68 FLRA No. 159

UNITED STATES
DEPARTMENT OF HEALTH
AND HUMAN SERVICES
NATIONAL INSTITUTE OF ENVIRONMENTAL
HEALTH SCIENCES
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2923
(Union)

0-AR-5062

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DECISION

September 30, 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 allocated funds in its fiscal year (FY) 2013 budget for bargaining-unit employee performance awards (awards). Before the Agency could distribute the awards, Congress passed the Budget Control Act of 2011 (BCA)[1] and limited federal spending. The Office of Management and Budget (OMB) issued two guidance memoranda advising agencies on the use of discretionary spending under sequestration. The Agency subsequently refused to distribute the FY 2012 awards based on the OMB memoranda.

Arbitrator Dennis R. Nolan found that once the Agency decided to allocate funds in its budget for awards, it was obligated to distribute them under the parties' collective-bargaining agreement and a 2012 memorandum of agreement on the Agency's performance management and appraisal program (PMAP MOA). The Arbitrator also determined that the OMB guidance did not prohibit the Agency from doing so. He concluded that when the Agency failed to distribute the awards, it violated the parties' agreement and the PMAP MOA. This case presents us with two substantive questions.

The first question is whether the award is based on nonfacts because the Arbitrator allegedly found that "the [A]gency violated government[-]wide rules and regulations."[2] Because the Agency does not provide any arguments or authority to support this exception, the answer is no.

The second question is whether the award is contrary to law because the BCA and OMB guidance prohibit the Agency from paying the awards. Because the Agency does not demonstrate that the BCA or the OMB guidance memoranda prohibit the Agency from paying the awards, the answer is no.

II. Background and Arbitrator's Award

The parties' PMAP MOA provides for awards and applies "only when and if the [Agency's] budget permits awards to be granted."[3] The Agency's FY 2013 budget allocated funds for FY 2012 awards. However, before the Agency distributed the FY 2012 awards, the BCA triggered sequestration, resulting in across-the-board cuts to federal agency discretionary spending.[4]

The BCA did not specify how discretionary spending should be eliminated, but the OMB issued two guidance memoranda on discretionary spending under sequestration. The first OMB memorandum, issued before sequestration, advised that monetary awards to employees "should occur 'only if legally required.'"[5] But this memorandum offered no definition or explanation of "legally required."[6] The second OMB memorandum, issued after sequestration, explained that "[l]egal requirements include compliance with provisions in collective[-]bargaining agreements."[7] The memorandum also expressly advised agencies to seek the advice of agency counsel as to whether awards are "legally required" and to "consider bargaining with employee representatives 'to explore revisions to such provisions in existing collective[-]bargaining agreements.'"[8]

[1] Pub. L. No. 112-25 (Aug. 2, 2011).

[2] Exceptions at 1.

[3] Award at 2; *see also id.* at 6- 7

[4] *Id.* at 2; *see also NAIL, Local 17*, 68 FLRA 279, 279 (2015).

[5] Award at 2; *see also id.* at 7 (quoting Exceptions, Attach. 6 (OMB M-13-05) at 3).

[6] *Id.* at 2; *see also id.* at 7 (quoting OMB M-13-05 at 3).

[7] *Id.* at 2 (internal quotation marks omitted); *see also id.* at 7-8 (quoting Exceptions, Attach. 5
(OMB M-13-11) at 3 n.1, available at http://whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-11).

[8] *Id*. at 2, 7-8 (quoting OMB-M-13-11 at 3 n.1).

The Agency also received guidance from its parent agency, the National Institutes of Health (NIH). The NIH memorandum explained that it "cannot process any monetary awards" because they are "considered discretionary under the OMB memo[randum]."[9] Based on the OMB and NIH guidance, the Agency refused to distribute the FY 2012 awards to employees.

The Union filed a grievance on behalf of all bargaining-unit employees who received a performance rating making them eligible for an award. As relevant here, the grievance claimed that the Agency's failure to pay FY 2012 awards violated the parties' collective-bargaining agreement and the PMAP MOA.

