71 FLRA No. 223

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
DUBLIN, CALIFORNIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3584
COUNCIL OF PRISON LOCALS #33
(Union)

0-AR-5492

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DECISION

December 11, 2020

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Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members
(Member DuBester dissenting in part)

Decision by Member Abbott for the Authority

I. Statement of the Case

On January 24, 2017, Arbitrator Linda S. Klibanow issued an award (the merits award), finding that the Agency violated the parties' agreement and awarded several remedies regarding the Agency's improper recording and distribution of overtime assignments. Subsequently, the Arbitrator conducted a remedial hearing to address the remaining disputes and issued a tentative remedial award and final remedial award (jointly referred to as the remedial award). In the remedial award, the Arbitrator ruled individually on each of the Union's backpay claims and she ordered the Agency to utilize an overtime sign-up list in non-emergency situations.

While we find that the Agency's exceptions to the remedial award are timely, we dismiss all of the Agency's untimely exceptions to the merits award because it was a final award. We also find that the Arbitrator did not exceed her authority because the Agency fails to demonstrate that the Arbitrator disregarded a specific limitation on her authority. Lastly, we find that the award is contrary to law, in part, because it violates the Agency's management right to assign work.

II. Background and Arbitrator's Award

A. The merits award

In March 2014, the Union filed a grievance alleging that the Agency violated the parties' agreement by failing to distribute overtime equitably and by failing to maintain or provide the Union with overtime-related records necessary for the Union to monitor overtime assignments. The parties could not resolve the grievance, and it proceeded to arbitration.

In the merits award, the Arbitrator found that the Agency's recordkeeping of overtime assignments violated Article 18, Section p(2) of the parties' agreement.[1] Specifically, the Arbitrator found that the Agency's overtime records did not enable the Union to monitor the assignment and distribution of overtime and that the Agency had improperly removed some Union officials' access to the Agency's Computerized Roster Program (CRP).[2] The Arbitrator also found that the Agency violated Article 18, Section p(1) of the parties' agreement by failing to rotate and distribute overtime equitably in the Custody and Food Service departments. The Arbitrator ruled that, unless the Agency's overtime records demonstrated the existence of an emergency justification for bypassing the sign-up list, a list-exempt overtime assignment was improper.[3] The Arbitrator also found that the Food Services department improperly required employees to use only compensatory (comp) time when overtime assignments were made, and passed over employees who would not accept comp time.

[1] Article 18, Sections p(1)-(2) of the parties' agreement states the following:
Specific procedures regarding overtime assignments may be negotiated locally.
1. When Management determines that it is necessary to pay overtime for positions/assignments normally filled by bargaining unit employees, qualified employees in the bargaining unit will receive first consideration for these overtime assignments, which will be distributed and rotated equitably among bargaining unit employees; and
2. Overtime records, including sign-up lists, offers made by the Employer for overtime, and overtime assignments, will be monitored by the Employer and Union to determine the effectiveness of the overtime assignment system and ensure equitable distribution of overtime assignments to members of the unit. Records will be retained by the Employer for two (2) years from the date of said record.
Final Remedial Award at 5.

[2] At the time of the merits award, the CRP was used only in the Custody and Food Service departments. Merits Award at 8.

[3] The Arbitrator noted that the term "list exempt" is not based on any language in Article 18, but that the parties appeared to have a past practice of allowing supervisors to bypass the sign-up list in "true emergency situations." Merits Award at 27-28.

Lastly, the Arbitrator found that the Agency violated Article 18, Section p(1) of the parties' agreement when it paid overtime to supervisors for performing bargaining-unit work when the overtime had not previously been offered to, and refused by, qualified unit employees.

