64 FLRA No. 70

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
UNITED STATES
CUSTOMS AND BORDER PROTECTION
WASHINGTON, D.C.
(Agency)

0-AR-4062
(61 FLRA 729 (2006))

DECISION

January 29, 2010

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members [1]

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Roger P. Kaplan filed by the Union under § 7122 of the Federal Service Labor-Management Relations Statute (Statute) and part 2425 of the Authority's Regulations. The Agency (or CBP) also filed exceptions to the award. Each party filed an opposition to the other's exceptions.

The Arbitrator found that the Agency did not violate law or the parties' agreement by failing to implement a Decision and Order of the Federal Service Impasses Panel (Panel). For the reasons discussed below, we deny the Agency's exceptions, find that the award is contrary to law, and direct the Agency to: (1) cease and desist from failing to implement the Panel's Decision and Order: (2) incorporate the Panel-imposed provision into its collective bargaining agreement with the Union; (3) post a notice to employees; and (4) provide a letter to the Union explaining the Agency's compliance methodology. [2]

II. Background and Arbitrator's Awards

In April 2002, the Agency issued interim guidelines that prohibited Agency inspectional personnel from using or carrying privately owned wireless communication devices in "Primary Inspection Areas" (involving "initial inspection of arriving passengers and/or commercial traffic") and "Secondary Inspection Areas" (involving "secondary and/or intensive inspections of arriving passengers and/or commercial traffic"). Union Exceptions, Attachment, Jt. Ex. 1. The parties negotiated over the policy's implementation until January 2004, when the Agency implemented a final policy, which states, as relevant here: "CBP inspectional personnel are prohibited from carrying or using a privately owned . . . electronic communications device in primary and secondary inspectional areas of all ports of entry, crossings, or functional equivalents." *Id.*, Attachment, Jt. Ex. 14.

In May 2004, the Union filed a Request for Assistance with the Panel. *Id.*, Attachment, Jt. Ex. 15. *See* Award at 4. In October 2004, the Panel resolved the impasse. *Dep't of Homeland Sec., Border & Transp. Sec. Directorate, Bureau of Customs & Border Prot., Wash., D.C.*, 04 FSIP 100 (2004) (*CBP*). The Panel determined that it had jurisdiction to decide whether the Union's proposal was negotiable, and that the proposal was negotiable, because it was substantively identical to a proposal found negotiable in *AFGE, Local 1122*, 47 FLRA 272 (1993) (*Local 1122*). [3] *CBP*, 04 FSIP 100 at 5-6 & n.6. Having established jurisdiction, and having determined that the evidence showed that the "benefit to employees under the Union's proposal outweighs its costs[,]" *id.* at 6, the Panel ordered the parties to adopt the Union's proposal:

> In the event that employees are prohibited from carrying a privately owned pager, cell phone, or other wireless communication device to receive incoming calls or messages, [CBP] will ensure that at least one manned telephone is available at all ports covered by this policy which is specifically and solely dedicated to receiving incoming emergency telephone calls to bargaining unit

1. Member Beck's dissenting opinion is set forth at the end of this decision.

2. A Notice to Employees is set forth in the Appendix.

3. The relevant proposal in *Local 1122* required the agency to provide two centralized telephones for unit employees to handle "rollover" calls, i.e., calls that transfer to a second phone when the first phone is not answered. *Local 1122*, 47 FLRA at 272 & n.1. The proposal was intended to enable affected employees to make and receive personal emergency and other authorized non-work related phone calls. *Id.* at 280. The Authority found that the proposal affected the agency's right to determine the technology of performing work but that it was negotiable as an appropriate arrangement.

> employees. Port employees will be informed of the emergency telephone numbers and emergency notification procedures . . . .

Id.

The Agency refused to implement the Panel's Decision and Order. Award at 5. In response, the Union filed a grievance claiming that the Agency's refusal constituted an unfair labor practice (ULP) and violated the parties' agreement. *Id.* at 1-2, 5. A hearing was held and, in his initial award, the Arbitrator ruled that he lacked jurisdiction to determine the negotiability of the provision and denied the grievance.[4] *NTEU*, 61 FLRA 729, 730 (2006). The Union filed exceptions to the award with the Authority. The Authority found that the Arbitrator's determination was contrary to law, and remanded the case to the Arbitrator. *Id.* at 732-34. The Authority stated:

> [T]he Arbitrator was compelled to address the merits of the negotiability issue as a necessary element in resolving the alleged violation of § 7116(a) of the Statute. . . .
>
> . . . Specifically, the Arbitrator must make findings as to the make-up of the phone system, and the effect of [the provision] on the operation[s] of that system, in order to resolve whether the [provision] is an appropriate arrangement. . . .
>
> Accordingly . . . we will remand the award to the parties . . . for resubmission to the Arbitrator so that he can decide, on the merits, whether the Agency's failure to comply with the FSIP's Order constitutes a violation of § 7116(a) of the Statute.

Id. at 733.

In his award on remand — which is under review in this case — the Arbitrator found that the disputed provision "requires that the CBP either add over 300 additional telephone lines, or take over 300 lines currently being used for Agency business and dedicate those lines for employee emergency calls." Award at 7-8. In addition, the Arbitrator accepted the Union's interpretation of the provision term "manned" as requiring that "the dedicated telephone line be in an area where an employee could hear it ring and be able to answer the call." *Id.* at 9.