The Arbitrator framed the issue as: "Did the Agency properly refuse to pay [performance-award] bonuses in 2013? If not, what shall the remedy be?"[10]

The BCA became effective and OMB issued its guidance, after the parties executed the PMAP MOA. The Arbitrator considered Article 3, Sections 1 and 3 of the parties' collective-bargaining agreement to determine whether it prohibited the Agency from distributing awards. He found that these provisions subjected "other agreements between the parties[, such as the PMAP MOA,] to supervening legal commands."[11] Section 1 states, in relevant part, that the parties are "governed by existing and future laws and regulations of appropriate authorities . . . and by subsequent [A]gency policies and regulations required by law or by the regulations [of] appropriate authorities."[12] And Section 3 states that "changes in law, regulations of appropriate authority, or decisions of appropriate authority may necessitate changes in . . . matters affecting working conditions. If the changes leave [the Agency] with no discretion in the matter, the Union will be informed of the impending change."[13]

With respect to the PMAP MOA, the Arbitrator determined that it applies "only when and if the [Agency's] budget permits awards to be granted."[14] Finding no dispute that the Agency's FY 2013 budget allocated funds for FY 2012 awards, the Arbitrator determined that the burden shifted to the Agency to show "not merely the existence of sequestration and the OMB guidance, but that [these events] actually prohibited [the Agency] from paying" the awards despite having budgeted and allocated the necessary funds.[15]

The Arbitrator held that the Agency failed to establish the legal force of the OMB memoranda. The Arbitrator found that although the OMB guidance is "clearly neither a law nor a regulation[, w]hether it is a decision of an appropriate authority is unexplained."[16] The Arbitrator further determined that although agencies should take the OMB "guidance" seriously, there was no evidence that an agency "would be subject to *legal* repercussions" for failing to follow it.[17]

But "assuming for sake of argument that the OMB memoranda bind the Agency," the Arbitrator concluded that they "fail to leave the Agency with 'no discretion' to make awards."[18] He found that the OMB memoranda permit the Agency to distribute awards that are "legally required," which includes "compliance with provisions in collective[-]bargaining agreements governing awards such as the PMAP MOA."[19] Therefore, the Arbitrator concluded that, even under sequestration, agencies retained some discretionary spending authority.

The Arbitrator found, however, that after the Agency received the OMB and the NIH memoranda, the Agency did not "explore revisions"[20] to the parties' PMAP MOA, nor did it seek advice from Agency counsel as to whether the performance awards were legally required, as OMB advised.[21] The Arbitrator determined that the Agency should have consulted its counsel as to the "force and meaning"[22] of the OMB memoranda and it should have met with the Union "to 'explore revisions' to the Agency's contractual obligations."[23] Rather than take these "obvious steps,"[24] or consult with NIH counsel, the Agency "decided on its own that the memoranda excused it from complying with the [PMAP] MOA," and that it did not need to discuss that decision with the Union. Consequently, the Arbitrator found, the Agency "refused to pay the usual monetary awards anticipated in its FY 2013 budget,"[25] and instead distributed nonmonetary awards such as time-off awards.

Finding no "satisfactory explanation" for the Agency's actions, the Arbitrator concluded that the Agency violated the parties' agreement and PMAP MOA

[9] *Id.* at 8.
[10] *Id.* at 4.
[11] *Id.* at 10.
[12] *Id.* 5, 10; *see also id.* at 10 n.2 (explaining apparent typographical error in § 1).
[13] *Id.* at 5, 10.
[14] *Id.* at 2.
[15] *Id.* at 10.
[16] *Id.* at 11(internal citations omitted) (internal quotation marks omitted).
[17] *Id.* at 2 (internal quotation marks omitted).
[18] *Id.* at 11.
[19] *Id.* (internal quotation marks omitted) (quoting OMB M-13-11 at 3).
[20] *Id.* at 2 (internal quotation marks omitted) (quoting OMB M-13-11 at 3 n.1).
[21] *Id.*
[22] *Id.* at 11.
[23] *Id.* (quoting OMB M-13-11 at 3 n.1).
[24] *Id.* at 11-12.
[25] *Id.* at 3 n.1.

by failing to pay employee performance awards, and he awarded a make-whole remedy.[26]

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

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar some of the Agency's contrary-to-law exceptions.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.[27]

