69 FLRA No. 86

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
OGDEN SERVICE CENTER
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 67
(Union)

0-AR-5184

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DECISION

September 26, 2016

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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

In 2013, the federal government shut down due to a lapse in appropriations (the shutdown). Right before the shutdown, the Agency released seasonal employees (the grievants) to non-work status rather than furloughing them. Subsequently, Arbitrator Philip Tamoush found that the Agency violated law, regulation, and the parties' collective-bargaining agreement (the agreement) when it released the grievants because of the shutdown, rather than for lack of work. As a remedy, the Arbitrator awarded the grievants backpay. There are five substantive questions before us.

The first question is whether the Arbitrator's finding that the Agency released the grievants to non-work status for reasons other than lack of work is based on a nonfact. Because the Agency's nonfact claim concerns a factual matter that the parties disputed at arbitration, the answer is no.

The second question is whether the award fails to draw its essence from the agreement because – according to the Agency – the award prevents the Agency from releasing the grievants to non-work status for reasons other than lack of work. Although the Agency argues that the agreement is silent regarding whether the Agency is prevented from releasing seasonal employees for reasons other than lack of work, the Agency fails to demonstrate that the Arbitrator's interpretation of the agreement is irrational, unfounded, implausible, or in manifest disregard of the agreement. Accordingly, the answer to the second question is no.

The third question is whether the award is contrary to law because it allegedly violates management's rights to hire, assign, direct, and layoff the grievants under § 7106(a)(2)(A) of the Federal Service Labor-Management Relations Statute (the Statute).[1] Because the Agency does not argue that the relevant contract provisions are not enforceable exceptions to management's exercise of its rights under § 7106(b) of the Statute, the answer is no.

The fourth question is whether the award is contrary to the Back Pay Act (BPA)[2] because: (1) the Arbitrator allegedly failed to find that the grievants were affected by an unjustified or unwarranted personnel action; or (2) there is no causal connection between the Agency's release of the grievants and their failure to receive backpay under the Continuing Appropriations Act, 2014 (CAA).[3] Because the award satisfies the BPA's requirements for an award of backpay, the answer is no.

The fifth question is whether the awarded remedy is contrary to Section 115 of the CAA,[4] which provides backpay to employees furloughed because of the shutdown. The Agency argues that because it released – rather than furloughed – the grievants, they do not qualify for backpay under the CAA. Because the BPA provides a sufficient basis for the backpay award, it is immaterial whether the CAA independently supports the backpay award. Accordingly, the Agency's CAA exception provides no basis for finding the award deficient.

II. Background and Arbitrator's Award

The Agency employed the grievants as seasonal employees. Under the terms of the grievants' seasonal-employment agreements, the Agency could release the grievants to non-work status at the end of a season and recall them to duty the next season. Right before the shutdown, the Agency released the grievants to non-work status.

The shutdown ended when Congress passed the CAA, which directs federal agencies to retroactively compensate furloughed federal employees for the period of the shutdown. Specifically, the CAA provides, in relevant part, that "[e]mployees furloughed as a result of

[1] 5 U.S.C. § 7106(a)(2)(A).
[2] *Id.* § 5596.
[3] Pub. L. No. 113-46, § 101, 127 Stat. 558 (2013).
[4] *Id.* § 115, 127 Stat. 561.

any lapse in appropriations . . . shall be compensated at their standard rate of compensation, for the period of such lapse in appropriations, as soon as practicable after such lapse in appropriations ends."[5]

As soon as the shutdown ended, the Agency recalled the grievants to work but failed to retroactively pay them. The Union filed a grievance alleging that the Agency violated law and the agreement by releasing the grievants to non-work status and failing to pay them for the period of the shutdown. The parties were unable to resolve the grievance and submitted it to arbitration.

The parties did not stipulate to the issue before the Arbitrator, and he did not expressly frame one, but he considered "whether . . . [the Agency] furloughed the [grievants] as part of its normal routine of furloughing such employees. Or, was the furlough a result of the . . . shutdown."[6]

Before the Arbitrator, the Union argued that the Agency's release of the grievants for reasons other than lack of work violated law, regulation, and Articles 14 and 22 of the agreement. As a remedy, the Union claimed that the grievants were entitled to backpay.