To remedy the violations, the Arbitrator awarded backpay to employees who were deprived of overtime because of the unwarranted personnel actions. The Arbitrator further ordered the Agency to prospectively provide the Union—every month—with a broad range of overtime-related documents,[4] to retroactively provide all documents necessary to calculate who is eligible for back pay and in what amounts, and to cease and desist from interfering with the Union's access to the CRP. The Arbitrator also ordered the parties to jointly create "appropriate written procedures" for equitably distributing and recording overtime in the future.[5] She retained remedial jurisdiction to ensure compliance with the remedy. The Agency did not file any exceptions to the merits award and the parties reached a settlement, effective March 31, 2017, in which the Agency paid for the Union's attorney fees and expenses.

B. The remedial award

After the merits award, the parties engaged in extended discussions to identify and collect the necessary documents to calculate the amount of backpay that was due. Because the meetings were generally fruitless, the Arbitrator agreed to the parties' joint request that she extend her jurisdiction until the parties resolved the remedy. The Arbitrator then found that the Agency was in violation of the merits award and she ordered the Agency to provide further documentation to the Union. Due to the fact that the parties identified several hundred remaining backpay disputes, the Arbitrator conducted a remedial hearing to hear evidence on the remaining issues.

On February 22, 2019, the Arbitrator issued a tentative remedial award, ruling individually on each of the Union's claims for backpay. The Arbitrator noted that the Agency justified all of the disputed overtime assignments as its exercise of management rights under the Federal Service Labor-Management Relations Statute (the Statute). Applying the criteria outlined by the Authority in *U.S. DOJ, Federal BOP* (*DOJ*),[6] the Arbitrator stated that management did not have to use the overtime sign-up list when the Agency determined there was an "emergency" situation. She further established parameters for determining whether management had "inadequate time" to use the sign-up list and for evaluating other situations in which the sign-up list was ignored.[7] However, in the absence of an emergency and inadequate time, the Arbitrator ruled that the Agency must cooperate with the Union in establishing standards for the sign-up list and that a failure to properly use the sign-up list will be remedied with backpay.

The Arbitrator also ordered the Agency to verify that the CRP had been implemented "in each department with any bargaining unit employees."[8] Furthermore, because the list allows the grievants to sign-up for one shift at a time, the Arbitrator found that overtime could not be distributed equitably if medical-trip overtime was allowed to span two shifts. Lastly, the Arbitrator determined that the Agency should not prospectively allow supervisors to perform a combination of supervisory and bargaining-unit work during an overtime shift.

Finally, the Arbitrator ruled that back pay would be calculated by using the pay rate for GS-8, Step 10 (the average pay grade of eligible employees), at the time the overtime was performed.[9] She noted that the award was tentative "solely as to matter of identification, including correct correspondence of the parties' differing exhibit numbers, and numerical calculations," and that the award would become final after ten days absent a notice of correction from either party.[10] On March 4, 2019, the Agency indicated that the pay rates used for each of the overtime violations was inaccurate and attached a revised set of overtime calculations for the tentative remedial award. The Union did not object to the Agency's proposed corrections. On March 7, 2019, the Arbitrator issued the final remedial award, which was identical in all respects to the tentative remedial award, except that it used the Agency's corrected calculations.

[4] The overtime-related documents included sign-up lists, offers made, and explanations for when the sign-up list is not used.
[5] *Id.* at 26, 32 n.33.
[6] 70 FLRA 398 (2018) (Member DuBester dissenting).
[7] Tentative Remedial Award at 23 n.15 ("Upon review of relevant circumstances of the record herein, in formulating the within remedial decision and award the arbitrator employs 'insufficient time' leeway not to exceed 2 hours and a global estimate as to 'emergency time' not to exceed 2.5 hours, at which juncture overtime (shift remainder and/or succeeding shift) shall be only worked through roster assignment.").
[8] Final Remedial Award at 82-83.
[9] *Id.* at 29. At the remedial hearing, the parties agreed that it would not be feasible to recreate every improper overtime assignment in order to determine who would have received the overtime; instead, they agreed that a lump sum payment would be divided among eligible employees, using an average pay rate. However, the parties disagreed whether the appropriate pay rate should be GS-7, Step 5 or GS-8, Step 10. *See id.* at 9-10, 28-29; *see also* Opp'n, Attach. 3, Union's Post-Award Remedy Brief at 16-17.
[10] Final Remedial Award at 84.