The Agency asserts that the Arbitrator's award: (1) "excessively interferes with management's right to assign work";[28] and (2) is contrary to the American Tax Payer Relief Act of 2012 (ATRA).[29] Nothing in the record demonstrates that the Agency argued, before the Arbitrator, that enforcement of the PMAP MOA would affect this management right or that payment of the awards would violate ATRA. Because the Agency did not make these arguments before the Arbitrator, but could have done so, it may not do so now.[30]

The Agency also claims that the Arbitrator's award affects management's right to determine its budget[31] under § 7106(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute).[32] Although the Agency's response to the Union's grievance "noted . . . management['s] right to determine the budget of the [A]gency,"[33] nothing in the record demonstrates that the Agency made any budget-right argument during *arbitration*. And although the dissent notes that the Union "reject[ed]"[34] the management-rights argument offered by the Agency in response to the initial grievance, the record does not indicate that the Agency made this argument before the Arbitrator. Rather, the Arbitrator found that, apart from sequestration, "there was no other reason presented at the hearing to show the Agency's inability to pay" awards.[35] Because the record indicates that the Agency did not make this argument before the Arbitrator, but could have done so, it may not do so now.[36]

Additionally, to the extent that the Agency argues that it is entitled to deference in interpreting the OMB memoranda,[37] nothing in the record demonstrates that the Agency made this argument before the Arbitrator, and therefore we will not consider the argument now.[38]

Because §§ 2425.4(c) and 2429.5 of the Authority's Regulations bar consideration of these contrary-to-law exceptions, we dismiss them.

IV. Analysis and Conclusions

A. The award is not based on a nonfact.

The Agency asserts, without elaboration or support, that the Arbitrator's "decision that the [A]gency violated government[-]wide rules and regulations is based on a nonfact."[39] Section 2425.6(e)(1) of the Authority's Regulations provides that an exception "may be subject to dismissal or denial if . . . [t]he excepting party fails to raise and support a ground" listed in § 2425.6(a)-(c).[40] Consistent with § 2425.6(e), we deny the Agency's nonfact exception because the Agency does not provide any arguments or authority to support it.[41]

B. The award is not contrary to law.

The Agency argues that the award is contrary to law.[42] Where an exception involves an award's consistency with law, the Authority reviews the questions of law raised by the Arbitrator's award and the exception de novo.[43] Applying the de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[44] The Authority defers to the arbitrator's underlying

[26] *Id*. at 12.
[27] 5 C.F.R. §§ 2425.4(c), 2429.5; *U.S. DHS, CPB*, 68 FLRA 157, 159 (2015).
[28] Exceptions at 1.
[29] Exceptions Form at 4 (citing Pub. L. No. 112-240 (Jan. 2, 2013)).
[30] *AFGE, Local 3911, AFL-CIO*, 68 FLRA 546, 566 (2015) (*Local 3911*) (citing *AFGE, Local 1164*, 66 FLRA 74, 77 (2011) (*Local 1164*)).
[31] Exceptions Br. at 3.
[32] 5 U.S.C. §§ 7101-7135.
[33] Award at 4.
[34] Dissent at 12 (citing Award at 9).
[35] *Id.* at 9.
[36] *Local 3911* at 566 (citing *Local 1164* at 77).
[37] Exceptions Form at 9.
[38] *U.S. DHS, U.S. CBP*, 66 FLRA 745, 747 (2012) (declining to consider agency's argument that arbitrator failed to defer to agency's interpretation of phrase where agency did not raise argument below).
[39] Exceptions at 1.
[40] 5 C.F.R. § 2425.6(e).
[41] *E.g., DOJ, Fed. BOP, Metro. Corr. Ctr., N.Y.C., N.Y.*, 67 FLRA 442, 450 (2014) (denying nonfact exception where agency failed to provide any arguments or authority in support).
[42] Exceptions Form at 4; Exceptions Br. at 1.
[43] *U.S Dep't of the Air Force, Warner Robins Air Logistics Complex, Robins Air Force Base, Ga.*, 68 FLRA 102, 103 (2014) (citing *USDA, Forest Serv.*, 67 FLRA 558, 560 (2014) (*USDA*).
[44] *Id*. (citing *USDA*, 67 FLRA at 560).