In contrast, the Agency argued that "[m]anagement determined prior to [the shutdown] that the releasing of [the grievants] was necessary due to workload."[7] Therefore, according to the Agency, the grievants were "in non-pay status unrelated to any lapse in appropriations and cannot recover [backpay] for the furlough period."[8]

Articles 14 and 22 of the agreement address seasonal employment. Article 22 provides, in relevant part, that "[s]easonal employees will receive an employment agreement . . . which will . . . explain that the length of time an employee is in pay status is determined by the nature of the work assigned to the employee and the employee's standing on the release and recall list established under Article 14 of [the agreement]."[9] Article 14 outlines the procedures for the release and recall of seasonal employees "[w]hen it becomes necessary to place any or all the seasonal employees . . . in a non-work status."[10] Article 14 further provides, in relevant part, that the "parties agree that the arbitrator's appropriate remedy for an improper release or recall is [backpay]."[11]

In his award, the Arbitrator cited Articles 14 and 22 of the agreement, the BPA, and the CAA. The Arbitrator found that the Agency released the grievants to non-work status right before the shutdown and "returned them to work as soon as the shutdown was cancelled."[12] The Arbitrator further found that "the Agency took advantage of the timing of the impending . . . shutdown to mandatorily release the seasonal employees and *not* because of lack of work."[13] Accordingly, the Arbitrator concluded that the Agency violated the "[a]greement and relevant laws and regulations when it released the [grievants] coincident with the . . . shutdown."[14] As a remedy, the Arbitrator directed the Agency to pay the grievants backpay with interest, and reinstate any lost benefits.

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

III. Preliminary Matters

The Agency argues that the award is contrary to management's rights[15] and the BPA.[16] The Union argues that the Authority should dismiss those arguments because the Agency failed to present them to the Arbitrator.[17] Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the arbitrator.[18]

A. Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar one of the Agency's management's rights arguments.

The Agency argues that the award interferes with management's rights to hire, assign, direct, layoff, and retain seasonal employees under § 7106(a)(2)(A) of the Statute because the award "purports to limit the Agency to release seasonal employees based only on insufficient work."[19] In response, the Union contends that the "Authority should reject [these] arguments

[5] *Id.* § 115(a).
[6] Award at 4-5.
[7] *Id.* at 6.
[8] Exceptions, Attach. 3, Agency's Post-Hr'g Br. (Agency's Post-Hr'g Br.) at 6.
[9] Award at 4 (quoting Art. 22 without labeling it as such); *see also* Opp'n, Attach. 1, Union's Post-Hr'g Br. (Union's Post-Hr'g Br.) at 13 (quoting Art. 22).
[10] Award at 3 (quoting Art. 14).
[11] *Id.* (quoting Art. 14).
[12] *Id.* at 7.
[13] *Id.* (emphasis added).
[14] *Id.*
[15] Exceptions at 14-15.
[16] *Id.* at 17-19.
[17] Opp'n Br. at 16-17, 21; Opp'n Form at 2-3.
[18] 5 C.F.R. §§ 2425.4(c), 2429.5.
[19] Exceptions at 14.

because [the Agency] raises the management[-]rights issue for the first time at this stage."[20]

In its post-hearing brief to the Arbitrator, the Agency cited § 7106 of the Statute, and argued that the Statute "expressly reserves to the Agency[] the right[s] to hire, assign, direct[,] and [layoff] employees."[21] Thus, the record demonstrates that the Agency presented to the Arbitrator its arguments that restricting its ability to release the grievants to non-work status would excessively interfere with management's rights to hire, assign, direct, and layoff seasonal employees. Accordingly, we find that §§ 2425.4(c) and 2429.5 do not bar these arguments, and we address them in section IV.C.1. below.[22]

Because the Agency argued before the Arbitrator that restricting its ability to release the grievants to non-work status would excessively interfere with management's rights to hire, assign, direct, and layoff seasonal employees, the Agency could have also argued that restricting its ability to release the grievants would excessively interfere with management's right to retain seasonal employees. However, the record contains no indication that the Agency did so. Therefore, §§ 2425.4(c) and 2429.5 bar the Agency's argument regarding management's right to retain employees, and we dismiss it.[23]

The dissent asserts that we should consider the Agency's right-to-retain argument because the dissent considers the right to retain "as part and parcel of the right to layoff."[24] However, in the very decision that the dissent cites to support its assertion,[25] the Authority clarified that the rights to retain and layoff are two distinct rights under the Statute.[26] Thus, our Regulations bar the Agency from raising the right to retain where, as the dissent acknowledges, the Agency did not raise that right below.[27]

B. We assume, without deciding, that the Agency's BPA argument is properly before us.

The Agency claims that the award is contrary to law because it does not satisfy the BPA's statutory requirements.[28] The Union argues that because the Agency failed to raise its BPA arguments before the Arbitrator, it cannot do so now.[29] Because this exception lacks merit for reasons discussed in section IV.C.2. below, it is unnecessary to decide whether the Agency's BPA arguments are properly before us. Rather, we assume, without deciding, that they are.[30]

IV. Analysis and Conclusions

A. The award is not based on a nonfact.

The Agency argues that the Arbitrator's "finding that the Agency released [the grievants] for reasons other than insufficient work volume" is based on a nonfact.[31] In this regard, the Agency contends that the Arbitrator erroneously relied on the increased work volume caused by the shutdown – and the Agency's corresponding recall of the grievants as soon as the government reopened – to conclude that the Agency had sufficient work for the grievants when it released them.[32]

