69 FLRA No. 3

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL MEDICAL CENTER
LEXINGTON, KENTUCKY
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS #33
LOCAL 817
(Union)

0-AR-5107

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DECISION

October 16, 2015

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

I. Statement of the Case

The Agency staffs its nursing department with two groups of nurses. One group belongs to a bargaining unit that is represented by the Union and covered by the parties' collective-bargaining agreement (unit nurses), and the other group is part of the U.S. Public Health Service Commissioned Corps (service nurses) and excluded from representation by the Federal Service Labor-Management Relations Statute (the Statute).[1] Arbitrator Jerry B. Sellman found that, under Article 18 of the parties' agreement (Article 18), the Agency was required to post a roster of available assignments that the unit nurses could bid on before the Agency scheduled other employees for those assignments. The Arbitrator also found that the Agency violated Article 18 by reserving some assignments for service nurses rather than allowing unit nurses to bid on a full roster containing all of the assignments in the nursing department. There are four substantive questions before us.

The first question is whether the Arbitrator's interpretation of Article 18 fails to draw its essence from the parties' agreement. Because the Agency does not establish that the Arbitrator's interpretation of Article 18 is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement, the answer is no.

The second question is whether the award is based on two nonfacts because, according to the Agency, the Arbitrator found that: (1) Article 18 "permits the [unit nurses] to submit their requests on a full roster";[2] and (2) the Agency allowed the service nurses to participate in the Article 18 bidding process. The first alleged nonfact involves the Arbitrator's interpretation of Article 18, which does not constitute a fact that can be challenged as a nonfact. And the Agency does not demonstrate that the second alleged nonfact is central to the award. Therefore, the answer is no.

The third question is whether the award is contrary to law because the Arbitrator's interpretation of Article 18 violates management's rights under § 7106 of the Statute.[3] We assume, without deciding, that the Agency sufficiently raises a claim that the award affects management's rights to assign work and assign employees. However, the Agency does not argue that the Article 18 roster procedures are not an enforceable exception to management's exercise of its rights under § 7106(b) of the Statute. Thus, the answer is no.

The fourth question is whether the award is contrary to law because it would require the Agency to violate the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).[4] USERRA prohibits discrimination against a current or former member of the uniformed services based on that membership. Here, because the award denies the service nurses a benefit based on their non-bargaining unit status – not their current or former membership in the uniformed services – the Agency has not demonstrated that the award requires the Agency to violate USERRA.

II. Background and Arbitrator's Award

Article 18 provides, in pertinent part, that the Agency must post a roster to give unit nurses "advance notice of assignments, days off, and shifts that are available" so that unit nurses can bid on assignments before the Agency schedules any other employees to staff those assignments.[5] The Union filed a grievance alleging that the Agency posted a roster that did not include all of the "available job assignments" for bidding, but reserved

[1] 5 U.S.C. § 7103(a)(2)(ii).

[2] Exceptions at 18 (internal quotation marks omitted).
[3] 5 U.S.C. § 7106.
[4] 38 U.S.C. §§ 4301-4335.
[5] Award at 11.

certain assignments for service nurses.[6] The grievance went to arbitration.

At arbitration, the Arbitrator framed the issue, in relevant part, as whether the Agency violated Article 18 when it allowed service nurses to bid on assignments before unit nurses.[7]

The Arbitrator found that although the Agency has the right to determine the type – i.e., the "classification and qualification" – and number of jobs that are "available on each available shift," after making those determinations, it must follow the bidding "procedure" established by Article 18.[8] In this regard, the Arbitrator found that Article 18 requires the Agency to allow unit nurses to bid "on a full roster."[9] The Arbitrator further found that, instead of posting a full roster of all available assignments, the Agency "manipulate[d] bid[ding] opportunities" by reserving certain assignments for service nurses before allowing unit nurses to bid on the roster.[10]

Consequently, the Arbitrator concluded that the Agency violated Article 18 by not posting all assignments for unit nurses to bid upon. In reaching that conclusion, the Arbitrator rejected the Agency's argument that it had a management right to set aside certain assignments for service nurses because it was unfair for the service nurses to have only the "leftovers" after the unit nurses had finished bidding on assignments.[11] Additionally, the Arbitrator found that by "giving preferential treatment" to service nurses, the Agency permitted the service nurses "to participate in a right conferred by a collective[-]bargaining agreement" in violation of the Statute and Article 18.[12]

As a remedy, the Arbitrator directed the Agency to follow the roster procedures in Article 18 and refrain from reserving certain assignments for service nurses. The Agency argued to the Arbitrator that this remedy would require it to discriminate against employees based on their status in the uniformed services, in violation of USERRA. However, the Arbitrator found that this remedy did not violate USERRA because it merely enforced "a contractual right put in place exclusively for bargaining-unit staff."[13]