factual findings unless the excepting party establishes that they are nonfacts.[45]

The Agency argues that the award is contrary to the OMB memoranda and the BCA.[46] The Agency further argues that whether performance awards are "legally required"[47] under the OMB memoranda must be read in the context of sequestration[48] and OMB "directives."[49]

The Agency fails to show that the award is contrary to law. Even assuming, as the Arbitrator did, that OMB memoranda bound the Agency, the Agency does not show, and it is not otherwise apparent, that the memoranda prohibited the Agency from paying awards. The OMB memoranda explicitly state that awards should be issued if "legally required,"[50] such as when an agency is required to distribute awards in "compliance with provisions in collective[-]bargaining agreements."[51] The Arbitrator found that the parties' collective-bargaining agreement and the PMAP MOA "legally required" the Agency to pay the awards,[52] and the Agency does not challenge this finding on essence grounds. Therefore, as the Agency does not challenge the Arbitrator's interpretation of the parties' collective-bargaining agreement and the PMAP MOA, or the relevance of the OMB memoranda language the Arbitrator cites, it fails to establish that the Arbitrator's award is inconsistent with OMB memoranda.

The dissent's reliance on OMB's guidance overlooks key objectives of the memoranda – to "address questions that have been raised"[53] to OMB and to "ensure that [agencies] are fully aware of[,] and in compliance with[,] any and all collective[-]bargaining requirements."[54] Similarly, the dissent entirely ignores the memoranda's guidance as to whether distribution of awards is "legally required"[55] despite the limitations of sequestration: "Legal requirements include compliance with provisions in collective[-]bargaining agreements governing awards."[56] Here, that includes the requirements of the PMAP MOA.

Furthermore, the first OMB memorandum also reminded agencies of Executive Order 13,522 and its requirement that agencies engage in pre-decisional involvement with employees' exclusive representatives "with regard to any planned personnel actions to reduce [f]ederal civilian workforce costs."[57] And OMB later reiterated this guidance with specific reference to awards: "Consistent with legal requirements, agencies may consider engaging in discussions with employees' exclusive representatives to explore revisions to such provisions in existing collective[-]bargaining agreements."[58]

Therefore, although the dissent claims that the Arbitrator "selectively cherry-picked a handful of words from two contextually distinct mandates,"[59] it is clear that the Arbitrator's interpretation of the OMB memoranda is entirely consistent with the memoranda's plain language and intent. Read together, the guidance provides that awards should be distributed if required under a collective-bargaining agreement.[60]

More generally, the dissent's discomfort with the institution of collective bargaining – and the partnership it creates among agencies, employees, and their representatives – is evident. The dissent asserts that the Authority should not interfere with the missions and budgets of other federal agencies.[61] But Congress has expressly and unequivocally determined that the rights afforded agencies, employees, and their representatives under the Statute "contribute[] to the effective conduct of public business"[62] and are "in the public interest."[63] The issue in this case is the effect of sequestration-related OMB guidance on a collectively-bargained agreement, in this case, the PMAP MOA. The dissent should recognize, as OMB did in its memoranda, the role and legal ramifications of collectively-bargained agreements, and the importance of using the collective-bargaining partnership the Statute creates between agencies and labor organizations to enhance, rather than impede, an agency's ability to conduct its activities and accomplish its statutory mission responsibilities.

Accordingly, we find that the award is not contrary to law and deny this exception.

V. Decision

We deny the Agency's exceptions.

[45] *Id.* (citing *USDA*, 67 FLRA at 560).
[46] Exceptions Form at 4.
[47] OMB M-13-05 at 3; OMB M-13-11 at 3.
[48] Exceptions Br. at 2.
[49] *Id.* at 3.
[50] OMB M-13-05 at 3; OMB M-13-11 at 3.
[51] Award at 2 (internal quotation marks omitted); *see also id.* at 7-8 (quoting OMB M-13-05 at 3; OMB M-13-11 at 3).
[52] *Id.* at 11.
[53] OMB M-13-05 at 1.
[54] *Id.* at 2.
[55] OMB M-13-05 at 3; OMB M-13-11 at 3.
[56] OMB M-13-11 at 3; *see also* OMB M-13-05 at 3.
[57] OMB M-13-05 at 2.
[58] OMB M-13-11 at 3 n.1.
[59] Dissent at 11.
[60] Award at 7-8.
[61] Dissent at 9, 13-14.
[62] 5 U.S.C. § 7101(a)(1)(B).
[63] *Id.* at § 7101(a).