To establish that an award is based on a nonfact, the excepting party must establish that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[33] The Authority will not find an award deficient based on an arbitrator's determination regarding any factual matter that the parties disputed at arbitration.[34]

Essentially, the Agency challenges the Arbitrator's finding that it released the grievants because of the impending shutdown. However, before the Arbitrator, the parties disputed whether the Agency

[20] Opp'n Br. at 16.
[21] Agency's Post-Hr'g Br. at 5.
[22] *See, e.g., U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 65 FLRA 1040, 1042 (2011).
[23] *See U.S. Dep't of Transp., FAA*, 61 FLRA 54, 56 (2005) (citing *SSA, Office of Hearings & Appeals, Falls Church, Va.*, 59 FLRA 507, 509-10 (2003)).
[24] Dissent at 15.
[25] *Id.* (citing *AFGE, Local 1827*, 58 FLRA 344, 345 (2003) (*Local 1827*)).
[26] *Local 1827*, 58 FLRA at 345 ("reading the right to retain as simply being the converse of the right to layoff would be contrary to the fundamental principle of statutory construction that effect must be given, if possible, to every word, clause, and sentence of a statute . . . so that no part will be inoperative or superfluous, void, or insignificant.") (internal quotations omitted); *see also U.S. Dep't of the Air Force v. FLRA*, 680 F.3d 826, 830-31 & n.1 (D.C. Cir. 2012) (considering agency's right-to-layoff argument while finding that agency waived its right-to-retain argument by failing to present it below).
[27] *See* Dissent at 15-16.
[28] Exceptions at 17-19.
[29] Opp'n Br. at 21.
[30] *See, e.g., USDA, U.S. Forest Serv., Law Enf't & Investigations, Region 8*, 68 FLRA 90, 92-93 (2014); *cf. NFFE, Local 2189*, 68 FLRA 374, 376 (2015) (Member Pizzella concurring) (assuming without deciding that argument supporting exception was properly before the Authority where considering the argument did not affect disposition of exception).
[31] Exceptions at 4.
[32] *Id.* at 6-8.
[33] *E.g., NLRB Prof'l Ass'n*, 68 FLRA 552, 554 (2015) (*NLRB*).
[34] *E.g., id.*

released the grievants to non-work status because of the shutdown or for lack of work.[35] Therefore, the Agency's argument does not provide a basis for finding that the award is based on a nonfact, and we deny the exception.[36]

B. The award does not fail to draw its essence from the agreement.

The Agency argues that the award fails to draw its essence from the agreement.[37] 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.[38] Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the agreement when the appealing party establishes 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.[39] In this regard, the Authority will not find that an award fails to draw its essence from a collective-bargaining agreement when the excepting party fails to establish that the arbitrator's interpretation of that agreement conflicts with its express provisions.[40] Moreover, that an agreement is silent on a matter addressed by the arbitrator does not demonstrate that the arbitrator's award fails to draw its essence from the agreement.[41]

The Agency argues that the award fails to draw its essence from the agreement because "[i]mplicit in the . . . award is that the Agency is precluded from releasing . . . seasonal employees [based on any factor] except for the availability of work."[42] Further, the Agency contends that the agreement is silent as to whether the Agency is prevented from releasing seasonal employees for reasons other than lack of work.[43] Therefore, according to the Agency, "even assuming arguendo [that] the Agency released [the grievants] for reasons other than work volume[,] . . . such a release does not violate either Article[] 14 or 22 of the [agreement]."[44]

As noted in section II. above, Articles 14 and 22 of the agreement address seasonal employment, and Article 14 specifically outlines the procedures for release and recall of seasonal employees "[w]hen it becomes necessary to place any or all the seasonal employees . . . in a non-work status."[45] Before the Arbitrator, the Agency argued that "[m]anagement determined prior to [the shutdown] that the releasing of seasonal employees was necessary due to workload."[46] In rejecting the Agency's contention, the Arbitrator found that "the Agency took advantage of the timing of the impending . . . shutdown to mandatorily release the seasonal employees and *not* because of lack of work."[47] Accordingly, the Arbitrator concluded that the Agency violated the agreement.

Nothing in Article 14 or 22 of the agreement precluded the Arbitrator from determining that the Agency violated the agreement by releasing the grievants because of the shutdown, and the Agency has not identified any express provision of the agreement with which the Arbitrator's interpretation conflicts.[48] Moreover, the Agency's claim that the agreement is silent regarding whether the Agency is prevented from releasing seasonal employees for reasons other than lack of work does not demonstrate that the award is irrational, unfounded, implausible, or in manifest disregard of the agreement.[49] Accordingly, we deny the exception.

