 2016

_____

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

I. Statement of the Case

Arbitrator T. Zane Reeves issued an award finding that the Agency (1) violated the parties' agreement when it unreasonably denied the grievant's request for a shift trade; and (2) failed to provide the Union with notice and an opportunity to bargain over the impact and implementation of changes to its shift-trade procedures, in violation of the Federal Service Labor-Management Relations Statute (the Statute)[1] and the parties' agreement. As remedies, the Arbitrator directed the Agency to (1) make the grievant whole; (2) return to the status quo ante; and (3) bargain in good faith with the Union regarding changes to shift-trade procedures. The Arbitrator also preliminarily awarded attorney fees to the Union, pending the Union's detailed request. This case presents us with three substantive questions.

The first question is whether the Arbitrator's findings are based on nonfacts. Because the Agency's nonfact claims either concern factual matters that the parties disputed at arbitration or are not central facts underlying the award, the answer is no.

The second question is whether the Arbitrator's finding that the Agency violated its statutory duty to bargain in good faith with the Union regarding changes to shift-trade procedures is contrary to law because the matter is covered by Article 28, Section I of the parties' agreement (Article 28). Because the Agency's shift-trade procedure is both expressly contained and inseparably bound up with Article 28, the answer is yes.

The third question is whether the award fails to draw its essence from the parties' agreement because – contrary to the Arbitrator's finding – Article 3, Section A of the parties' agreement (Article 3) does not require the Agency to bargain with the Union regarding changes to shift-trade procedures. Because the Arbitrator failed to address relevant contractual language – producing a critical ambiguity – we remand the award for further proceedings.

II. Background and Arbitrator's Award

The grievant is a border patrol agent at the Las Cruces, New Mexico Border Patrol Station. Two weeks before the new calendar year, the Agency sent an email to its supervisors and agents announcing that for the first pay period of the new year, shift trades would be "highly scrutinized and reserved for those with the most pressing . . . issues."[2]

One week after the Agency sent its email, the grievant submitted shift-trade requests for the first three pay periods. He requested to trade his afternoon shifts for midnight shifts due to family obligations. The grievant's supervisor returned the request to the grievant for further clarification. After the grievant resubmitted his shift-trade requests, the supervisor denied the request for a first-pay-period trade, but approved the requests for second- and third-pay-period trades. Consistent with the Agency's email, the supervisor determined that the grievant's first-pay-period shift did not interfere with his family obligations and that the grievant did not demonstrate a "pressing need."[3]

The Union filed a grievance, arguing that the Agency violated Articles 3 and 28, and § 7116(a)(1), (4), and (5) of the Statute. As pertinent here, Article 3 provides:

> The parties recognize that from time to time during the life of the agreement, the need will arise requiring the change of existing [Agency] regulations covering personnel policies, practices, and/or working conditions not covered

[1] 5 U.S.C. § 7116.

[2] Award at 4.

[3] *Id.* at 6.

> by this agreement. The [Agency] shall present the changes . . . to the Union. The Union will present its views and concerns (which must be responsive to either the proposed change or the impact of the proposed change) within a set time after receiving notice from [the Agency] of the proposed change.[4]

The Agency denied the grievance and the matter was submitted to arbitration. At arbitration, the parties did not agree to stipulated issues, so the Arbitrator framed the issues as whether "the Agency violate[d] Articles 3 [] and 28[] . . . when it denied the [g]rievant's request for a shift trade[,] and when it did not negotiate with the Union regarding changes in shift[-]trade policies and procedures? If so, what is the appropriate remedy?"[5]

The Arbitrator found that shift trades are governed by Article 28. Article 28, in pertinent part, provides that "supervisor[s] will not unreasonably withhold approval of a request to trade shifts" when the trades are "mutually agreeable to all employees affected."[6] The Arbitrator found that Article 28 did not require employees "to justify shift trades"[7] or provide "documentation."[8]

The Agency argued that it could deny shift-trade requests – in accordance with Article 28 – provided the denial was reasonable. And the Agency claimed that its denial was reasonable because the Agency was "facing prolonged inconsistencies with varying administrative issues, and as a means to resolve some of these inconsistencies, [the Agency] withheld all shift[-]trade requests, except for those based on the most pressing of needs."[9] Additionally, the Agency argued that it had no statutory or contractual duty to bargain modifications in how it interprets Article 28 because "the issue of shift trading is in the [parties' agreement], which means that the issue has already been negotiated and agreed to by the Agency and the Union."[10] Therefore, the Agency asserted, the issue was covered by the parties' agreement and no bargaining was required.