Member Pizzella, dissenting:

Sir Henry Maximilian "Max" Beerbohm, the nineteenth century essayist, once observed that "[h]istory does not repeat itself. The historians repeat one another."[1]

The Federal Service Labor-Management Relations Statute (the Statute)[2] states that "***nothing*** in this [Statute] shall affect the authority of any management official of any agency . . . to determine ***the*** . . . ***budget*** . . . ***of the agency***."[3] This right is commonly referred to as a reserved management right.

The majority repeats again today a proposition that it has frequently recited (but not so successfully as to convince the U.S. Court of Appeals for the District of Columbia Circuit) during the past three years.[4] Once again, the majority decides for another executive branch agency how it should have allocated its budget. In this case, the majority decides for the National Institute of Environmental Health Sciences (NIEHS) (a subcomponent of the U.S. Department of Health and Human Services and the National Institutes of Health) how NIEHS should have prioritized and adjusted its Fiscal Year 2013 (FY 13) budget after Congress mandated, and the President of the United States implemented, "sequestration."[5]

Unlike the majority, I do not agree that the Statute permits us to reach that far or that we have the expertise to dictate to another executive branch agency how it should allocate its budget under normal circumstances, let alone how it should allocate its reduced funding under extraordinary circumstances such as sequestration. Without a doubt, that is what Congress meant when it specifically excluded specific matters, such as management's § 7106(a)(1) right to determine its budget, from the general obligation to bargain under the Statute.

The Budget Control Act of 2011 (BCA)[6] triggered "sequestration" when the Balanced Budget and Emergency Deficit Control Act (BBEDCA)[7] "*cancel[led]* $85 billion in budgetary resources across the federal government."[8] Those statutes left federal agencies "with *little discretion* . . . where and how to reduce spending [in their FY 13 budgets]."[9] As a consequence, the Office of Management and Budget (OMB), at the direction of the President, directed all executive branch agencies to eliminate *all* spending that was *not necessary* to perform "the agency's *core mission* in service of the American people"[10] and to "protect[] the *agency's mission* to serve the public."[11]

Simply put, awards are not part of a federal agency's *core mission.*

Despite this clear language, Arbitrator Dennis Nolan determined that he was more qualified to interpret the directives and memoranda (concerning the implementation of sequestration) that OMB issued to executive branch agencies than OMB itself.

Contrary to at least two OMB memoranda − OMB M-13-05 and OMB M-13-11− Arbitrator Nolan decided (and the majority agrees) that NIEHS was legally *obligated* to pay bonuses that were entirely *discretionary* [12] and should not have redirected that funding to the agency's core mission after its budget was severely reduced by sequestration. According to the Arbitrator, once the Agency set aside funds for discretionary bonuses in its original FY 13 plan, it lost all discretion to redirect those funds under any circumstance, including when sequestration was triggered.

It would be prudent for the majority to read OMB's directives more carefully. Arbitrator Nolan conflated the term, "legally required," which OMB used exclusively to define the circumstances under which an agency *could pay* "monetary awards"[13] during sequestration, with the language that OMB used to mandate that − if an agency intended "to reduce [f]ederal civilian workforce costs" *through* "*furloughs*"[14] − the