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

[6] *Id.* at 12.
[7] *Id.* at 3.
[8] *Id.* at 30.
[9] *Id.* at 31.
[10] *Id.* at 30.
[11] *Id.* at 28-29 (internal quotation marks omitted).
[12] *Id.* at 30.
[13] *Id.* at 33.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar some of the Agency's arguments.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, exceptions may not rely on "any evidence, factual assertions, [or] arguments . . . that could have been, but were not, presented to the arbitrator,"[14] and the Authority "will not consider any [such] evidence, factual assertions, [or] arguments."[15]

First, the Agency argues that the award is contrary to *Federal BOP v. FLRA* (*BOP*).[16] In this regard, the Agency argues – in both its essence and nonfact exceptions – that the Arbitrator's interpretation of Article 18 is inconsistent with *BOP*.[17] Additionally, the Agency cites *BOP* in support of its argument that the award is contrary to management's rights under § 7106 of the Statute.[18]

The Union argued before the Arbitrator that Article 18 contained negotiated procedures on how management would exercise its right to assign work.[19] The Union requested that the Arbitrator find that, under those Article 18 procedures, unit nurses were permitted to bid on all assignments on the roster before the Agency scheduled service nurses for assignments.[20] Although the issue before the Arbitrator was the interpretation of Article 18,[21] and the Agency could have raised *BOP*'s interpretation of Article 18 below, there is no record evidence that the Agency cited, or otherwise raised, *BOP* before the Arbitrator. Thus, §§ 2425.4(c) and 2429.5 of the Authority's Regulations bar the Agency from making arguments based on *BOP* before the Authority.[22] Accordingly, we do not consider the Agency's essence, nonfact, and contrary-to-law arguments that rely on *BOP*, and we dismiss those portions of the Agency's exceptions.

Second, the Agency argues in its contrary-to-law exception that the Authority should set the award aside because leaving the award intact "would likely result in a mass exodus" of service nurses.[23] The Union states in its opposition that the Agency raises this argument for the

[14] 5 C.F.R. § 2425.4(c).
[15] *Id.* § 2429.5.
[16] Exceptions at 12-14, 18-19 (citing *BOP*, 654 F.3d 91 (D.C. Cir. 2011)).
[17] *Id.* at 12-14, 18-19.
[18] *Id.* at 19-21.
[19] Award at 15-16.
[20] *Id.* at 16-17.
[21] *Id.* at 3.
[22] *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Terre Haute, Ind.*, 67 FLRA 697, 699 (2014) (citing *AFGE, Local 1546*, 65 FLRA 833, 833 (2011)).
[23] Exceptions at 22.

first time in its exceptions.[24] At arbitration, the Agency was aware that the Union asked the Arbitrator to find that Article 18 gave unit nurses the right to bid on all roster assignments before service nurses.[25] Therefore the Agency could have made its argument regarding the possible effects of such a finding before the Arbitrator. However, there is no record evidence that the Agency did so. Accordingly, it is barred from making such argument before the Authority, and we do not consider it.[26] Therefore, we dismiss this portion of the Agency's contrary-to-law exception.

IV. Analysis and Conclusions

A. The award does not fail to draw its essence from Article 18.

The Agency argues that the award fails to draw its essence from Article 18.[27] To demonstrate that an award fails to draw its essence from a collective-bargaining agreement, an excepting party must establish that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement.[28] 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."[29] Where an arbitrator interprets a collective-bargaining agreement as imposing a particular requirement, the agreement's silence with respect to that requirement does not demonstrate, by itself, that the arbitrator's award fails to draw its essence from the agreement.[30] Further, the Authority has found that where an arbitrator's interpretation of contract language is one of several possible interpretations, it will not find that the arbitrator's interpretation fails to draw its essence from the agreement.[31]

The Agency challenges the Arbitrator's finding that Article 18 requires the Agency to allow unit nurses to bid on a full roster.[32] Article 18 states, in relevant part, that "a blank roster . . . will be posted . . . for the purpose of giving . . . employees advance notice of assignments, days off, and shifts that are *available*."[33] The Agency asserts that the Arbitrator misinterpreted the meaning of "available" because the "plain language of Article 18" does not require the Agency to post a roster of "all available positions" or a "full roster of all available positions," or to "make sure [unit nurses] will have access to every possible position or post . . . that they are qualified for."[34] In this connection, the Agency argues that "available" means only those posts that the Agency has reserved for unit nurses, not every post in the department.[35]