The Arbitrator disagreed and sustained the grievance for four reasons. First, the Arbitrator found that the "[A]gency violated the [parties' agreement] when it disallowed the shift[-]trade request by the [g]rievant [because the grievant's s]upervisor . . . unreasonably withheld [the] shift trade."[11] Specifically, the Arbitrator found that although the grievant "provided substantial evidence of his need"[12] to trade shifts, the Agency erred by "plac[ing] additional requirements on the [g]rievant to justify the need for his shift change."[13]

Second, the Arbitrator found that "[s]upervisors at the same station . . . allowed shift changes to other similarly situated agents without a written reason or explanation."[14] Consequently, the Arbitrator found, the Agency's "reasons for granting or denying the shift trades [were] inconsistent and arbitrary at best."[15]

Third, analyzing the parties' agreement, the Arbitrator determined that the Agency's denial of the grievant's request "occurred[] even though a reading of the plain language of Article 28[] only requires that two agents agree on the trade and, if so, [directs] the [Agency] not to 'unreasonably withhold approval of a request to trade shifts.'"[16]

And last, the Arbitrator disagreed with the Agency's argument that "prolonged . . . administrative issues"[17] allowed it to "highly scrutinize[] and reserve[shift-trade approvals] for those with the most pressing of issues."[18] Specifically, the Arbitrator found that the Agency "disallow[ed] the [g]rievant's requested shift trade . . . for staff orientation purposes."[19] The Arbitrator also found, however, that "the Agency provided the same training to all employees regardless of what shifts they were on," and therefore that the Agency's "reason for disallowing a shift change was inconsistent or not supported by the preponderance of evidence."[20]

The Arbitrator also determined that the Agency unilaterally modified Article 28 by requiring agents to show "the most pressing of needs"[21] to trade shifts during the first pay period. In the Arbitrator's view, this "changed the [employees'] conditions of employment,"[22] had more than a de minimis effect,[23] and violated the Agency's statutory and contractual duties to bargain.[24]

---

[4] *Id.* at 4.
[5] *Id.* at 2.
[6] *Id.* at 4.
[7] *Id.* at 13.
[8] *Id.* at 11.
[9] *Id.* at 2.
[10] Exceptions, Ex. 3, Post-Hr'g Br. at 16.
[11] Award at 8.
[12] *Id.*
[13] *Id.* at 8-9.
[14] *Id.* at 9.
[15] *Id.* at 13.
[16] *Id.* at 9 (quoting Art. 28).
[17] *Id.* at 2.
[18] *Id.* at 4.
[19] *Id.* at 11.
[20] *Id.* at 11-12.
[21] *Id.* at 2.
[22] *Id.* at 9.
[23] *Id.* at 10-11 (citing *U.S. DOD, Def. Logistics Agency, Def. Distrib. Depot, New Cumberland, Pa.*, 58 FLRA 750 (2003) (*DLA*)).
[24] *Id.* at 13.

Regarding the Agency's statutory duty to bargain under § 7116(a)(1) and (5) of the Statute,[25] the Arbitrator found that the Agency was "obligated to bargain over the impact and implementation of a change in unit employees' conditions of employment."[26] Similarly, regarding the Agency's contractual duty to bargain, the Arbitrator found that Article 3 "mandates a duty to bargain over any changes to existing policies," and that "there was no effort to communicate with the Union regarding these changes [to shift-trade procedures] in terms of impact or implementation."[27] Because the Agency did not notify the Union of the change, the Arbitrator concluded that the Agency violated its statutory and contractual duties to bargain. The Arbitrator, however, did not address the Agency's covered-by argument – that it had no statutory or contractual duty to bargain because "the issue of shift trading is in the [parties' agreement]."[28]

As to the remedy, the Arbitrator (1) ordered the Agency to make "the [g]rievant . . . whole, in every way;" (2) "granted status[-]quo[-]ante [relief] and the opportunity to bargain with the Agency in good faith concerning . . . shift[-]trade requests;" and (3) granted a preliminary award of attorney fees to the Union subject to an appropriate motion.[29] The Arbitrator denied the Union's remedial request to require the Agency to post a notice acknowledging the Agency's violation. Last, the Arbitrator retained jurisdiction "over this matter to assist the parties in interpreting and implementing [the a]ward."[30]

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

III. Preliminary Matter: The Union's opposition is timely.

The Authority issued an order directing the Union to show cause why its opposition should not be dismissed as untimely.[31] Under the Authority's Regulations, the time limit for filing an opposition to exceptions is thirty days after the date of service of the exceptions.[32] Generally, the parties are granted an additional five days to respond to documents served by first-class mail or commercial delivery.[33] But a party is not entitled to an additional five days to file a responsive pleading when it is served by mail or commercial delivery and some other form of service on the same day.[34]

Here, the Agency's statement of service indicated it served its exceptions on the Union's representative of record by certified mail and email on June 5, 2015.[35] But the Union did not file its opposition until more than thirty days later.[36] In its timely response to the Authority's order to show cause, the Union asserted that its opposition is timely because the Agency filed its exceptions, and served the Union by certified mail, on June 8, not June 5, 2015, and did not serve the Union by email at all. The Union also provided evidence indicating that the Agency representative confirmed that he had filed the exceptions and mailed a copy of the exceptions to the Union on June 8, 2015, and had not emailed the exceptions to the Union on June 5, 2015, or at any other time.[37] Because the Union timely filed its opposition relative to the June 8 service date, we consider the Union's opposition.