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[1] Quote Investigator, http://www.quoteinvestigator.com/2013/10/17repeat-history/ (last visited Sept. 28, 2015).
[2] 5 U.S.C. §§ 7101-7135.
[3] *Id*. § 7106(a)(1) (emphasis added).
[4] Below nn. 31-32, 34-35.
[5] Exceptions, Attach. 6, OMB M-13-05 (Feb. 27, 2013) at 1 (OMB M-13-05).
[6] Pub. L. No. 112-25 (Aug. 2, 2011) (Pub. L. 112-25).
[7] 2 U.S.C. § 901a.
[8] Exceptions, Attach. 5, OMB M-13-11 (Apr. 4, 2013) at 1 (OMB M-13-11).
[9] *Id*. (emphasis added).
[10] *Id*. at 2 (emphasis added) (internal quotation marks omitted).
[11] OMB M-13-05 at 1.
[12] Exception, Attach. 7, Performance management and appraisal program MOA (PMAP MOA), at 1 ("The [A]gency retains the right to determine how much of its budget will be allocated for performance awards.")
[13] OMB M-13-05 at 3 ("[I]ncreased scrutiny should apply to . . . discretionary monetary awards to employees, which should occur only if legally required.").
[14] *Id*. at 2 (emphasis added) ("[I]n instances where agencies are considering potential furloughs, agencies have a duty to notify their exclusive representatives and, upon request, bargain over any negotiable impact and implementation proposals . . . in compliance with any and all collective bargaining requirements.")

agency must "notify their exclusive representatives" and "bargain [with them] over any negotiable impact and implementation proposals" "in compliance with any and all collective bargaining requirements."[15]

OMB-M-13-05 states that federal agencies must apply "*increased scrutiny* to . . . discretionary monetary awards . . . which should occur *only if* legally required."[16] Discretionary awards, as those at issue here, are not legally required. As acknowledged by Arbitrator Nolan, the parties' agreement provides that the parties "are governed by existing and *future* laws and regulations *of appropriate authorities*" such as OMB[17] and recognizes that "*changes* in law, regulations . . . , or *decisions of appropriate authorit[ies]* [including OMB] may necessitate *changes* in . . . matters affecting working conditions."[18]

Even the parties' performance management and appraisal program memorandum of understanding (PMAP MOA), which was relied upon by Arbitrator Nolan,[19] clearly establishes that "the Agency *retains* the right to determine *how much* of its budget will be allocated for performance awards."[20] Consequently, contrary to the conclusions of Arbitrator Nolan and the majority, the fact that the NIEHS included an allocation in its *original* FY 13 budget for discretionary monetary awards did not take away its prerogative to later reallocate those funds to core mission requirements after sequestration was implemented.

Under these circumstances, the Arbitrator and the majority have no more business telling NIEHS that it *may not* reallocate the funds originally earmarked for monetary awards than they have the authority to second-guess the Agency on any other post-sequestration budget reallocation.

In order to conclude that the Agency was obligated to pay monetary awards rather than reallocate those funds to its core mission, Arbitrator Nolan selectively cherry-picked a handful of words from two contextually distinct mandates.

As the majority correctly notes, OMB-13-05 in passing "reminded agencies . . . [of the] requirement [imposed by Executive Order 13,522 to] engage in pre-decisional involvement with employees' [unions]"[21] on certain *specified* "personnel actions," such as "furloughs," that may be required in order to comply with the reduced funding levels triggered by sequestration.[22]

But the majority conveniently fails to similarly acknowledge how "little discretion" agencies had to "decid[e] where and how to reduce spending."[23] Significantly, the other sections of OMB-13-05, which address "discretionary" "activities," such as "hiring," "monetary awards," and "training, conferences, and travel," do not require, or even suggest, bargaining.[24] These other sections impose an obligation directly on the shoulders of "*agency leadership*," not the Union, to "review" all forms of "*discretionary*" spending and to do so with "increased scrutiny."[25]

It is readily apparent that the primary focus, of each and every one of OMB's sequestration memoranda, was to remind agencies that their primary responsibility, even during sequestration, is to "serv[e] . . . the American people,"[26] "protect[] *the agency's mission* to serve *the public*,"[27] and to "minimize the negative impact of sequestration" on the public, not on federal unions.[28] (And I would remind my colleagues, who question my commitment to "the institution of collective bargaining,"[29] a phrase that is not found in the Statute, that the very "right of employees to organize [and] bargain collectively," as that right is outlined in the Statute, carries with it a concomitant responsibility to "safeguard the public interest," to promote "the effective conduct of public business" in exercising those rights,[30] and to recognize the responsibility that senior management carries "to determine the mission, budget, [and] organization . . . of the agency."[31])

I would conclude, therefore, that the award is contrary to law and regulation.