[24] Opp'n at 21.
[25] Award at 3.
[26] 5 C.F.R. §§ 2425.4(c), 2429.5.
[27] Exceptions at 9-15.
[28] *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990) (*OSHA*); *see also NTEU, Chapter 32*, 67 FLRA 354, 355 (2014).
[29] *OSHA*, 34 FLRA at 576.
[30] *U.S. Dep't of VA, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 58 FLRA 413, 414 (2003).
[31] *E.g.*, *U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 56 FLRA 1057, 1061 (2001) (*Army*).
[32] Exceptions at 9-10.
[33] Award at 6 (emphasis added).
[34] Exceptions at 9-10 (internal quotation marks omitted).
[35] *Id.*

Article 18 is silent as to the meaning of "available."[36] The Arbitrator found that after management determines the type and number of assignments needed on each shift in the nursing department, all of those assignments are "available" for unit nurses to bid on under Article 18.[37] The Arbitrator's interpretation, while not the only possible interpretation, is not irrational, unfounded, implausible, or in manifest disregard of the agreement.[38] Thus, the Agency does not demonstrate that the award fails to draw its essence from Article 18.[39]

B. The award is not based on a nonfact.

The Agency argues that the award is based on two nonfacts because the Arbitrator allegedly found that: (1) Article 18 "permits the [unit nurses] to submit their requests on a full roster";[40] and (2) the Agency allowed the service nurses to participate in the Article 18 bidding process.[41] 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.[42] However, an arbitrator's interpretation of a collective-bargaining agreement does not constitute a fact that can be challenged as a nonfact.[43]

First, the Agency challenges the Arbitrator's finding that Article 18 requires the Agency to post a "full roster" for unit nurses to bid upon.[44] For support, the Agency reiterates its essence argument – that nothing in the "plain language of Article 18" creates a "full roster" requirement.[45] But we have denied the Agency's essence exception above. And because the Arbitrator's interpretation of Article 18 does not constitute a fact that can be challenged as a nonfact, we find that the award is not based on a nonfact in this regard.[46]

Second, the Agency argues that the Arbitrator erroneously found that the Agency allowed service nurses to participate in the Article 18 bidding process, when there were actually two separate bidding processes.[47] The Agency asserts that, but for the Arbitrator's failure to find that the Agency used separate bidding procedures for the unit nurses and the service nurses, he would not have been able to find a violation of Article 18.[48]

The Arbitrator found that Article 18 required that a full roster – in other words, *all* the available assignments in the nursing department – be available for unit nurses to bid on.[49] Consequently, the Arbitrator's finding *that* the Agency allowed service nurses to bid on any part of that roster before unit nurses – not *how* service nurses bid on assignments – was central to his finding that the Agency violated Article 18. And the Agency concedes that it permitted service nurses to bid on certain assignments before unit nurses.[50] Therefore, even if the Arbitrator found that the service nurses participated in the Article 18 bidding procedures rather than a separate bidding process, that finding is not a central fact underlying the award. Accordingly, the Agency has not established that the award is based on a nonfact in this respect.

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[36] Award at 6.
[37] *Id.* at 30.
[38] *Army*, 56 FLRA at 1061.
[39] Member DuBester notes the following: The dissent makes several arguments that are worthy of comment. However, one point in particular is a recurring theme in the dissent's opinions in the recent series of cases involving these parties. The dissent's reliance on the D.C. Circuit's decision in *BOP* to find, among other things, that the award fails to draw its essence from the parties' agreement, Dissent at 12, and the dissent's conclusion "that the award is contrary to *BOP*[]," *id.* at 15, reflects a fundamental misunderstanding of the limits of the court's holding. The dissent fails to acknowledge, and apparently overlooks, that *BOP* dealt exclusively with an agency's statutory duty to bargain under the "covered-by" doctrine. But the Agency's statutory duty to bargain is not at issue here. In the words of the D.C. Circuit in a later case distinguishing, and rejecting, an agency's reliance on *BOP*, the dissent's claims "misconstrue[] the 'covered by' defense, which applies only to statutory duties. Simply put, the 'covered by' defense respects the bargain the parties struck." *Broad. Bd. of Governors, Office of Cuba Broad. v. FLRA*, 752 F.3d 453, 458 (D.C. Cir. 2014). So "[i]t would make little sense to consider such a defense when evaluating a purported contractual duty, since contractual duties are themselves products of the very bargaining the 'covered by' defense is designed to respect." *Id.* As the Authority and the courts have held, "[u]nder the 'covered-by' doctrine, questions about a party's compliance with agreed-upon contract provisions are 'properly resolved through the contractual grievance procedure.'" *U.S. DOJ, Fed. BOP, Fed. Det. Ctr., Miami, Fla.*, 68 FLRA 61, 64 (2014) (quoting *Dep't of the Navy v. FLRA*, 962 F.2d 48, 61 (D.C. Cir. 1992) (citations omitted)). The Arbitrator in this case did just that: he resolved a question about the Agency's compliance with the agreed-upon contract provision at issue here. Accordingly, *BOP* does not support the dissent's claims.
[40] Exceptions at 18.
[41] *Id.* at 16.
[42] *NFFE, Local 1984*, 56 FLRA 38, 41 (2000).
[43] *NLRB*, 50 FLRA 88, 92 (1995) (*NLRB*).
[44] Exceptions at 18.
[45] *Id.*
[46] *U.S. DOJ, Fed. BOP, Fed. Det. Ctr., Miami, Fla.*, 68 FLRA 61, 65 (2014) (citing *NLRB*, 50 FLRA at 92); *SPORT Air Traffic Controllers Org.*, 66 FLRA 552, 554 (2012) (citation omitted).
[47] Exceptions at 16-17.
[48] *Id.* at 17-18.
[49] Award at 30, 34.
[50] *Id.* at 16.