The Agency filed exceptions to the merits and remedial awards on April 8, 2019, and the Union filed an opposition on May 10, 2019.

III. Preliminary Matter: The exceptions to the merits award are untimely.

Under 5 C.F.R. § 2425.2(b), the time limit for filing exceptions to an arbitration award is thirty days after the date of service of the award. The time limit may not be extended or waived by the Authority.[11] Furthermore, an award is considered final for purposes of filing exceptions when it fully resolves all issues submitted to arbitration.[12]

In the merits award, the Arbitrator resolved all of the issues submitted to her, ordered a remedy, and retained jurisdiction to assist in implementing the remedy.[13] Therefore, unlike *Department of VA, Edith Nourse Rogers Memorial VA Medical Center, Bedford, Massachusetts*,[14] the Arbitrator completed the process of fashioning a remedy in the merits award.[15] Furthermore, the remedial award was limited to issues surrounding the Agency's compliance with the remedies ordered by the merits award.[16] Therefore, the merits award was a final award and the Agency was required to file exceptions relating to that award within thirty days after receiving the merits award.[17]

In the instant case, the Agency's essence exception challenges procedural arbitrability determinations from the merits award.[18] Because the Agency's essence exception does not raise a statutory jurisdictional defect,[19] we dismiss it as untimely. Additionally, the Agency's nonfact exception is untimely because it pertains to factual findings from the merits award.[20] Lastly, portions of the Agency's contrary-to-law and exceeds-authority exceptions solely pertain to issues that were resolved by the Arbitrator in the merits award. Specifically, to the extent that the Agency's exceeds exception challenges remedies and violations which stem solely from the merits award, these arguments are untimely and are dismissed.[21] Similarly, the Agency's contrary-to-law exception is dismissed as untimely insofar as it claims the merits award does not comport with the Authority's prior interpretation of Article 18.[22]

However, the Arbitrator expressly stated that the tentative remedial award would only become final if there were no corrections submitted from either party within ten days of the tentative remedial award.[23] Moreover, because one of the primary purposes for the remedial hearing was to determine the amount of damages owed to the Union, the tentative remedial award was not a final award. Consequently, we will consider the Agency's exceptions which allege deficiencies in the tentative remedial award and final remedial award.

[11] 5 C.F.R. § 2425.2(b); *see* 5 U.S.C. § 7122(b) ("If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30-day period beginning on the date the award is served on the party, the award shall be final and binding."); *U.S. Dep't of the Air Force, Pope Air Force Base, N.C.*, 71 FLRA 338, 339 (2019) (*Pope AFB*) (Member DuBester concurring).

[12] *U.S. Dep't of the Navy, Trident Refit Facility, Kings Bay, Ga.*, 65 FLRA 672, 674 (2011).

[13] Merits Award at 3.

[14] 71 FLRA 232 (2019) (Member DuBester concurring).

[15] *Id.* at 233 n.7; *see* Merits Award at 30-33.

[16] Final Remedial Award at 8-10.

[17] *Pope AFB*, 71 FLRA at 339; *see U.S. DHS, U.S. Citizenship & Immigration Servs.*, 68 FLRA 1074, 1076 (2015) (Member DuBester dissenting) (stating that an award is final even "where an arbitrator has retained jurisdiction solely to assist the parties in the implementation of awarded remedies, including the specific amount of monetary relief awarded"); *U.S. Dep't of the Treasury, IRS*, 63 FLRA 157, 159 (2009) (finding an award final where it resolved all issues submitted to arbitration even though the arbitrator retained jurisdiction while the parties determined the amount of backpay and expenses); *OPM*, 61 FLRA 358, 361 (2005) (Member Pope dissenting in part) (award is final when it awards fees or damages, but leaves the amount of those damages to be determined).

[18] Exceptions Br. at 9, 12.