[35] *See* Award at 4-5.
[36] *E.g.*, *NLRB*, 68 FLRA at 555; *Fed. Energy Regulatory Comm'n*, 58 FLRA 596, 598 (2003) (*FERC*).
[37] Exceptions at 11-13.
[38] *E.g.*, *U.S. DOD, Def. Commissary Agency*, 69 FLRA 379, 383 (2016) (*DOD*) (citations omitted).
[39] *Id.* (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990) (*OSHA*)).
[40] *E.g., U.S. Dep't of the Air Force, Edwards Air Force Base, Cal.*, 68 FLRA 817, 819 (2015) (*Edwards*) (citing *OSHA*, 34 FLRA at 576).
[41] *U.S. DOD, Def. Contract Mgmt. Agency*, 66 FLRA 53, 57 (2011) (*DCMA*) (citing *U.S. Dep't of VA, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 58 FLRA 413, 414 (2003)); *U.S. Dep't of the Air Force, Ogden Air Logistics Ctr., Hill Air Force Base, Utah*, 35 FLRA 1267, 1271 (1990) (*Ogden*).
[42] Exceptions at 11-12.
[43] *Id.* at 12.
[44] *Id.* at 12-13 (italics omitted).
[45] Award at 3 (quoting Art. 14).
[46] *Id.* at 6.
[47] *Id.* at 7 (emphasis added).
[48] *See, e.g.*, *Edwards*, 68 FLRA at 819 ("[T]he Authority will not find that an award fails to draw its essence from a collective-bargaining agreement when the excepting party fails to establish that the arbitrator's interpretation of that agreement conflicts with its express provisions.") (citations omitted).
[49] *See, e.g.*, *DCMA*, 66 FLRA at 56-57; *Ogden*, 35 FLRA at 1271.

C. The award is not contrary to law.

The Agency argues that the award is contrary to law in three respects, which we discuss separately below. When an exception involves an award's consistency with law, rule, or regulation, the Authority reviews any question of law raised by the exception and the award de novo.[50] In applying the standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[51]

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

The Agency contends that the award interferes with its rights to hire, assign, direct, and layoff seasonal employees under § 7106(a)(2)(A) of the Statute because the award "purports to limit the Agency to release seasonal employees based only on insufficient work."[52] Further, the Agency argues that "any restriction to the Agency's right and ability to release seasonal employees directly interferes with [management's] . . . rights regarding hiring and laying off its employees."[53]

When a party alleges that an arbitrator's award is contrary to a management right under § 7106(a), the Authority first assesses whether the award affects the exercise of the asserted management right.[54] 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).[55] The Authority places the burden on the party arguing that the award is contrary to management rights to allege both that the award affects a management right under § 7106(a), and that the relevant contract provision is not enforceable under § 7106(b).[56] If an excepting party fails to allege that a contract provision was not negotiated under § 7106(b), then the management-rights exceptions fail as a matter of law.[57]

The Union does not specifically dispute the Agency's assertion that the award affects management's rights to hire, assign, direct, or layoff employees under the Statute.[58] Therefore, we assume that the award affects these rights.[59] Nevertheless, the Agency does not argue that the relevant contract provisions – Articles 14 and 22 – are not enforceable exceptions to management's exercise of its rights under § 7106(b) of the Statute. Thus, based on the foregoing, we find that the Agency fails to demonstrate that the award is inconsistent with management's rights to hire, assign, direct, and layoff seasonal employees under § 7106(a)(2)(A) of the Statute.[60] Accordingly, we deny the exception.

2. The award is not contrary to the BPA.

The Agency argues that the award is contrary to the BPA.[61] Under the BPA, an award of backpay is authorized only where an arbitrator finds that: (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) the personnel action has resulted in the withdrawal or reduction of the employee's pay, allowances, or differentials.[62] The Agency argues that the award fails to meet either of these requirements.

First, the Agency argues that the award is deficient because the Arbitrator did not find that the grievants were affected by an unjustified or unwarranted personnel action.[63] The first BPA requirement is satisfied if an arbitrator finds a violation of an applicable law, rule, regulation, or provision of a collective-bargaining agreement.[64] The Agency contends that this requirement is not satisfied because the Arbitrator failed to identify which provision of law, regulation, or the agreement that the Agency violated when it released the grievants to non-work status.[65] However, the Authority has stated that an arbitrator's finding of a contract violation satisfies