C. The award is not contrary to law.

The Agency argues that the award is contrary to law in two respects,[51] which are discussed separately below. When an exception involves an award's consistency with law, rule, or regulation, the Authority reviews any question of law de novo.[52] In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[53] In making that assessment, the Authority defers to the arbitrator's underlying factual findings, unless the excepting party establishes that they are nonfacts.[54]

1. The award is not contrary to § 7106 of the Statute.

The Agency argues that the Arbitrator's interpretation of Article 18 is contrary to law because determining which assignments are "available" to unit nurses is a management right.[55] When a party alleges that an arbitrator's award is contrary to § 7106(a) of the Statute, the Authority first assesses whether the award affects the exercise of the asserted right.[56] If the award affects the right, then the Authority examines, as relevant here, whether the award provides a remedy for a contract provision negotiated under § 7106(b).[57] In conducting this examination, the Authority relies on the excepting party's claims to frame the issue that the Authority must decide.[58] Under the Authority's case law, an award enforcing a contract provision will not be found deficient under § 7106(a) absent a claim that the contract provision was not negotiated under § 7106(b) of the Statute.[59] The Authority places the burden on the party arguing that the award is contrary to management rights to allege not only that the award affects a right under § 7106(a), but also that the agreement provision that the arbitrator has enforced is not the type of contract provision that falls within § 7106(b) of the Statute.[60]

Here, the Agency asserts in its essence exception that Article 18 consists of "appropriate arrangements and procedures to be applied when the Agency exercises its reserved management rights to assign work and employees."[61] In its contrary-to-law exception, the Agency asserts generally that the award is contrary to management's "right to assign."[62] We assume, without deciding, that, taken together, these assertions are sufficient to raise an argument that the award affects management's rights to assign work and assign employees. Nevertheless, the Agency does not argue that Article 18's roster provision (described as a "procedure" by both the Arbitrator[63] and the Agency[64]) is not an enforceable exception to management's exercise of its rights under § 7106(b) of the Statute. Consequently, consistent with the principles set forth above, we find that the Agency's management's rights argument does not demonstrate that the Arbitrator's enforcement of Article 18 is contrary to § 7106 of the Statute.[65]

2. The Agency does not demonstrate that the award is contrary to USERRA.

The Agency argues that the award is contrary to USERRA because the award requires the Agency to "deny [the service nurses] a benefit of employment."[66] As relevant here, USERRA provides that a current or former "member of . . . a uniformed service shall not be denied . . . any benefit of employment by an employer on the basis of that membership."[67] A "benefit of employment" is a "term[], condition[], or privilege[] of employment . . . that accrues by reason of an employment contract or agreement . . . and includes . . . the opportunity to select work hours or location of employment."[68] USERRA also provides that an employer can defeat a claim that it violated the statute by demonstrating that it would have taken the allegedly illegal action in the absence of the affected individual's uniformed-service membership.[69]