IV. Analysis and Conclusions

A. The award is not based on nonfacts.

The Agency contends that the award of a remedy for the grievant is based on two nonfacts.[38] To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[39] And the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration.[40]

Regarding its first nonfact exception, the Agency claims that the Arbitrator's finding that the Agency unilaterally modified shift-trade procedures for "staff orientation purposes" is a nonfact because the Agency modified shift-trade procedures "so that agents could participate in performance[-]expectation discussions."[41] Specifically, the Agency argues that "because performance expectations needed to be communicated by the home/rating supervisor, . . . such discussions could not have been given to employees[] regardless of what shift they were on."[42] And, the Agency alleges, "[h]ad [the grievant's supervisor] approved [the grievant's]

[25] 5 U.S.C. § 7116(a)(1), (5).
[26] Award at 10-11.
[27] *Id.* at 13.
[28] Exceptions, Ex. 3, Post-Hr'g Br. at 16.
[29] Award at 17.
[30] *Id.* at 18.
[31] Order to Show Cause (Order) at 1-2.
[32] 5 C.F.R. § 2425.3(b).
[33] *Id.* § 2429.22(a).
[34] *Id.* § 2429.22(b).
[35] Order at 2.
[36] *Id.*
[37] Union Response, Ex. B at 1.
[38] Exceptions Br. at 14-17.
[39] *NFFE, Local 1984*, 56 FLRA 38, 41 (2000).
[40] *Id.*
[41] Exceptions Br. at 14.
[42] *Id.* at 15.

shift[-]trade request, the rating/home unit supervisor would not have had the chance to communicate performance expectations."[43]

We find the Agency's first nonfact exception without merit for two reasons. First, although there is no dispute that the Agency's mandatory orientation was uniform and would be given to all agents regardless of shift,[44] the parties disputed whether the Agency's performance-expectation discussion was a part of, or separate from, the overall orientation.[45] And as discussed previously, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration – as occurred here.[46] Second, the Agency fails to cite any part of the record to support its allegation that approval of the grievant's shift-trade request would have resulted in the grievant not receiving his performance-expectation discussion.[47] Therefore, the Agency does not establish that the alleged nonfact is either clearly erroneous or central to the award, and we deny the Agency's first nonfact exception.

Regarding the Agency's second nonfact exception, the Agency claims that the award is based on a nonfact because the Arbitrator compared the shift-trade denial by the grievant's supervisor to the actions of other supervisors who had – incorrectly in the Agency's view – "granted shift trades for minor or no reasons."[48] Specifically, the Agency argues that "the Arbitrator failed to consider that [the supervisor]'s denial of [the grievant]'s shift[-]trade request was a result of [the supervisor] following instructions set forth by his chain of command."[49]

We find the Agency's second nonfact exception unpersuasive. The Arbitrator found that "[s]upervisors at the same station . . . allowed shift changes to other similarly situated agents without a written reason or explanation,"[50] and emphasized that the Agency's violation was premised on the supervisor's *unreasonable* denial.[51] Specifically, the Arbitrator found that "the reasons for granting or denying the shift trades w[ere] inconsistent or arbitrary at best," and that "[t]he Agency did not produce any evidence or testimony in the hearing that there was a strict rule and consistent standard to be followed in granting [shift] trades."[52] Therefore, even if the Arbitrator had found the fact that the Agency claims he should have found – that the supervisor was merely following orders – there is no basis for finding that the Arbitrator would have reached a different conclusion. As such, the Agency's assertion does not demonstrate that a central fact underling the award is clearly erroneous, but for which the Arbitrator would have reached a different result.

Accordingly, we deny the Agency's nonfact exceptions.