[50] *E.g.*, *AFGE, Council of Prison Locals, Council 33*, 68 FLRA 757, 758 (2015) (citation omitted).
[51] *E.g.*, *id.* (citation omitted).
[52] Exceptions at 14.
[53] *Id.* at 15.
[54] *U.S. DOJ, Fed. BOP, Fed. Med. Ctr., Lexington, Ky.*, 69 FLRA 10, 14 (2015) (*Lexington*) (Member Pizzella dissenting) (citing *SSA, Office of Disability Adjudication & Review, Region VI, New Orleans, La.*, 67 FLRA 597, 602 (2014) (*ODAR*) (Member Pizzella dissenting)).
[55] *Id.* (citing *ODAR*, 67 FLRA at 602).
[56] *E.g.*, *id.* (citations omitted); *U.S. DOJ, Fed. BOP*, 68 FLRA 311, 315 (2015) (Member Pizzella dissenting) (*DOJ*) (citing *ODAR*, 67 FLRA at 602).
[57] *E.g.*, *NTEU, Chapter 83*, 68 FLRA 945, 950 (2015) (*Chapter 83*) (Member Pizzella dissenting) (citing *U.S. DHS, U.S. CBP*, 66 FLRA 634, 638 (2012)).
[58] *See* Opp'n Br. at 16-18.
[59] *E.g.*, *DOJ*, 68 FLRA at 315 (citing *U.S. Dep't of the Treasury, IRS, Wage & Inv. Div.*, 66 FLRA 235, 242 (2011)); *U.S. Dep't of HHS, Ctrs. for Medicare & Medicaid Servs.*, 67 FLRA 665, 666 (2014).
[60] *E.g.*, *Lexington*, 69 FLRA at 14 (citing *DOJ*, 68 FLRA at 315).
[61] Exceptions at 17-19.
[62] *E.g.*, *FERC*, 58 FLRA at 600 (citing *U.S. DOD, Def. Commissary Agency, Fort Lee, Va.*, 56 FLRA 855, 859 (2000)).
[63] Exceptions at 18-19.
[64] *E.g.*, *U.S. DOD, Def. Logistics Agency, Def. Distrib. Region W., Stockton, Cal.*, 48 FLRA 221, 223 (1993) (citing *U.S. Dep't of the Army, Pine Bluff Arsenal, Ark.*, 47 FLRA 626, 629 (1993)).
[65] Exceptions at 18-19.

the first requirement even if the arbitrator fails to specify what contract provision was violated.[66]

Here, the Arbitrator cited Articles 14 and 22 of the agreement in his award.[67] He also found that the Agency violated the agreement when it released the grievants to non-work status.[68] As noted above, we have denied the Agency's exceptions challenging that determination. Thus, the Arbitrator's finding that the Agency violated the agreement satisfies the first BPA requirement.[69]

Second, the Agency argues that the backpay award is deficient because there is no causal connection between the Agency's release of the grievants and their failure to receive backpay under the CAA.[70] The second BPA requirement is satisfied if there is a showing of a causal connection between the unjustified or unwarranted personnel action and the withdrawal or reduction of a grievant's pay.[71] In this regard, the Authority has stated that a finding of a causal connection may be implicit from the record and the award.[72]

Here, the Arbitrator found that the Agency violated the agreement, and he directed the Agency to pay the grievants backpay. There is no dispute that the Agency's release of the grievants resulted in their loss of pay. But the Agency asserts that only employees furloughed as a result of the shutdown are entitled to backpay under the CAA, and because the Agency released the grievants to non-work status for reasons unrelated to the shutdown, "[t]here is no causal connection between the Agency's actions in releasing [the grievants] . . . and the government shutdown which immediately followed."[73] Contrary to the Agency's assertion, the Arbitrator specifically found that the Agency released the grievants because of the shutdown rather than lack of work.[74] We defer to the Arbitrator's factual findings in the absence of a demonstration that they are based on nonfacts.[75] And, as noted above, we have denied the Agency's nonfact exception regarding those findings. Thus, the Arbitrator's findings establish the requisite causal connection – had the Agency complied with the agreement, the Agency would not have released the grievants, and they would have been entitled to backpay. Therefore, the award satisfies the second BPA requirement.[76] Accordingly, we deny the exception.

3. The award is not contrary to the CAA.

The Agency argues that the awarded remedy is contrary to the CAA.[77] Specifically, the Agency contends that "[b]ecause the seasonal employees were not furloughed[,] they do not qualify for [backpay] pursuant to the terms of the [CAA,] . . . which limits [backpay] to employees furloughed as a result of any lapse in appropriations."[78]

As discussed in section IV.C.2. above, the BPA provides a sufficient basis for the award of backpay in this case. Consequently, it is immaterial whether the CAA independently supports the backpay award. Accordingly, the Agency's exception provides no basis of finding the award deficient, and we deny the exception.

Finally, we note the dissent's assertion[79] that the Authority should withhold its decision in this case until the U.S. Court of Appeals for the Fourth Circuit has issued a decision in *U.S. DHS v. FLRA* (*DHS*).[80] But *DHS* does not involve the CAA, the shutdown, or any other issues involved in this case. Accordingly, it is unclear how *DHS* would be relevant here. We see no basis for allowing this case to linger indefinitely before us while we wait for a decision in a case that has no apparent bearing here. In our view, that certainly would not promote "an effective and efficient [g]overnment"[81] or the prompt "settlement[] of disputes."[82]