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[51] Exceptions at 19-25.
[52] *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)).
[53] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[54] *U.S. DHS, U.S. CBP, Laredo, Tex.*, 66 FLRA 567, 567-68 (2012).
[55] Exceptions at 21-22.
[56] *SSA, Office of Disability Adjudication & Review, Region VI, New Orleans, La.*, 67 FLRA 597, 602 (2014) (*SSA*) (Member Pizzella dissenting) (citing *U.S. EPA*, 65 FLRA 113, 115 (2010) (Member Beck concurring)).
[57] *Id.*
[58] *Id.*
[59] *Id.* (citing *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102, 107 (2010) (Chairman Pope concurring, in part)); *see also U.S. DOJ, Fed. BOP*, 68 FLRA 311, 315 (2015) (*DOJ*) (Member Pizzella dissenting) (citing *SSA*, 67 FLRA at 602).
[60] *SSA*, 67 FLRA at 602 (citation omitted); *see also DOJ*, 68 FLRA at 315 (citation omitted).
[61] Exceptions at 10-11.
[62] *Id.* at 21.
[63] Award at 30.
[64] Exceptions at 11.
[65] *DOJ*, 68 FLRA at 315.
[66] Exceptions at 24 (internal quotation marks omitted).
[67] 38 U.S.C. § 4311(a).
[68] *Id.* § 4303(2).
[69] *Id.* § 4311(c)(1).

Here, to comply with the award, the Agency must not set aside assignments for *any* non-bargaining unit employees before the unit nurses bid on a full roster, regardless of the employees' uniformed-service membership.[70] As discussed above, USERRA prohibits discrimination against a current or former member of the uniformed services based on that membership.[71] In this case, because the award denies the service nurses a benefit based on their non-bargaining unit status – not their current or former membership in the uniformed services – the Agency has not demonstrated that the award requires the Agency to violate USERRA. Thus, the Agency's argument provides no basis for finding the award contrary to USERRA.

V. Decision

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

[70] Award at 34.
[71] 38 U.S.C. § 4311(a).

Member Pizzella, dissenting:

Norman Vincent Peale was renowned for his encouragement to think positively and to never give up when pursuing one's goals.[1] According to Dr. Peale, "[i]t's always too soon to quit."[2]

It seems that AFGE, Council 33 may have taken Dr. Peale's advice a bit too literally. This is now the *ninth* time that Council 33 has grieved a variation of the same arguments concerning just one article (Article 18) contained in their national agreement with the Bureau of Prisons (Bureau).[3]

Seeming to channel the proverbial cat of nine lives (of which famed French philosopher, Michel de Montaigne, warned all cat owners, "[i]n nine lifetimes, you'll never know as much about your cat as your cat knows about you"[4]) Council 33 believes that it knows a lot more about Article 18 than does the Bureau. In this case, Council 33, yet again, takes the very same "remarkably clear and simple provision (Article 18(d)) [which also was at issue in *U.S. DOJ, Federal BOP* (*BOP IV*)[5]] and tries to turn it into something that does not even resemble the plain words it negotiated."[6]

Council 33 has been enabled, in this never-ending pursuit of redundancy, by arbitrators and the majority who are never willing to say that enough is enough. When Dr. Peale spoke and wrote about the virtues of persistence, he could never have imagined a scenario where Council 33's Quixotic quest, every step of the way, would be paid for by the American taxpayer in the form of union official time, lost productivity, and arbitrator fees – all over questions which the U.S. Court of Appeals for the District of Columbia Circuit (the court) put to rest four years ago.[7]

I am equally convinced that is not what Congress had in mind when it encouraged federal unions and agencies to use the collective-bargaining process to

[1] https://en.wikipedia.org/wiki/Norman_Vincent_Peale.
[2] http://www.brainyquote.com/quotes/quotes/n/normanvinc100962.html.
[3] 68 FLRA 311, 316 (2015) (*BOP IV*) (Dissenting Opinion of Member Pizzella) (citing *U.S. DOJ, Fed. BOP, Fed. Detention Ctr., Miami, Fla.*, 68 FLRA 61, 66 (2014) (*BOP III*) (Dissenting Opinion of Member Pizzella)).
[4] http://www.brainyquote.com/quotes/quotes/m/micheldemo385790.html.
[5] 68 FLRA at 316.
[6] *Id*.
[7] *See Fed. BOP v. FLRA*, 654 F.3d 91, 95 (D.C. Cir. 2011) (*BOP II*).

"facilitate[] . . . the amicable settlement[] of disputes."[8] In this respect, Council 33, represented by National Vice President, Sandy Parr, sounds a lot more like "Zack" Mayo (played by Richard Gere in the movie *An Officer and a Gentleman*) – "You can kick me outta here, but I ain't quitting!"[9] – than Norman Vincent Peale.