[19] *See U.S. Dep't of HUD*, 70 FLRA 605, 607-08 (2018) (Member DuBester dissenting) (where grievance suffered from statutory jurisdictional defect, Authority set aside series of remedial awards because "the Arbitrator has always lacked jurisdiction over the grievance, as a matter of law, under § 7121(c)(5)").

[20] Exceptions at 38-43.

[21] The Agency argues that the Arbitrator exceeded her authority in the merits award by improperly requiring: (1) the Agency to maintain and furnish the Union with a wide range of documentation relating to overtime that is not required by the Master Agreement, Exceptions Br. at 19-20; (2) the parties to enter into new negotiations, and to reach agreement, on "appropriate written procedures and supporting joint terminologies for the concepts and practices at issue in the equitable distribution and rotation of overtime . . .", *id.* at 20-21; and (3) the Agency to release information in violation of the Privacy Act. *Id.* at 20 n.4. Furthermore, although the remedial award touches upon the issue of drafting a "overtime guide," *id*. at 22-23, the Arbitrator was simply emphasizing her conclusion in the merits award that "the parties must devise appropriate written procedures and supporting terminologies" regarding the assignment of overtime. Merits Award at 26, 32 n.33. Therefore, the Agency's challenge to the Arbitrator's order that the parties meet and confer regarding a "draft Overtime Guide" should have also been raised before the merits award became final.

[22] Exceptions Br. at 26-27.

[23] Tentative Remedial Award at 84.

IV. Analysis and Conclusions

A. The Arbitrator did not exceed her authority.

The Agency argues that the Arbitrator exceeded her authority by modifying the parties' agreement to require the Agency to expand the CRP from only two departments to every department.[24] The Agency also argues that the Arbitrator has violated the doctrine of functus officio by "maintaining never ending jurisdiction."[25] Generally, arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance.[26]

While the merits award did not require the CRP to be utilized in any specific department, a review of the record demonstrates that the Agency subsequently agreed at a teleconference to expand the CRP to all departments.[27] Therefore, the Arbitrator's order relating to the CRP simply embodies the Agency's own agreement to expand the program beyond the Custody department.[28] Because the Agency does not challenge this as a nonfact, we reject the Agency's argument. Additionally, the Authority has recognized that, after issuing an award, an arbitrator may retain jurisdiction in order to oversee remedial implementation.[29] Therefore, because the Arbitrator retained jurisdiction to resolve compliance issues with the merits award,[30] the Arbitrator did not exceed her authority.[31] Therefore, we deny this exception.

B. The award is contrary to law, in part.

The Agency argues that the award violates its right to assign work under § 7106(a) of the Statute.[32] Specifically, the Agency makes general claims that the remedial award excessively interferes with these rights because the Agency cannot do the following: determine when an emergency necessitates overtime, "make basic managerial decisions regarding staffing resources," "assign one officer to cover an overtime shift that straddles over two shifts," "make a decision to cover a post using comp time without first offering it as overtime[,] and it may not use supervisors to cover shifts that are typically bargaining unit positions."[33]

As noted above, the Arbitrator ruled on the remaining backpay claims in the remedial award and identified (in both general and specific terms) the circumstances in which the Agency could justifiably avoid using the overtime sign-up list.[34] In so doing, the Arbitrator expanded on some of the general conclusions she had made in the merits award. Specifically, the remedial award expanded on the merits award by requiring the following: to pay the unresolved backpay claims from the merits award; to utilize an overtime sign-up list—except in emergency situations and where the Agency has less than two hours to fill a post; to jointly establish standards for using the sign-up list; to verify that the CRP had been implemented in each department; that medical-trip overtime should not span more than one shift; and that the Agency should not

[24] Exceptions Br. at 21-22. The Agency relatedly claims that the Arbitrator exceeded her authority, by awarding relief to persons not encompassed in the Union's grievance, because she ordered the Agency to expand the CRP to every department. Exceptions Br. at 22 n.5. However, a review of the Union's grievance demonstrates that the Union grieved the Agency's failure to permit the Union to monitor *all* overtime assignment records. Exceptions, Attach. D at 4. Therefore, the Agency's argument is without merit and is denied. *See U.S. DOJ, Fed. BOP, Fed. Det. Ctr., Honolulu, Haw.*, 66 FLRA 858, 862 (2012) (Chairman Pope dissenting in part); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Sheridan, Or.*, 66 FLRA 388, 391 (2011); *U.S. DOL, Bureau of Labor Statistics, Wash., D.C.*, 59 FLRA 533, 535 (2003) (denying exceeds-authority exception because remedy was responsive to the violations and appropriate).