B. The award's finding of a statutory bargaining violation is contrary to law.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by an exception and the award de novo.[53] In applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[54] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are based on nonfacts.[55]

The Agency argues that the award is contrary to the Authority's "covered-by" doctrine. The covered-by doctrine is a defense to a claim that an agency violated the Statute by failing to provide a union with notice and an opportunity to bargain over changes in conditions of employment.[56] The covered-by doctrine has two prongs.[57] Under the first prong, the Authority examines whether the subject matter of the change is expressly contained in the agreement.[58] The Authority does not require an exact congruence of language.[59] Instead, the Authority finds the requisite similarity if a reasonable reader would conclude that the contract provision settles the matter in dispute.[60]

If the agreement does not expressly contain the matter, then, under the doctrine's second prong, the Authority will determine whether the subject is inseparably bound up with, and thus plainly an aspect of,

[43] *Id.*
[44] Award at 11-12.
[45] Exceptions, Ex. 5, Tr. at 65, 143-45, 153-54, 157, 166-70.
[46] *Id.*
[47] Exceptions Br. at 15.
[48] *Id.* at 16.
[49] *Id.* at 15.
[50] Award at 9.
[51] *Id.* at 8-9.
[52] *Id.* at 13.

[53] *See 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)).
[54] *See NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998).
[55] *See U.S. DHS, U.S. CBP, Laredo, Tex.*, 66 FLRA 567, 567-68 (2012).
[56] *U.S. Dep't of the Interior, Wash., D.C. & U.S. Geological Survey, Reston, Va.*, 56 FLRA 45, 53 (2000).
[57] *U.S. Customs Serv., Customs Mgmt. Ctr, Miami, Fla.*, 56 FLRA 809, 814 (2000).
[58] *Id.*
[59] *Fed. BOP v. FLRA*, 654 F.3d 91, 94-95 (D.C. Cir. 2011).
[60] *U.S. Dep't of HHS, SSA, Balt., Md.*, 47 FLRA 1004, 1018 (1993) (*SSA*).

a subject covered by the agreement.[61] In doing so, the Authority will determine whether the subject matter is so commonly considered to be an aspect of the matter set forth in the agreement that the negotiations are presumed to have foreclosed further bargaining.[62]

Here, the Agency alleges that it does not have a statutory obligation to bargain over shift-trade issues because Article 28 both expressly contains and is inseparably bound up with shift trades.[63] As described above, Article 28 provides that "[w]here mutually agreeable to all employees affected, and approved by the supervisor, employees may trade shifts out of the normal rotation. The supervisor will not unreasonably withhold approval of a request to trade shifts."[64]

The Arbitrator found, and there is no dispute, that Article 28 sets forth procedures and policies governing shift trades.[65] Specifically, in order for agents to trade shifts, Article 28 requires that (1) affected agents mutually agree to the shift trade, and (2) a supervisor not *unreasonably* withhold approval of a request to trade shifts.[66] The subject matter of the disputed change concerns the procedures employees must follow to apply for a shift trade, and the basis upon which the Agency will approve or deny a shift-trade request. By establishing a reasonableness standard for Agency actions in connection with shift-trade requests, Article 28 settles the matter of how the Agency will deal with such requests. As such, Article 28 expressly contains the subject matter of the disputed change, satisfying the first prong of the covered-by doctrine.[67]

Alternatively, the second prong of the covered-by doctrine is also satisfied. In this connection, even assuming that the agreement does not "expressly contain" the precise procedures employees must follow, and the Agency's basis for approving or denying a shift-trade request, those matters are "inseparably bound up with[,] and thus plainly an aspect of,"[68] Article 28's requirement that the Agency adhere to a reasonableness standard in dealing with shift-trade requests.[69]

Therefore, we find that the matter in dispute – the Agency's disapproval of the grievant's shift-trade request – is covered by the parties' agreement,[70] and as such, the Agency had no statutory duty to bargain. Accordingly, we grant the Agency's contrary-to-law exception.

C. We remand the award to the parties for resubmission to the Arbitrator for further findings concerning the Agency's contractual duty to bargain.

The Agency asserts that the award fails to draw its essence from the parties' agreement because – contrary to the Arbitrator's finding – Article 3 does not require the Agency to bargain with the Union regarding changes to shift-trade procedures.[71] Specifically, the Agency alleges that Article 3's bargaining requirement only pertains to subjects that are not "covered by" the parties' agreement.[72] As discussed in section IV.B., above, we find that shift-trade procedures are covered by Article 28 within the meaning of the Authority's covered-by doctrine.

In reviewing an arbitrator's interpretation of a collective-bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector.[73] Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the parties' agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the parties' agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the parties' agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the parties' agreement; or (4) evidences a manifest disregard of the parties' agreement.[74] The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained."[75]

As pertinent here, Article 3 provides that, during the life of the parties' agreement, the Agency may require changes to existing "[Agency] regulations covering personnel policies, practices, and/or working conditions *not covered by*" the parties' agreement.[76] Article 28, as discussed previously, covers shift-trade procedures, and states that "supervisor[s] will not unreasonably withhold