In 2011, after Council 33's sixth redux at trying to give new meanings to the plain language of individual sections of Article 18, the court noted that Article 18 was a "complete rewrite" of all procedures concerning the assignment of work including the "publication of *available* posts."[10] Putting an end to Council 33's Quixotic quest, the court held that Article 18 "preempts challenges to *all specific outcomes* of the assignment process" including the posting of rosters,[11] the very issue which Council 33 raised earlier this year in *BOP IV* and raises again today.

Within the Bureau there are two types of medical care professionals. Some are nurses employed by the Bureau and belong to the AFGE, Council 33 bargaining unit (unit nurses).[12] Other "highly qualified" medical personnel, of the Commissioned Corps of the U. S. Public Health Service under the command of the Assistant Secretary of Health and Surgeon General (PHS nurses),[13] are assigned to provide "high level" medical care throughout the Bureau[14] (including work that may only be performed by dentists, pharmacists, therapists, social workers, and physician assistants).[15] Council 33 admits that PHS nurses fill positions which are "hard to hire" and for which unit nurses do not qualify[16] but apparently has been annoyed by the presence, and competition, of PHS nurses "for many years."[17]

As I noted in *BOP IV*, Article 18(d) is not complicated. It requires the Bureau to post "shifts that are ***available*** for which [in this case, unit nurses] will be given the opportunity to submit their *preference* requests."[18] Despite this clear language, Council 33 argues, as they did in *BOP IV*, that Article 18(d) requires the Bureau to open[19] for bidding, not just those shifts that are "available" (i.e., shifts that do not require the expertise of PHS nurses), but even those which the Bureau has determined, as in this case, require the particular expertise of PHS nurses.[20]

Contrary to the assertions of Council 33, all shifts and assignments are not, and cannot be, made "available" to unit nurses. The plain language of Article 18(d) does not require that all shifts be offered to them. Rather, the determination of which shifts and posts require the expertise of PHS nurses is as much an internal-security matter protected by 5 U.S.C. § 7106(a)(1)[21] as it is encompassed by the right of the Bureau to assign work under 5 U.S.C. § 7106(a)(2)(B).

But Arbitrator Jerry Sellman and the majority (again) ignore the plain language of Article 18(d) and effectively strip the term "available" of any commonsense meaning. According to Arbitrator Sellman and the majority, the Bureau must make "all" shifts "available" for bidding, not according to the specific medical requirements or security needs of the Bureau or the medical attention required to attend to the medical needs of inmates, but according to the "preference" of unit nurses.[22] In other words, Arbitrator Sellman and the majority determine that the personal preferences of Council 33 and its unit nurses are more important than and effectively supersede the Bureau's rights which are preserved by § 7106(a).

Therefore, unlike my colleagues, I would conclude that the award is not a plausible interpretation of the plain language of Article 18(d).

I would also conclude that the award is contrary to the Bureau's right "to determine . . . internal security practices"[23] and the right "to assign work."[24]

The majority goes out of its way to avoid addressing these significant issues. In one clever avoidance maneuver, the majority determines that it need not address the Bureau's argument that the Arbitrator's interpretation of Article 18 is contrary to its right to assign work or the court's holding in *BOP II* because there is "no record evidence that [the Bureau] cited, or otherwise raised, *BOP* [*II*] before the Arbitrator."[25] In another maneuver, the majority avoids the issue by asserting that "the [Bureau] *does not argue* that Article 18's roster provision (described as a 'procedure' by both the Arbitrator and the Agency) is not an

[8] 5 U.S.C. § 7101(a)(1)(C).
[9] https://m.imdb.com/title/tt0084434/quotes An_Officer_and_a_Gentleman.
[10] *BOP II*, 654 F.3d at 96 (emphasis added) (internal quotation marks omitted).
[11] *Id*. (emphasis added).
[12] Award at 11.
[13] http://www.usphs.gov/aboutus/; *see also* Exceptions at 4-5.
[14] Exceptions at 6.
[15] *Id*.
[16] Union Post-Hr'g Br. at 16.
[17] Award at 16.
[18] *Id*. at 6 (emphasis added) (citing Art. 18 (d)(2)).
[19] *Id.* at 14-16.
[20] *Id*. at 20-21.
[21] *Id*. at 21-22; Agency Post-Hr'g Br. at 8.
[22] Majority at 5-6; Award at 33-34.
[23] 5 U.S.C. § 7106(a)(1).
[24] *Id*. § 7106(a)(2)(B).
[25] Majority at 4.

enforceable exception to management's exercise of its rights under § 7106(b)."[26]

I disagree with my colleagues in both respects.