[25] Exceptions Br. at 24.

[26] *AFGE, Local 1633*, 64 FLRA 732, 733 (2010).

[27] Opp'n, Ex. 2, Arbitrator's Directive with Respect to February 2, 2018 Teleconference & May 9-10, 2018 Hearing at 2.

[28] Final Remedial Award at 82-83.

[29] *U.S. Agency for Global Media*, 70 FLRA 946, 947 (2018) (Member DuBester dissenting).

[30] Final Remedial Award at 8-13.

[31] *U.S. Dep't of the Navy, Naval Surface Warfare Ctr., Indian Head Div., Indian Head, Md.*, 56 FLRA 848, 852 (2000) (finding that the arbitrator had jurisdiction to resolve compliance issues with previous awards).

[32] Exceptions Br. at 18-21. When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception de novo. *DOJ*, 70 FLRA at 408. 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. *Id.* In making this assessment, the Authority defers to the arbitrator's underlying factual findings unless they are shown to be nonfacts. *Id.*

[33] Exceptions Br. at 46. Under the three-part framework set forth in *DOJ*, the first question is whether the arbitrator found a violation of a contract provision. *DOJ*, 70 FLRA at 405. If so, we proceed to the second question of whether the arbitrator's remedy reasonably and proportionally relates to that violation. *Id.* If the answer to both questions is yes, then the final question is whether the arbitrator's interpretation of the provision excessively interferes with a § 7106(a) management right. *Id.* If the answer to that question is yes, then the arbitrator's award is contrary to law and must be vacated. *Id.* at 406.

[34] *See supra* Part II.

prospectively allow supervisors to perform a combination of supervisory and bargaining-unit work during an overtime shift.[35] Therefore, we will address the Agency's exceptions to the degree that they object to these conclusions from the remedial award.

With regard to the first question under *DOJ*,[36] the Arbitrator found that the Agency violated Article 18, Section p of the parties' agreement by improperly recording and distributing overtime assignments.[37] Therefore, the answer to the first question – whether the arbitrator found a violation of a contract provision – is yes.[38]

Under *DOJ*, the second question asks whether the arbitrator's remedy reasonably and proportionally relates to the violation.[39] Here, the Arbitrator ordered the Agency to pay the remaining backpay claims originating from the violations found in the merits award.[40] Additionally, the remainder of the remedial award's remedies stem from the Arbitrator's finding in the merits award that the Agency failed to comply with Article 18 when assigning overtime.[41] Because the Arbitrator found that the parties' agreement requires the Agency to equitably distribute overtime assignments and to give first consideration to bargaining-unit employees for overtime assignments normally filled by unit employees, the remedies reasonably and proportionally relate to the Agency's violation of Article 18. Accordingly, the answer to the second question is yes.

The third question under the *DOJ* test is whether the Arbitrator's interpretation of the parties' agreement excessively interferes with the agency's right to assign work and to assign its employees. Previously, the Authority has recognized that management has broad latitude under the Statute when assigning overtime, including the ability to reassign employees to different shifts or vacate shifts in order to avoid paying overtime.[42] Furthermore, the Authority has held that the right to assign work under § 7106(a)(2)(B) includes the right to assign work to non-bargaining-unit employees.[43] Generally, an award that simply requires an agency to adhere to a provision to which it agreed does not excessively interfere with its management's rights.[44] However, an exception to this general rule would be if an agency can demonstrate that the arbitrator's interpretation of the provision encompasses subjects that are beyond the scope of what an agency can legally agree to under § 7106 of the Statute.[45]