[61] *Id.*
[62] *NTEU*, 66 FLRA 186, 189-90 (2011) (*NTEU*).
[63] Exceptions Br. at 5-10.
[64] Award at 4.
[65] *Id.* at 9.
[66] *Id.* at 4.
[67] *See SSA*, 47 FLRA at 1018.
[68] *Id.*
[69] *See NTEU*, 66 FLRA at 189-90.
[70] *See U.S. Dep't of the Treasury, IRS, Denver, Co.*, 60 FLRA 572, 574 (2005).
[71] Exceptions Br. at 11.
[72] *Id.*
[73] 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998) (*AFGE*).
[74] *U.S. DOL* (*OSHA*), 34 FLRA 573, 575 (1990).
[75] *Id.* at 576 (citing *Paperworks v. Misco, Inc.*, 484 U.S. 29, 38 (1987); *Dep't of HHS, SSA, Louisville, Ky. Dist.*, 10 FLRA 436, 437 (1982)).
[76] Award at 4 (emphasis added).

approval of a request to trade shifts" when the trading agents mutually agree to the trade.[77]

The Arbitrator determined that Articles 3 and 28 controlled whether the Agency had a contractual duty to bargain over changes to shift-trade procedures.[78] Regarding Article 28, the Arbitrator found that the Agency's unilateral modification "changed the [employees'] conditions of employment,"[79] and had more than a de minimis effect.[80] Regarding Article 3, the Arbitrator found that it "mandates a duty to bargain over any changes to *existing policies* [and that] . . . the Agency clearly violated [Article] 3[] because there was no notification to the Union whatsoever"[81] of the Agency's changes to shift-trade procedures. The Arbitrator did not, however, discuss the Agency's argument that Article 3 simply does not apply. The Agency argued in this regard that Article 3 "has no bearing on this issue"[82] because Article 3 only applies to issues "*not* covered by the [parties' agreement],"[83] and "shift trading *is* covered by Article 28."[84]

Where an arbitrator fails to discuss critical contract terminology, which terminology might reasonably require a result opposite to the arbitrator's award, the award cannot be considered to draw its essence from the contract.[85] In such cases, the Authority follows the practice in the private sector and remands such awards for the arbitrator to address the contract provision in dispute.[86] Consistent with fundamental tenets of arbitral practice, a remand in such cases permits the arbitrator, who is the parties' choice to interpret and apply their agreement, to interpret in the first instance the provision that may be dispositive of the grievance.

Here, the Agency challenged Article 3's applicability. The Agency argued at arbitration that Article 3's bargaining requirement did not apply because, according to Article 3's plain language, it is only applicable to issues "*not* covered by the [parties' agreement]."[87] The Arbitrator's award fails to acknowledge the Agency's argument concerning Article 3.[88] Moreover, the Arbitrator does not discuss Article 3's "not covered by" language, or what effect, if any, Article 3's alleged limitation has on Article 3's applicability in resolving the further issue of whether the Agency had a contractual duty to bargain.

To be clear, the Arbitrator's finding of a *contractual* bargaining obligation is not necessarily inconsistent with our finding that the Agency did not have a *statutory* bargaining obligation. For example, although the subject matter of shift-trade procedures is "covered by" the agreement *for purposes of our covered-by doctrine*, that does not necessarily mean that the parties intended the wording of the agreement to incorporate that statutory doctrine. And, even if the agreement were interpreted in that manner, that would not preclude the Arbitrator from finding that the parties modified their contractual bargaining obligations by the establishment of a contrary past practice.[89]

Therefore, a critical ambiguity exists due to the Arbitrator's failure to address contractual language that could reasonably require a result opposite to the award's finding of a contractual bargaining obligation.

The dissent's criticism of our reliance on the "critical[-]ambiguity" principle is unfounded.[90] The dissent discounts the precedential nature of "critical ambiguity," and finds no rational basis for employing it.[91] And the dissent is concerned that the principle permits the Authority to "manufacture" an ambiguity simply to create an opportunity to get a different result from an arbitrator on remand.[92] Neither concern is justified.

Contrary to the dissent's uncertainty about the rational nature of "critical ambiguity," the conditions for applying the principle are clear.[93] As the Authority reaffirmed in a recent decision citing critical-ambiguity precedent, "where it appears that [an] agreement and [an] award are inconsistent, and an arbitrator has not interpreted the relevant contract provision, the appropriate course of action is to remand because," consistent with the principles stated above, "it permits the arbitrator, who was the parties' choice to interpret and apply their agreement, to interpret in the first instance the provision that may be dispositive."[94] The dissent acknowledges that the "not-covered-by" language of Article 3 is critical.[95] That is the first step in applying the