As I noted in *SSA, Office of Disability Adjudication & Review, Region VI, New Orleans, Louisiana* (*SSA New Orleans*):[27]

> I do not believe that the Authority should go out of its way to catch parties in technical trapfalls and summarily dismiss otherwise meritorious arguments.[28] To do so, most certainly does not "utilize the Statute to create positive working relationships and resolve good-faith disputes" or to promote "the effective conduct of government business."[29] The United States Circuit Court of Appeals for the District of Columbia Circuit apparently shares the same sentiment. In a recent decision, the Court criticized the Authority for arguing that the union had waived an argument simply because the union failed to use the right combination of words in the exceptions it had previously filed with the Authority.[30] The Court noted that "a party is not required to invoke 'magic words' in order to adequately raise an argument before the Authority. Instead, an argument is preserved if the party has *fairly brought* the argument 'to the Authority's attention.'"[31]

As in *SSA New Orleans*, the majority traps the Bureau in "a proverbial catch-22."[32] The Agency cannot argue that Article 18 is *not* a "procedure" because, as noted by the court in *BOP II*, both the Bureau and the Arbitrator (and presumably Council 33 as well), "understand Article 18 *to be* a *procedural* provision."[33] (Oddly, in *BOP II* only the majority disagreed that Article 18 was a procedure. The court, however, corrected the majority and noted that it was the Bureau, not the majority, which properly characterized and interpreted Article 18.[34] Therefore, it is entirely understandable that the majority would try in this case to avoid addressing, directly or indirectly, the Bureau's arguments on this point.)

Therefore, even if I were to presume, as do my colleagues, that our precedent establishes a prerequisite to assert that a contract provision "is not an enforceable exception to management's exercise of its rights under § 7106(b),"[35] I do not agree that the Agency failed to "demonstrate that the Arbitrator's enforcement of Article 18 is contrary to § 7106 of the Statute."[36]

The Bureau argues that when Arbitrator Sellman concluded that *all* shifts, even those which the Bureau had determined require the particular expertise of PHS nurses,[37] must be made "available" to unit nurses, he substituted his own personal assessment concerning the Bureau's internal-security determinations for those which were made by the Bureau.[38] Incredibly, Arbitrator Sellman found "[t]here is *no basis* for concluding that [PHS nurses] *need to be assigned* to positions over [unit nurses] *for security reasons*."[39]

That is not *an interpretation* of the parties' agreement; that is *a direct assault* on a right that is preserved for the Bureau under 5 U.S.C. § 7106(a)(1). It is difficult to imagine a finding that more directly impacts the Bureau's right to determine its own internal security.

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[26] *Id.* at 8 (emphasis added) (footnotes omitted).
[27] 67 FLRA 597, 607 (2014) (Dissenting Opinion of Member Pizzella) (footnote citations in original) (citing *U.S. Dep't of the Air Force, Space & Missile Sys., Ctr., L.A. Air Force Base, El Segundo, Cal.*, 67 FLRA 566, 573 (Dissenting Opinion of Member Pizzella); *AFGE, Local 2198*, 67 FLRA 498, 500 (2014) (Concurring Opinion of Member Pizzella).
[28] *See AFGE, Local 1897*, 67 FLRA 239, 240 (2014) (*Local 1897*) (Member Pizzella concurring) (Authority finding that union's exception that asserts "using the '*Douglas* [f]actors as guidance . . . the Agency's five[-]day suspension of [the grievant] is excessive'" does not state a contrary to law claim); *AFGE, Local 1738*, 65 FLRA 975, 977 (2011) (Member Beck concurring) (Authority finding that union's exception that asserts an award is "contrary to the plain language of the negotiated agreement" does not establish an essence exception); *AFGE, Local 3955, Council of Prison Locals 33,* 65 FLRA 887, 889 (2011) (Member Beck concurring) (Authority finding that union's exception that asserts arbitrator erred by "relying on Article 32 of the parties' agreement" and "citing [*AFGE, Fed. Prison*] *Council 33*, 51 FLRA 1112 [(1996)], in support of his award" does not establish an essence or contrary to law exception).
[29] *U.S. DHS, CBP*, 67 FLRA 107, 113 (2013) (Concurring Opinion of Member Pizzella).
[30] *NTEU v. FLRA*, 754 F.3d 1031, 1039 (D.C. Cir. 2014).
[31] *Id.* at 1040 (emphasis added) (quoting *U.S. Dep't of Commerce v. FLRA*, 7 F.3d 243, 245 (D.C. Cir. 1993)).
[32] *SSA New Orleans*, 67 FLRA at 607.
[33] *BOP II*, 654 F.3d at 95 (emphasis added).
[34] *Id.* at 95-96 ("[T]he Authority said only that [Article 18] 'addresses the impact of a nationwide change in staffing patters,' and *does not* '*deal*[] *with procedures*.' The Authority has never explained *why a roster* drafted and issued in accordance *with the procedures* prescribed by Article 18 *is not an Article 18 roster*, *nor has it responded to the **Bureau's unquestionably correct observation*** that Article 18 itself is the product of impact and implementation bargaining under § 7106(b)." (emphasis added) (citations omitted)).
[35] Majority at 8.
[36] *Id.*
[37] Award at 20-21.
[38] *Id.* at 20; Exceptions at 10-14; *see also* Agency Post-Hr'g Br. at 8.
[39] Award at 32 (emphasis added).