In that regard, the Arbitrator interpreted Article 18, Section p(1) of the parties' agreement to require the Agency to give "first consideration" to bargaining-unit employees for overtime assignments that normally concern unit work and that such assignments should be distributed equitably.[46] As relevant here, the Arbitrator emphasized in the remedial award that the Agency has the ability to avoid use of the sign-up list when there is an emergency,[47] or they have less than two hours to fill the post.[48] Therefore, the remedial award properly tailors the sign-up list to observe the

[35] Final Remedial Award at 16-26; 82-84.
[36] 70 FLRA at 405-06.
[37] Merits Award at 30-33.
[38] 70 FLRA at 406.
[39] *Id.*
[40] Merits Award at 30-33.
[41] 70 FLRA at 406; Final Remedial Award at 16-26. We also note that the Agency concedes in its exceptions that the remedies reasonably and proportionally relate to the Agency's violation of the parties' agreement. Exceptions Br. at 46.
[42] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Dublin, Cal.*, 71 FLRA 183, 185 (2019) (*BOP, Dublin*) (Member DuBester dissenting) ("Here, the awarded remedy precludes the [a]gency from vacating mission-critical posts in the absence of an emergency or other rare circumstance. Therefore, we find that the remedy excessively interferes with the [a]gency's right to assign work under § 7106(a)(2)(B)."); *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Lompoc, Cal.*, 70 FLRA 596, 597-98 (2018) (*BOP, Lompoc*) (Member DuBester dissenting) ("The awarded remedy here requires the [a]gency to assign vacant cook-supervisor shifts to the grievants on an overtime basis and precludes the Agency from—for economic reasons—either assigning those shifts to non-unit employees or leaving the shifts vacant. Therefore, we find that the remedy excessively interferes with the [a]gency's right to assign work under § 7106(a)(2)(B).").
[43] *DOJ*, 70 FLRA at 406 ("By restricting the [a]gency to a point where it is no longer able to assign work to employees outside of the bargaining unit, the [a]rbitrator's interpretation of Article 18 clearly excessively interferes with the [a]gency's right to assign employees and to assign work under § 7106."); *see also BOP, Lompoc*, 70 FLRA at 597-98.
[44] S*ee Ass'n of Civilian Technicians, Mont. Air Chapter No. 29 v. FLRA*, 22 F.3d 1150, 1155-56 (1994) (finding "[t]he nonnegotability of management rights enumerated in [§ 7106](a) is expressly '[s]ubject to [7106](b)'" and finding "the agreement cannot subsequently be deemed unlawful . . . simply because it pertains to a permissible – rather than mandatory – subject of [bargaining]").
[45] *DOJ*, 70 FLRA at 405 ("In other words, the '[s]ubject to subsection (b) of this section' in § 7106(a) and the corresponding '[n]othing in this section shall preclude any agency and any [union] from negotiating' language in § 7106(b) do not create a standard to evaluate an arbitrator's award but have to do with what the agency must negotiate or may elect to not negotiate.").
[46] Merits Award at 30-31. Consequently, we will apply the Arbitrator's interpretation of the parties' agreement because the Agency fails to demonstrate that the Arbitrator's interpretation of Article 18, Section p does not draw its essence from the parties' agreement.
[47] Contrary to the Agency's claim that it "can no longer determine what it considers to be an emergency situation," Exceptions Br. at 46, the Arbitrator emphasized that this remains a management decision. Final Remedial Award at 17.
[48] Final Remedial Award at 17, 24-25.

Agency's right to assign work in emergency situations.[49] Furthermore, the Agency does not argue that the Arbitrator's interpretation of Article 18 is beyond the scope of what the Agency can legally agree to under § 7106 of the Statute. Consequently, to the extent the remedy requires the Agency to adhere to Article 18, Section p, it does not excessively interfere with the Agency's right to assign work.