V. Decision

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

[66] *E.g.*, *FERC*, 58 FLRA at 600 (citing *U.S. DOD, Army & Air Force Exch. Serv., Dall., Tex.*, 49 FLRA 982, 991-93 (1994)); *U.S. Dep't of the Air Force, Tinker Air Force Base, Okla.*, 42 FLRA 1342, 1347 (1991).
[67] *See* Award at 3-4.
[68] *Id.* at 7.
[69] *See, e.g.*, *FERC*, 58 FLRA at 600; *U.S. Dep't of the Air Force, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 52 FLRA 938, 942 (1997) (*Warner Robins*).
[70] Exceptions at 19.
[71] *GSA*, 55 FLRA 493, 496 (1999).
[72] *E.g.*, *U.S. Dep't of the Navy, Naval Air Depot Cherry Point, N.C.*, 61 FLRA 38, 40 (2005) (*Cherry Point*); *Warner Robins*, 52 FLRA at 942 (citation omitted).
[73] Exceptions at 19.
[74] Award at 7.
[75] *See, e.g.*, *AFGE, Local 1164*, 66 FLRA 74, 78 (2011).
[76] *See, e.g.*, *Cherry Point*, 61 FLRA at 40; *FERC*, 58 FLRA at 600; *Warner Robins*, 52 FLRA at 942-43.
[77] Exceptions at 15-17.
[78] *Id.* at 17.
[79] Dissent at 14.
[80] No. 15-2502 (4th Cir. *pet. for review filed* Nov. 30, 2015).
[81] 5 U.S.C. § 7101(b).
[82] *Id.* § 7101(a)(1)(C).

Member Pizzella, dissenting:

In the 1983 remake of the movie *Scarface*, Tony Montana (played by Al Pacino) observes: "In this country, you gotta make the money first. Then when you get the money, you get the power."[1]

Article 1, Section 9, clause 7 of the U.S. Constitution makes it unmistakably clear that "[n]o money 'can be paid out of the Treasury unless it has been appropriated by an act of Congress.'"[2] This provision "protects Congress's 'exclusive power over the federal purse,'"[3] the ability to tax and spend public money for the federal government, "one of the most important authorities allocated to Congress in the Constitution's 'necessary partition of power among the several [branches of the federal government].'"[4]

Federal agencies are well aware of the process that Congress employs to fund federal agencies and operate the federal government on a day-to-day basis. Under this Constitutional process, Congress appropriates money for federal agencies to use but instructs, quite specifically, how, when, and for what purposes those monies may be used.[5] And it is those restrictions, which are imposed by Congress – the authority to "appropriat[e]," to "contract," and to "borrow[]" – that define the parameters of an agency's "***budget authority***."[6] Obviously, the "***budget authority***" which Congress grants to a federal agency as part of the Constitutional appropriations process has a far broader meaning and context than does the management right enumerated in the Federal Service Labor-Management Relations Statute (the Statute) at 5 U.S.C. § 7106(a)(1) – "nothing in this chapter shall affect the authority of any management official of any [federal] agency[] to determine the . . . ***budget*** . . . of the agency."[7]

On this point, federal courts recognize the limits of their judicial authority with respect to Congress's appropriations authority. According to the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit), "Congress's control over federal expenditures is 'absolute.'"[8] The federal courts recognize that, when it comes to obligating and spending the government's money, the courts have no power to extend or revive a budget authority which has lapsed.[9]

Because these limitations are so clear to Congress, the federal courts, and federal agencies, it is quite surprising that the D.C. Circuit had to lecture the Authority about the Authority's limitations and the limited reach of the Statute when it comes to federal appropriations and arbitral awards, which impact the appropriations process and an agency's budget authority.[10] But that is what the D.C. Circuit had to do in *U.S. Department of the Navy v. FLRA* (*Navy*) when it reminded (and reversed) the Authority (for the second time in two years)[11] that the "budget authority" granted by Congress to a federal agency may not be extended or expanded "by contract" between a federal agency and a federal union.[12]

Somehow, the majority continues to miss, or ignores entirely, the D.C. Circuit's message on this point. The majority's decision in *U.S. DHS, U.S. CBP (DHS)*, has been challenged as contrary to federal appropriation law. The Department of Homeland Security *and* the Department of Justice have joined forces to challenge the majority's overreach and to ask the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) "whether an arbitrator has correctly interpreted ***federal statutory and constitutional requirements***, including ***limits*** on spending federal funds ***imposed by the Appropriations Clause***."[13] In other words, the Fourth Circuit is called upon to determine the same question that the court in *Navy* and *U.S. Department of the Air Force v. FLRA* previously had to answer and conclude − that the majority exceeded its authority when it came to applying our "organic statute" to an errant

[1] http://www.imdb.com/title/tt0086250/quotes.

[2] *U.S. Dep't of the Navy v. FLRA*, 665 F.3d 1339, 1346 (D.C. Cir. 2012) (*Navy*) (quoting *OPM v. Richmond*, 596 U.S. 414, 424 (1990)).

[3] *Id.* (quoting *Rochester Pure Waters Dist. v. EPA*, 960 F.2d 180, 185 (D.C. Cir. 1992) (*Rochester*)).