The Bureau also argues that the Arbitrator's application of Article 18 impermissibly interferes with its "rights to assign work and employees under 5 U.S.C. § 7106"[40] and is thus contrary to *BOP II* wherein the court specifically held that Article 18 leaves with the Bureau "wide latitude . . . in determining what posts, shifts, assignments . . . will be available on any given roster."[41]

But the majority refuses to even consider the Bureau's arguments concerning *BOP II*.[42] As discussed above, I can understand why my colleagues are reluctant to address this argument. After all, the court reversed their interpretation of Article 18:

> [i]gnoring this inconvenient history (as had the arbitrator), ... [*n*]*either* in its decision nor in its brief on appeal has the Authority [of which I was not a member at the time] *addressed . . . the origins of Article 18*. It has also *ignored* the arbitrator's belated realization that *Article 18 . . . permitted* [*the Bureau*] *to adopt* the very *rosters* about which [Council 33] had grieved. The Authority abused its discretion by approving an award so patently at odds with itself.[43]

The majority may not agree with the court's decision in *BOP II* and they may not even like it. But that does not mean we may simply ignore what the court had to say just because the parties have no appeal from the Authority's decision to the court.[44] Even if, as the majority posits, the Agency did not raise *BOP II*, it should be apparent to them that decisions of the U.S. Court of Appeals for the District of Columbia Circuit are binding on the Authority.

Nonetheless, I do not agree that the parties did not dispute the same substantive issues, which were also at issue in *BOP II*, before the Arbitrator.

It was obvious to Council 33 that the Bureau presented its arguments in the context of *BOP II*.[45] In that case, the court held:

- that "[§] 7106(a) gives an agency an exclusive, non-negotiable right to assign work. Similarly, in this case, the Bureau argued that "[t]he law at 5 [U.S.C.] § 7106[] gives management certain rights . . . . management has the right to . . . assign; . . . assign work, and[] determine the personnel by which Agency operations shall be conducted."[46]

- that "[Article 18] represent[s] the agreement of the parties about the procedures by which [the Bureau] formulates a roster [and] assigns officers to posts."[47] Similarly, in this case, the Bureau argued that "there is no restriction on management on determining whether a position will be filled with [unit nurses] or [PHS nurses]"[48] and there is nothing in Article 18 "which states that [unit nurses] get to determine what posts. . .[are] available [to them]. . . first."[49]

- that "[t]he Bureau . . . retain[s] 'its Article 18[] prerogatives' and 'local wardens . . . simply repost the kind of mission-critical rosters they had been posting.'"[50] Similarly, in this case, the Bureau argued "there is no provision which states that the [unit nurses] get to determine the posts/assignments available"[51] and "it is [the Bureau's] right to determine what posts/assignments will be available."[52]

The issues that were resolved by the court in *BOP II* were for all intents and purposes of the same type which were presented to the Arbitrator in this case. Therefore, I do not agree that the Agency's *BOP II* arguments were not raised and can be dismissed under §§ 2425.4(c) and 2429.5 of the Authority's Regulations. I would also conclude that the award is contrary to *BOP II*.

Thank you.

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[40] Exceptions at 11.
[41] *Id*. at 21 (citing *BOP II*, 654 F.3d at 95-97).
[42] *See* Majority at 4.
[43] *BOP II*, 654 F.3d at 97 (emphasis added).
[44] *See NTEU, Chapter 83*, 68 FLRA 945, 959 (2015) (Dissenting Opinion of Member Pizzella) ("[T]here is no other appeal for the [agency] because, as in most arbitration cases, the Authority is the last level of review. Thus, this ill-conceived award is bound to go into effect.").
[45] *See* Union Post-Hr'g Br. at 27-28.
[46] Agency Post-Hr'g Br. at 6.
[47] *BOP II*, 654 F.3d at 95.
[48] Agency Post-Hr'g Br. at 5.
[49] *Id*.
[50] *BOP II*, 654 F.3d at 96.
[51] Agency Post-Hr'g Br.at 5.
[52] *Id*. at 5-6.