However, the Agency correctly asserts that part of the remedial award imposes new obligations that are not present in the parties' agreement.[50] And those obligations excessively interfere with its management rights. Specifically, the parties' agreement does not restrict the Agency's ability to assign work when a shift concerns a combination of supervisory and unit work.[51] Furthermore, the parties' agreement does not restrict the Agency's ability to assign multiples shifts of overtime in one assignment.[52] Because the Agency has broad latitude to assign work and overtime,[53] the answer to the third question is yes, in part, and we strike the portions of the award where the Arbitrator imposed these two obligations on the Agency's prospective use of the sign-up list.[54]

IV. Decision

Because we find that the award is contrary to law, in part, we vacate the award, in part.

[49] *See U.S. DOJ, Fed. BOP, Fed. Corr. Inst. Tallahassee, Fla.*, 71 FLRA 622, 623 (2020) (Member DuBester concurring) ("The [a]rbitrator simply concluded that there was no emergency and that the assignment of overtime under these circumstances violated the parties' agreement."). In this regard, we note that the award here is distinguishable from previously overturned awards that restricted the agency's right to *vacate* posts in the absence of an emergency. *BOP, Dublin*, 71 FLRA at 185; *BOP, Lompoc*, 70 FLRA at 597-98. Here, in contrast, the Agency is choosing to assign overtime shifts and the remedial award merely requires it to use the agreed-upon procedures in distributing those assignments.

[50] Exceptions Br. at 46-47.

[51] Final Remedial Award at 5.

[52] *Id.*

[53] *See supra* note 42.

[54] *See BOP Lompoc*, 70 FLRA at 597-98; *DOJ*, 70 FLRA at 406. Also, to the extent that the Arbitrator awarded backpay for instances where the Agency assigned overtime that spanned for more than one shift, that award excessively interferes with the Agency's right to assign work and must be set aside. It is worth noting that the Arbitrator denied all claims where supervisors performed a combination of supervisory and unit work. Only a small number of individual claims were upheld where supervisors performed unit work. *See* Final Remedial Award at 39, 58, 75-79.

Member DuBester, dissenting in part:

I agree with the decision to dismiss the Agency's exceptions to the merits award, and to deny the Agency's exceeded-authority exception to the remedial award. However, I disagree that portions of the awarded remedies are contrary to law.

I have previously cautioned that the three-part test created by the majority in *U.S. DOJ, Federal BOP* (*DOJ*)[1] for assessing whether arbitration awards "excessively interfere" with a management right "'invite[s] the exercise of arbitrary power'" because it "lack[s] discernible principles."[2] In today's decision, the majority explains that under the *DOJ* test, "an award that simply requires an agency to adhere to a provision to which it agreed does not excessively interfere with its management's rights."[3] And applying this interpretation, the majority concludes that the award does not excessively interfere with the Agency's right to assign work "to the extent [it] requires the Agency to adhere to Article 18, section p" of the parties' collective-bargaining agreement.[4]

The majority also concludes, however, that two aspects of the award excessively interfere with management rights because they "impose[] new obligations that are not present in the parties' agreement."[5] Specifically, the majority vacates remedies imposed by the Arbitrator relating to medical-trip overtime[6] and supervisors working overtime[7] because they restrict "the Agency's ability to assign multiple shifts of overtime in one assignment" and its "ability to assign work when a shift concerns a combination of supervisory and unit work."[8]

But the majority's conclusion does not align with its own iteration of the *DOJ* test. Article 18, Section p of the parties' agreement requires that when the Agency "determines that it is necessary to pay overtime for positions/assignments normally filled by bargaining unit employees, qualified employees in the bargaining unit will receive first consideration for these overtime assignments, which will be distributed and rotated equitably among bargaining unit employees."[9] Here, the record clearly demonstrates that the Arbitrator imposed the remedies vacated by the majority to address the Agency's failure to use the overtime roster – and offer overtime for each shift first to bargaining-unit employees and on a rotating basis – when it has no justification for failing to do so.[10]

In other words, the vacated remedies do not "impose[] new obligations that are not present in the parties' agreement."[11] To the contrary, they merely – in the words of the majority – "require[] the Agency to adhere to Article 18, section p" of the parties' agreement when it determines it is necessary to assign overtime.[12]

[1] 70 FLRA 398 (2018) (Member DuBester dissenting).