[77] *Id.*
[78] *Id.* at 3-4.
[79] *Id.* at 9.
[80] *Id.* at 10-11 (citing *DLA*, 58 FLRA at 750).
[81] *Id.* at 13 (emphasis added).
[82] Exceptions, Ex. 3, Post-Hr'g Br. at 16.
[83] *Id.* at 15.
[84] *Id.* at 16.
[85] *AFGE*, 54 FLRA at 160 (citations omitted).
[86] *Id.*; *see Cannelton Indus. v. District 17, UMWA*, 951 F.2d 591, 594 (4th Cir. 1991).
[87] Exceptions, Ex. 3, Post-Hr'g Br. at 15.
[88] *See* Award at 2-3 (identifying Agency's arguments).
[89] *AFGE, Local 1633*, 64 FLRA 732, 734 (2010) (arbitrator may appropriately determine whether past practice modified terms of collective-bargaining agreement).
[90] Dissent at 14.
[91] *Id.*
[92] *Id.* at 15.
[93] *Id.* at 14.
[94] *SSA, Office of Disability Adjudication & Review, Region VI, New Orleans, La.*, 67 FLRA 597, 601 (2014) (Member Pizzella dissenting on other grounds) (citing *AFGE*, 54 FLRA at 160).
[95] *See* Dissent at 13.

principle. All that remains is a willingness, which the dissent disavows, to permit the Arbitrator to interpret in the first instance a provision that the award, reasonably interpreted, did not discuss.

The dissent's concern about the principle's asserted misuse is also unjustified. The dissent relies on clearly distinguishable, or inapplicable, Authority case law for support. For instance, in *SSA, Boston, Region 1*,[96] although the majority and the dissent disagreed about whether to remand an award to resolve a critical ambiguity, the principle itself was not at issue. What was at issue was "critical ambiguity's" applicability in that case, not the principle's precedential nature or validity. Additionally, *U.S. DHS, U.S. CBP, Brownsville, Texas*[97] and *U.S. DOD, Defense Logistics Agency, Defense Distribution Depot, Red River, Texarkana, Texas*[98] also do not provide a reason for concern over the misuse of the critical-ambiguity principle. Indeed, neither case mentions or employs the concept. The cases are merely examples of circumstances where the dissent differs with the other Members as to how to reasonably interpret an arbitrator's award.

As stated above, consistent with Authority precedent that the dissent acknowledges, we conclude that a critical ambiguity exists due to the Arbitrator's failure to address contractual language that could reasonably require a result opposite to the award. Accordingly, we remand the award to the parties for resubmission to the Arbitrator, absent settlement, to have the Arbitrator clarify – consistent with our decision – Article 3's applicability and whether in light of that clarification the Agency has a contractual duty to bargain in this case.[99]

V. Decision

We deny the Agency's nonfact exceptions, grant the Agency's contrary-to-law exception, and remand the award to the parties for resubmission to the Arbitrator, absent settlement, for further proceedings consistent with this decision, including, if necessary, reconsideration of what, if any, remedy is appropriate for the Agency's alleged violation of its contractual duty to bargain. We leave undisturbed the award's make-whole remedy for the grievant.

[96] 59 FLRA 671 (2004) (then-Member Pope dissenting).
[97] 67 FLRA 688 (2014) (Member Pizzella concurring).
[98] 67 FLRA 609 (2014) (Member Pizzella dissenting).
[99] Member DuBester notes the following: My dissenting colleague's comment that the majority opinion, of which I am a part, is "vacuous," reminds me of a serious automobile accident that I had a few years ago in which I banged my head. At the hospital, a thorough examination of my head was done. Subsequently, the doctor came to my room and reported, "there is nothing there."

Member Pizzella, concurring in part, dissenting in part:

I agree with the majority that Arbitrator T. Zane Reeves's award is contrary-to-law because the matter in dispute is covered by Article 28 of the parties' agreement.

However, as I noted in my dissent in *U.S. DOJ, Federal BOP, Federal Correctional Complex, Terre Haute, Indiana*, "I do not believe that a contractual provision that simply repeats the Bureau's [statutory] obligation to bargain creates a separate bargaining obligation."[1] Therefore, to the extent that the majority interprets our covered-by precedent as permitting such a dichotomous result, I agree with Member DuBester's dissenting opinion in *NTEU, Chapter 160* wherein he posited that the Authority's covered-by precedent warrants a "fresh look."[2] I would go even further. Our precedent on this point is in need of a serious overhaul, and this case presents the perfect opportunity for the Authority to do so.

Accordingly, even if I were to presume as my colleagues do that a separate-contractual-bargaining obligation may be found when a matter in dispute is covered by the parties' agreement, I do not agree that a remand is warranted under the circumstances of this case.