[4] *Id.* (quoting The Federalist No. 51, at 320).

[5] *Id.* at 1347-48.

[6] *Nat'l Ass'n of Reg'l Councils v. Costle*, 564 F.2d 583, 586 (D.C. Cir. 1977) (*Costle*) (emphasis added) ("Government agencies may only enter into obligations to pay money if they have been granted such authority by Congress. Amounts so authorized by Congress are termed collectively 'budget authority' and can be subdivided into three conceptually distinct categories [−] appropriations, contract authority, and borrowing authority. Appropriations permit an agency to incur obligations and to make payments on obligations."); *see also Rochester*, 960 F.2d at 184 (the agency's "[b]udget authority [] impose[s] deadlines that require agencies to obligate funds [and may only be extended] in the rare circumstance where the extension will serve the interests of justice and the ends Congress sought to bring about.").

[7] 5 U.S.C. § 7106(a)(1).

[8] *Navy*, 665 F.3d at 1348 (quoting *Rochester*, 960 F.2d at 185).

[9] *Costle*, 564 F.2d at 589-90; *see also Rochester*, 960 F.2d at 184 (court lacks authority to award remedy after underlying appropriation lapsed).

[10] *Navy*, 665 F.3d at 1347-48; *U.S. Dep't of the Air Force v. FLRA*, 648 F.3d 841, 845 (D.C. Cir. 2011) (*Air Force*).

[11] *See Air Force*, 648 F.3d at 845-46.

[12] *Navy*, 665 F.3d at 1348 (quoting *Air Force*, 648 F.3d at 845).

[13] Br. for Petitioner at 19, *U.S. DHS v. FLRA*, No. 15-2502, (4th Cir. June 7, 2016) (emphasis added).

arbitral award which directly impacted an agency's budget authority and the federal appropriations process.[14] Quite remarkably, the D.C. Circuit has found that the Authority has exceeded its authority in this respect at least *five* times since 2000.

How could it then be "unclear [to my colleagues] how [the determination by the Fourth Circuit in] *DHS* would be relevant here[?]"[15] If the arbitrator's award (and thus the Authority's decision) in *DHS*, is found by the Fourth Circuit to have impermissibly awarded a monetary remedy for the violation of a statute that is not "money-mandating" and therefore does not waive sovereign immunity, it will be the *sixth* time that a federal court has ruled against the Authority on this matter. Perhaps even more telling, it will also mean that the Fourth Circuit agrees with the D.C. Circuit that the Authority may not use our "organic statute" to override an agency's budget authority and the federal appropriations process. It is quite irrelevant that the factual underpinnings in *DHS* are different. What is relevant is that both courts will have addressed whether the arbitrator and the majority have "correctly interpreted federal statutory and constitutional requirements, including limits on spending federal funds imposed by the Appropriations Clause."[16]

Contrary to the majority, therefore, I must conclude that the prudent course here is to defer our determination until the Fourth Circuit makes its determination in *DHS*. The parties have already submitted briefs to the Fourth Circuit and are awaiting a date for oral arguments.[17] Thus, there is nothing "effective and efficient" about rushing a decision which repeats the same errors for which the D.C. Circuit overruled the Authority five times before.

After "the federal government shut down due to a lapse in appropriations" in 2013,[18] Congress passed the Continuing Appropriations Act which specifically identified those employees who were entitled to backpay as a result of the furlough.[19] Those decisions were not to be made through discussions with federal unions and were not subject to any provisions of the Statute.[20]

Once again today, however, the majority embraces an illogical and overreaching award and "decides for another executive branch agency how it should have allocated its budget."[21] Specifically, the majority decides for the IRS that the IRS should have paid "seasonal employees" backpay for the period of time the federal government was shut down.

The IRS only calls "seasonal employees" into "pay status" whenever there is work for them to do.[22] Whenever there is not enough, or *no*, *work* to do, they are released.[23] In other words, there is no guarantee of work for any "length of time" for a seasonal employee.[24]

Article 14 of the parties' agreement permits the IRS to release "any or all . . . seasonal employees" whenever there is *no work* for them to do.[25] Obviously, when the federal government shut down, there was *no work* for any non-essential IRS employees to do. That is a matter of common sense.

But Chapter 67 of the National Treasury Employees Union thought it knew better and convinced Arbitrator Philip Tamoush that the IRS "took advantage of" "and released [seasonal] employees coincident with the government shutdown."[26] It is almost as if Arbitrator Tamoush believes the IRS conspired with Congress to create the shutdown just so it would not have to pay its seasonal employees.

Give me a break.

It is astounding that the majority actually goes along with this outlandish scheme and agrees that the Arbitrator could direct the IRS to pay its seasonal employees for the period of the shutdown. The Authority does not have that power, and goes far beyond any power it has under the Statute, as I discuss at length above.