I also do not agree with the majority insofar as they conclude "nothing in the record demonstrates that the Agency argued, before the Arbitrator, that the award would affect [management's right to determine its budget under 5 U.S.C. 7106(a)(1)]."[32] To the contrary, the

[15] *Id*.
[16] *Id*. at 3 (emphasis added).
[17] Award at 5 (emphasis added) (quoting parties' agreement, Art. 111, § 1).
[18] *Id.* (emphasis added) (quoting parties' agreement, Art. 111, § 3).
[19] *Id.* at 10.
[20] PMAP MOA at 1 (emphasis added).
[21] See Majority at 8 (citing OMB-13-05 at 2).
[22] OMB-13-05 at 2-3.
[23] OMB-13-11 at 1.
[24] OMB-13-05 at 3.
[25] *Id.* (emphasis added).
[26] OMB-13-11 at 2 (quoting OMB 13-03).
[27] OMB-13-05 at 1 (citing OMB 13-03).
[28] OMB-13-11 at 2.
[29] Majority at 7.
[30] 5 U.S.C. §§ 7101(a)(1)(A) & (B).
[31] *Id.* § 7106(a)(1).
[32] Majority at 5.

Arbitrator notes that AFGE, Local 2923 "rejects *the Agency's management rights argument* [*concerning 5 U.S.C. § 7106*]"[33] and identifies 5 U.S.C. § 7106 as a "pertinent [] provision."[34]

I would hope that the majority and I have reviewed the same record because it is difficult for me to imagine an award that more directly interferes with the Agency's right to determine its budget.

This is but one more example in which the majority uses the Statute to encroach upon specific statutory authorities which Congress gives exclusively to other federal agencies. During the past three years, the majority saw fit:

- to educate the U.S. Department of the Air Force that it had been reading 10 U.S.C. §2481(a) wrong for 119 years and informed the Secretary of the Air Force that he *must* give bargaining-unit employees the same access to taxpayer-funded military exchanges and commissaries that have been reserved solely to the military and their families to alleviate some of the hardship that they endure as a result of military service;[35]

- to explain to the U.S. Department of Homeland Security's Inspector General how he *must* interpret the Inspector General Act;[36]

- to define for the Director of the U.S. Immigration and Customs Enforcement Agency *when*, *how*, and *if* the Federal Information Security Management Act[37] permitted her to restrain the personal use of agency computers by employees of the agency at work and dictated that she *could not* without first getting the permission of the union;[38] and

- to dictate to the U.S. Department of the Navy that it *must* purchase bottled water for its employees even though several appropriations statutes and regulations indicated that it could not.[39]

Unfortunately for the majority, the U.S. Court of Appeals for the D.C. Circuit (the court) did not agree with them in two of these cases. In *Department of the Navy, Naval Undersea Warfare Center Division*, the court specifically criticized the Authority for injecting its own "organic statute [into] another statute . . . not within [our] area of expertise."[40] In *U.S. DHS, U.S. CBP*, the court again criticized the majority for telling the inspector general how to interpret the Inspector General Act.[41] *AFGE, Local 1547* has been appealed to the court and the majority's decision is awaiting judicial review. In *U.S. DHS, U.S. ICE*, the agency could not seek judicial review because it is not a case of the type which is permitted judicial review.[42]

I am surprised, therefore, that the majority attempts to dictate, yet once again, to a federal agency how it must allocate its budget. In the end, the majority dictates to NIEHS that it *must pay discretionary bonuses* to its employees for FY 12 out of its FY 13 funding even though Congress, in the BCA and the BBEDCA, and the President, through the OMB, "cancel[led] $85 billion in budgetary resources across the [f]ederal [g]overnment" for FY 13.[43]

I am surprised that the majority would go this far. In *NAGE, Local R14-52*, the Authority previously held that "requiring [] an agency [to] place a *specified amount* in its budget [*for a particular purpose*]" violates management's right to budget.[44] Here, once sequestration was triggered and funding was slashed, NIEHS had to start all over and reallocate whatever funds were left over. In effect, telling NIEHS, after the fact, that it *must* "*distribute* the allocated *money for* [] *awards*"[45] as originally budgeted is no different than telling NIEHS, at the outset of the budget process, the amount it *must allocate for awards* before sequestration.