Before the Arbitrator, the Agency specifically argued "that Article 3's bargaining requirement *did not apply* because . . . [its] plain language . . . is only applicable to issues '*not covered by the* [*parties' agreement*].'"[3] In his award, Arbitrator Reeves found that "the Agency *clearly violated* [*Article*] *3.A*."[4] It is inexplicable to me, therefore, how the majority now concludes that "[t]he Arbitrator's award *fails to acknowledge* the Agency's argument concerning Article 3."[5]

Make no mistake, the Arbitrator was WRONG when he made his determination. But there is no question that he addressed the Agency's argument. His finding of a violation of a nonexistent contractual-bargaining obligation is not a plausible interpretation of Article 3.A. Article 3 unmistakably provides that any obligation the Agency may have to bargain only applies to issues "*not covered by* [*the parties'*] *agreement*."[6] Therefore, the Arbitrator's determination does *not* draw its essence from the parties' agreement.

In such cases, the Authority's longstanding precedent dictates that the award is vacated, *not remanded.*

I do not agree that there is any legitimate basis which would support a remand in this case. But, in order to justify a remand, the majority invokes a rationale that has been mentioned *only twice* in the annals of the Authority (and was soundly criticized in one of those by then-Member Pope in a dissent which is discussed below) and suggests that the Arbitrator's award creates a "critical ambiguity."[7] The majority then invites the Arbitrator to try again to find a different violation of the parties' agreement because in their view a second look *just might* "*require* a *result opposite* to the award."[8]

I was not aware that Authority precedent permitted a Mulligan-style do-over just because the Arbitrator failed to find a supportable violation.

The problem here is not that the award is *ambiguous*; the problem is that the Arbitrator's award is *WRONG.* And his wrong decision is not supported by either law or the clear language of the parties' agreement. The Arbitrator found that "the Agency clearly violated [Article] 3.A"[9] even though that provision only requires bargaining over matters "*not covered by* [the parties'] agreement."[10] There is just one problem though. The portion of the decision, with which my colleagues and I agree, specifically concludes that the matter over which the Union wants to bargain *is covered by* Article 28.[11]

To reach their vacuous conclusion, the majority applies a concept – "critical contract terminology" – which first was mentioned in a single, but otherwise inconsequential, 1998 Authority decision.[12] Then, except for one other case, which used an entirely *different* term − "critical ambiguity"[13] – to describe the concept, the principle has been ignored entirely, and never used again,

[1] 67 FLRA 697, 702 (2014) (Dissenting Opinion of Member Pizzella)

[2] *Id*. ("the Authority's use of the covered-by standard warrants a fresh look" (quoting *NTEU, Chapter 160*, 67 FLRA 482, 487 (2014) (Dissenting Opinion of Member DuBester))).

[3] Majority at 10 (emphasis added) (citing Exceptions, Ex. 3, Post-Hr'g Br. at 15).

[4] Award at 13 (emphasis added).

[5] Majority at 10 (emphasis added).

[6] Award at 4 (emphasis added).

[7] *See* Majority at 11.

[8] *Id*. at 12 (emphasis added). But Member Pizzella notes that the Authority's Regulations do not permit "advisory opinions." 5 C.F.R. § 2429.10.

[9] Award at 13.

[10] *Id*. at 4 (citing Art. 3.A.) (emphasis added).

[11] Majority at 7-9.

[12] *AFGE, Council 220*, 54 FLRA 156, 160 (1998) (*AFGE, Council 220*).

[13] *SSA, Bos. Region 1*, 59 FLRA 671, 672 (2004) (*SSA Boston*) (then-Member Pope dissenting).

by the Authority until it was pulled down from the forgotten recesses of the Authority's attic today.[14]

But the majority fails to address the irony that it was (not me, as is asserted by the majority[15] but rather) then-Member Pope in *SSA, Boston Region 1* (*SSA Boston*), who expressed the original uncertainty about and criticism of the Authority's application of the "critical[-]ambiguity" principle. In her dissent in *SSA Boston*, then-Member Pope asserted, in no unmistakable terms, that there is "*no rational basis*" for refusing to resolve an exception when an "award fails to draw its essence from the [parties'] agreement."[16] Then-Member Pope in her sharply-worded dissent asserted that "critical ambiguity" is a "sham" because it permits the majority to "manufacture[] a 'critical ambiguity'" in order to create one more opportunity to get *a different result* from an arbitral award with which it disagrees.[17]

I only can say *"Brava!"* to then-Member Pope. I could not have said it any better and am pleased that we share the same concerns.

Just as then-Member Pope pointed out in *SSA Boston* that there was *no rational basis* to *not* resolve the agency's essence exception, there similarly is *no rational basis not* to resolve the Agency's essence exception in this case. If the "ambiguity" in *SSA Boston*, as was pointed out by then-Member Pope, was simply "manufacture[d]"[18] by the majority to justify a remand in order to get a different result, it then follows that the purported "*ambiguity*,"[19] in this case − wherein the Arbitrator erroneously found that "the Agency *clearly violated* [Article] 3.A."[20] − is similarly *manufactured* in order to get a different result.