[2] *U.S. DHS, U.S. CBP, Detroit Sector, Detroit, Mich.*, 70 FLRA 572, 576 (2018) (Dissenting Opinion of Member DuBester) (quoting *Sessions v. Dimaya*, 138 S.Ct. 1204, 1223-24 (2018) (Concurring Opinion of Justice Gorsuch)).

[3] Majority at 8.

[4] *Id.* at 9.

[5] *Id.*

[6] Final Remedial Award at 26 (stating that the Agency should adhere to the overtime assignments by shift to "conform[] to the equitable overtime assignment standard" except where exceptions were necessary).

[7] *Id.* at 25 (stating that "in furtherance of the contractual goal and requirements as to equitable distribution," assignments in which supervisors perform bargaining-unit work on overtime "shall not be so 'integrated'").

[8] Majority at 9.

[9] Final Remedial Award at 5 (quoting Article 18 of the parties' agreement).

[10] *Id.* at 25-26; s*ee, e.g.*, Exceptions, Attach., Tr. at 142-144, 148, 151-52; *see also e.g.*, Opp'n, Ex. 3, Union's Post-Hr'g Br. at 30, 31 (citing Tr., Day 2 at 35, 121-22, 124 (agency testimony that it should have used the overtime roster to assign overtime for an extra shift to a different bargaining-unit employee and rotate the employee to the bottom of the list after working the overtime)).

[11] Majority at 9. As the majority notes, even the Agency concedes in its exceptions that the awarded remedies reasonably and proportionally relate to its violation of the parties' agreement. *Id.* at 8 (citing Exceptions Br. at 46).

[12] *Id.* To the extent that the majority relies upon prior decisions in which it has applied *DOJ* to find an award contrary to management's rights, even these decisions are distinguishable from the award before us. *See, e.g.*, *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Dublin, Cal.*, 71 FLRA 183, 185 (2019) (Member DuBester dissenting) (concluding that award excessively interferes with agency's right to assign work where it "precludes the [a]gency from vacating mission-critical posts in the absence of an emergency or other rare circumstance"); *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Lompoc, Cal.*, 70 FLRA 596, 597-98 (2018) (Member DuBester dissenting) (vacating award because it "requires the [a]gency to assign vacant cook-supervisor shifts to the grievants on an overtime basis"); *DOJ*, 70 FLRA at 406 (concluding that award excessively interferes with agency's right to assign work "[b]y restricting the [a]gency to a point where it is no longer able to assign work to employees outside of the bargaining unit").

Arbitrators have "broad discretion . . . in fashioning appropriate remedies" for contractual violations.[13] And "where an arbitrator 'has found a contractual violation with regard to a particular action, the arbitrator may direct prospective relief, including directing the agency to comply with the violated contract provision in conducting future actions.'"[14] Absent any plausible basis for concluding that the Arbitrator's award impermissibly encroaches upon a management right, I would apply this principle to deny the Agency's contrary-to-law exception in its entirety.

Accordingly, I dissent.

[13] *SSA*, 71 FLRA 798, 807 (2020) (*SSA*) (Dissenting Opinion of Member DuBester); *see also United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (arbitrators commissioned to interpret and apply collective-bargaining agreements are expected to "bring [their] informed judgment[s] to bear in order to reach a fair solution of a problem," and "[t]his is especially true when it comes to formulating remedies").

[14] *SSA*, 71 FLRA at 807 (Dissenting Opinion of Member DuBester) (quoting *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 66 FLRA 712, 715 (2012) (Member Beck dissenting)); *see also U.S. Dep't of the Air Force, Joint Base Elmendorf-Richardson*, 69 FLRA 541, 547 (2016) (Member Pizzella dissenting) ("it is well[-]established that an arbitrator may prospectively direct an agency to comply with a violated contract provision").