In its decision today, the majority decides, for NIEHS, that it is more important that NIEHS pay bonuses than it is to fund its core mission for which it exists − "to discover how the environment affects people's health . . . follow the lines of scientific evidence of environmental

[33] Award at 9 (emphasis added).
[34] *Id*. at 5, 8.
[35] *AFGE, Local 1547*, 67 FLRA 523, 531-33 (2014) (*AFGE 1547*) (Dissenting Opinion of Member Pizzella).
[36] *U.S. DHS, U.S. CBP v. FLRA*, 751 F.3d 665, 669 (D.C. Cir. 2014).
[37] 44 U.S.C. §§ 3541-3549.
[38] *U.S. DHS, U.S. ICE*, 67 FLRA 501, 505-08 (2014) (Dissenting Opinion of Member Pizzella).
[39] *U.S. Dep't of the Navy, Naval Undersea Warfare Ctr. Div., Newport, R.I. v. FLRA*, 665 F.3d 1339, 1348 (D.C. Cir. 2012) (*Naval Undersea*).
[40] *Id*. at 1348.
[41] *U.S. DHS, U.S. CBP*, 751 F.3d at 669.
[42] 5 U.S.C. § 7123 (arbitral award not involving an unfair labor practice).
[43] *Id*.
[44] 48 FLRA 1198, 1208 (1993).
[45] Award at 12 (emphasis added).

influences . . . to understand[] respiratory outcomes, cognitive deficits, and cardiovascular . . . disease and stroke [which alone costs the American taxpayer] nearly $286 billion a year."[46] Unlike the majority, I believe that it is the prerogative of NIEHS "to determine [its] mission [and] budget"[47] particularly under the extraordinary circumstances and limitations imposed by and through sequestration.

In this case, the intentions of AFGE, Local 2923 are quite clear. AFGE, Local 2923 did not seek to just engage through "pre-decisional involvement" (as my colleagues suggest),[48] and AFGE, Local 2923 did not seek to discuss "procedures"[49] or "appropriate arrangements."[50] AFGE, Local 2923 wanted to "determine the mission [and FY 13] budget . . . of the agency"[51] and instead directly "challenge[d] [NIEHS's determination not] to pay [discretionary] bonuses" [52] following sequestration.

It is difficult to imagine a scenario that more directly interferes with an agency's right to determine its budget.

Embracing this unprecedented encroachment on NIEHS's statutory rights, the majority asserts that *any* "collective-bargaining partnership the Statute creates between agencies and labor organizations . . . enhance[s], rather than impede[s], an agency's ability to conduct its activities and accomplish its statutory mission responsibilities."[53]

I do not agree.

I would remind my colleagues that the "right of employees to organize [and] bargain collectively," carries with it a concomitant responsibility, under the Statute, to "safeguard the public interest," to promote "the effective conduct of public business,"[54] and to recognize the responsibility that "management officials" carry "to determine the mission, budget, [and] organization . . . of the agency."[55]

The Statute does not require NIEHS to surrender its right to determine its own budget simply because AFGE, Local 2923 demands that it do so. It is that inverted view of the Statute − "not the institution of collective bargaining" − which causes me "discomfort."[56]

Let there be no mistake. AFGE, Local 2923's demand that NIEHS surrender its rights to reorder its budget to comply with sequestration is not a "collective-bargaining partnership [which] the Statute create[d]."[57] It is nothing less than a *coup d'etat*.

I would conclude that the award is contrary to 5 U.S.C. § 7106(a)(1).

Thank you.

[46] Dep't of HHS, NIH, NIEHS, *FY 13 Justification of Budget Request* at 13, available at www.niehs.nih.gov/about/congress/justification/2013/2013_congressional_508.pdf.
[47] 5 U.S.C. § 7106(a)(1).
[48] Majority at 7.
[49] 5 U.S.C. § 7106(b)(2).
[50] *Id*. § 7106(b)(3).
[51] *Id*. § 7106(a)(1).
[52] Award at 1.
[53] Majority at 8.
[54] 5 U.S.C. § 7101(a)(1)(A) & (B).
[55] *Id*. § 7106(a)(1).
[56] Majority at 7.
[57] *Id*. at 8.