It is baffling, therefore, that the majority is unwilling to make a definitive decision in this case (in which there is no ambiguity), whereas in other cases (in which an arbitrator *does not make* a clear decision) the majority will simply "fill in the gaps that are left open by [an] [a]rbitrator who fail[s] to finish [his] job"[21] and will find "*implicitly*" a violation even when the arbitrator found no violation.[22] For example, in *U.S. DOD, Defense Logistics Agency, Defense Distribution Depot, Red River, Texarkana, Texas* (*DLA Red River*), the majority concluded that the arbitrator "*implicitly found*" a violation of a specific article in the parties' agreement even though the article was never mentioned by the arbitrator in the award.[23] And, in *U.S. DHS, U.S. CBP, Brownsville, Texas* (*CBP Brownsville*), the majority determined that the arbitrator *specifically* "found" a violation of a specific provision in the parties' agreement even though that provision was never mentioned by the parties in their submissions or by the arbitrator in his award.[24]

In contrast to those cases, Arbitrator Reeves in this case *actually* and *specifically found* (not implicitly or by inference) that "the Agency *clearly violated* [Article] 3.A."[25] I have already stated that I believe that conclusion is wrong. But it is apparent that my colleagues also believe that Arbitrator Reeves was wrong, otherwise they would not believe it is necessary to remand the case. It is a mystery, then, why the majority does not simply address and resolve the Agency's exception as they did in both *DLA Red River* and *CBP Brownsville* and definitively conclude – one way or the other – that the Arbitrator's interpretation of Article 3.A. does or does not draw its essence from the parties' agreement. By failing to do so, the majority brings "more confusion and less stability to an important area of the law."[26]

The question, then, is not as the majority asserts whether "to permit the Arbitrator to interpret in the first instance a provision that the award, reasonably interpreted [(or in other words "implicitly")] did not discuss."[27] The question that should be asked is why the majority attempts to resurrect a dormant concept, which has been mentioned *only twice* in the history of the Authority – in *AFGE, Council 220*[28] and *SSA Boston* (criticized by then-Member Pope) − to justify a remand to try to get a different outcome *in this case*?

---

[14] Majority at 11 (citing *SSA Boston*, 59 FLRA at 672 (then-Member Pope dissenting)) ("although the majority and the dissent disagreed about whether to remand an award to resolve a critical ambiguity, the principle itself was not at issue").

[15] *Id.*

[16] 59 FLRA at 674 (emphasis added).

[17] *Id.* at 673.

[18] *Id.*

[19] Majority at 11 (emphasis added).

[20] Award at 13 (emphasis added).

[21] *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 693 (2014) (*CBP Brownsville*) (Concurring Opinion of Member Pizzella).

[22] *Id.* (emphasis added) (citing *U.S. DOD, Def. Logistics Agency, Def. Distrib. Depot, Red River, Texarkana, Tex.*, 67 FLRA 609, 617 (2014) (*DLA Red River*) (Dissenting Opinion of Member Pizzella)).

[23] 67 FLRA at 611 (Member Pizzella dissenting) (emphasis added).

[24] 67 FLRA at 693.

[25] Award at 13 (emphasis added).

[26] *SSA*, 59 FLRA 257, 259 (2003) (Dissenting Opinion of then-Member Pope).

[27] Majority at 11.

[28] 54 FLRA at 160.

My colleagues insist that my position is not "consistent with Authority precedent" but they look to *SSA, Office of Disability Adjudication & Review, Region VI, New Orleans, Louisiana* (*SSA New Orleans*)[29] as support for their miraculous resurrection of "critical ambiguity."[30] Strangely, however, that case makes *no mention*, either implicitly or explicitly, of "critical ambiguity"[31] or "critical contract terminology."[32] I dare say that if a union or agency were to make a similar argument in a filing before the Authority, the majority without any doubt would summarily refuse to consider that case as precedent because the decision in *SSA New Orleans* did not "*use [that] precise language or [those] 'particular' words*."[33]

I agree with then-Member Pope's dissent in *SSA Boston* which asserted that "there is no rational basis" for remanding a case because of a purported "ambiguity" when "the award fails to draw its essence from the [parties' agreement]."[34] In other words, "critical ambiguity" permits the Authority to do whatever it wants to do with an award with which it does not agree.

I would address the Agency's essence exception directly. The Arbitrator's interpretation of Article 3.A. is not a plausible interpretation of that provision.

Thank you.

[29] 67 FLRA 597, 601 (2014) (Member Pizzella dissenting).
[30] Majority at 11.
[31] *Id*. at 11.
[32] *Id*. at 10.
[33] *CBP Brownsville*, 67 FLRA at 693 (emphasis added).
[34] *SSA Boston*, 59 FLRA at 673 (Dissenting Opinion of then-Member Pope).