To the contrary, it is obvious to me that the Authority has no more business telling the IRS that it must pay backpay to seasonal employees, who may be released whenever there is no work for them to do, than when the majority dictated to the National Institute of

[14] *See Navy*, 665 F.3d at 1348; *Air Force*, 648 F.3d at 846 (quoting *Dep't of VA v. FLRA*, 9 F.3d 123, 126 (D.C. Cir. 1993)); *see also Ass'n of Civilian Technicians, Tony Kempernich Mem'l Chapter 21 v. FLRA*, 269 F.3d 1119, 1121 (D.C. Cir. 2001); *SSA v. FLRA*, 201 F.3d 465, 471 (D.C. Cir. 2000).
[15] Majority at 10.
[16] Brief for Petitioner at 19, *U.S. DHS v. FLRA*, No. 15-2502, (4th Cir. June 7, 2016).
[17] *U.S. DHS v. FLRA*, No. 15-2502 (4th Cir. *pet. for review filed* Nov. 30, 2015).
[18] Majority at 1.
[19] Pub. L. No. 113-46, § 115, 127 Stat. 558, 561 (2013).
[20] 5 U.S.C. §§ 7101-35.
[21] *U.S. Dep't of HHS, Nat'l Inst. of Envtl. Health Sciences*, 68 FLRA 1049, 1053 (2015) (*NIEHS*) (Dissenting Opinion of Member Pizzella).
[22] Majority at 3 (quoting Award at 4).
[23] *Id.*
[24] *Id.*
[25] Award at 3.
[26] *Id.* at 7.

Environmental Health Sciences how "it should allocate its reduced funding under . . . sequestration."[27]

Furthermore, the majority employs a hyper-legalistic technique to avoid addressing the IRS's argument that the award excessively interferes with its § 7106(a)(2)(A) right to retain seasonal employees. In its closing brief to the Arbitrator, the IRS argued that the Statute "expressly reserves to the [IRS] the right to hire, assign, direct[,] and lay[]off employees."[28] According to the majority, however, because the IRS did not include the single word "retain" in that brief (to the Arbitrator), it need not even consider the IRS's management rights' argument.

I do not agree.

Section 7106(a)(2)(A) contains two broad clauses. The first clause, which describes "the authority of any management official . . . to hire, assign, direct, layoff, and retain employees in the agency" is set off from the second clause which describes the authority "to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees." The two clauses are separated by the conjunction "***or***" which is particularly meaningful because the rights in the first clause are similar to one another just as the rights in the second clause are also similar to one another. However, the characteristics in each clause are quite distinct.[29]

Against this backdrop, the Authority (not just me as my colleagues assert) has often considered the right to retain as part and parcel of the right to layoff and the other rights delineated in the first clause of § 7106(a)(2)(A).[30] And, even though in some circumstances a distinction may be warranted, that is not true here, where the IRS argues that the parties' agreement "adopts this statutory language and reserves its right to hire, assign, direct and lay[]off employees." In the context of its arguments, concerning the release and recall of seasonal employees, the IRS's right-to-retain argument should not be summarily dismissed. As I have noted before, "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."[31]

Finally, contrary to the majority, I do not agree that the Arbitrator's interpretation of Article 14 represents a plausible interpretation of the parties' agreement. Article 14 allows the Agency to release seasonal employees for *lack of work*. During the government shutdown there was *no work* for seasonal employees. But the Arbitrator oddly concludes that the IRS violated Article 14 because of his feeling that the IRS "took advantage of the timing of the impending government shutdown" and "released the employees coincident with the government shutdown."[32]

I am not sure what other option the IRS had. The IRS did not make the decision to shut down the federal government. Those circumstances were beyond its control. But when the government did shut down, clearly, there was *no work*.

Thank you.

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[27] *NIEHS*, 68 FLRA at 1053 (Dissenting Opinion of Member Pizzella).

[28] Agency's Post-Hr'g Br. at 5.

[29] *See AFGE, Local 1827*, 58 FLRA 344, 345 (2003) (*AFGE, Local 1827*) ("the right to retain employees has never been separately defined in Authority case law and has always been addressed in connection with the right to layoff"); *AFGE, Local 1156*, 63 FLRA 340, 341 (2009) (the Authority has interpreted the § 7106(a)(2)(A) right "to suspend, remove, reduce in grade or pay or take other disciplinary action . . . as encompassing an agency's right to take action based on unacceptable performance.").

[30] *AFGE, Local 1827*, 58 FLRA at 345.

[31] *U.S. DOJ, Fed. BOP, Fed. Med. Ctr., Lexington, Ky.*, 69 FLRA 10, 18 (2015) (Dissenting Opinion of Member Pizzella) (quoting *SSA, Office of Disability Adjudication & Review, Region VI, New Orleans, La.*, 67 FLRA 597, 607 (2014) (Dissenting Opinion of Member Pizzella)).

[32] Award at 7.