The Arbitrator found that the provision is an arrangement for employees. *See id.* at 7. In this regard, the Arbitrator noted "few would even question that the denial of access to one's personal cell phone creates an adverse impact." *Id.* The Arbitrator added that, in *NTEU*, 61 FLRA 729, the Authority "assumed . . . an adverse impact." *Id.*

Nevertheless, the Arbitrator found that the provision excessively interferes with the Agency's rights to determine the technology of performing work, to determine its internal security practices, and to assign work. *Id.* at 7-10.

Regarding the right to determine the technology of performing work, the Arbitrator distinguished the provision from the relevant proposal in *Local 1122*, 47 FLRA 272. Noting that "[t]here is a big difference in requiring an agency to add two (2) telephone lines and requiring one to add over 300 lines[,]" and further noting that the telephone lines would be dedicated "strictly to emergency employee business[,]" the Arbitrator concluded that the provision excessively interferes with the Agency's right to determine the technology of performing work. *Id.* at 8.

Regarding the right to determine internal security practices, the Arbitrator stated:

> NTEU did not attempt to specify how the CBP should make available over 300 dedicated lines. Arguably, instead of adding over 300 lines . . . CBP could use some or all of its existing lines and dedicate them for emergency employee calls. . . . If [the provision] was adopted and the Agency had to take some of its telephones currently used for Agency business and dedicate them for emergency employee telephone calls, CBP operations would likely be adversely affected . . . . Reducing the number of telephone lines that the Agency has determined it needs for its own internal security practices would impair those practices.

Id. at 8-9.

Regarding the Agency's right to assign work, the Arbitrator determined that the provision would not affect that right at the Agency's larger offices because "it is likely that at least one (1) employee would be available at all times to hear and answer the dedicated line, as a minor interruption to the other Agency work the employee was performing." *Id.* at 9. However, the

4. When the Panel orders a party to adopt a proposal, the proposal subsequently is referred to as a "provision." *See, e.g., U.S. Army Aeromedical Ctr., Fort Rucker, Ala.*, 49 FLRA 361, 361-62 & n.1 (1994) (proposal that the Panel ordered the parties to adopt referred to as "provision").

Arbitrator determined that the provision would affect the right to assign work at the Agency's smaller offices because, in those offices:

> [I]t is likely that there would be times when an employee would not be available to hear and answer the dedicated line. In those situations, the CBP would have to choose between violating the requirements of the [provision] or reassigning an employee from other duties to make sure an employee was available to hear and answer the dedicated line.

Id. at 9-10.

Consistent with the foregoing, the Arbitrator found that the provision is nonnegotiable. *See Id.* at 10. The Arbitrator concluded, therefore, that the Agency's failure to implement the Panel's Decision and Order did not violate the parties' collective bargaining agreement or § 7116(a) of the Statute. *Id.* at 11.

III. Positions of the Parties

A. Union's Exceptions

The Union argues that the Arbitrator's determination that the provision is nonnegotiable is contrary to law. In this regard, the Union asserts that the provision does not affect the Agency's rights to determine its internal security practices, to assign work, or to determine the technology of performing work. [5] Union Exceptions at 10-18.

With regard to the Agency's internal security practices, the Union asserts that the Agency can implement the provision by adding telephone lines instead of using existing telephone lines. *Id.* at 15-16. Therefore, the Union argues, the Agency can implement the provision without affecting the telephone lines the Agency currently uses. *Id.* at 16.

With regard to assignment of work, the Union argues that the provision does not require that the Agency designate employees to specifically answer emergency phone calls. *Id.* at 17-18. Additionally, the Union asserts that the Arbitrator's determination that the provision would affect the Agency's ability to assign work in its smaller offices is based on nonfact, as this argument was not considered at the hearing. *Id.* at 18 n.17.

With regard to the right to determine the technology of performing work, the Union argues that because the Agency can implement the provision by adding phone lines instead of using the Agency's existing phone lines, and because these lines would not be used for work-related calls, the provision does not affect the Agency's right to determine the technology of performing work. *Id.* at 12-13.

In the alternative, the Union asserts that the provision is an appropriate arrangement under *NAGE, Local R14-87*, 21 FLRA 24 (1986) (*KANG*). *Id.* at 19-22. In this regard, the Union argues that the provision is an appropriate arrangement because the benefit of the provision, "increasing the ability of officers to remain in contact," with their families, *id.* at 21, "far outweighs" any intrusion on the Agency's rights. *Id.* at 22.

B. Agency's Opposition

The Agency asserts that it uses its telephone lines to protect the Agency from bomb threats and dangerous cargo, and that the provision interferes with this practice by diverting telephone lines currently used for that purpose. Agency Opp'n at 20-21. The Agency claims that, even if it were to implement the provision by adding telephone lines, the provision would affect the Agency's internal security practices because it would have "an implicit impact on the Agency's telecommunications strategy, plans, and budget to allot for telephone lines to perform agency work." *Id.* at 22. Additionally, the Agency contends that the provision would interfere with its internal security practices because it would "require that an employee, who is in the middle of responding to a security threat, must interrupt his security efforts in order to answer the dedicated line." *Id.*

As for the assignment of work, the Agency contends that the provision would require the Agency to assign employees to be within earshot of the proposed phone lines. *Id.* at 23. As such, the Agency argues, it would be required to assign a sufficient number of employees "so that the dedicated line would be answered in any situation." *Id.* In response to the Union's nonfact claim, the Agency claims that the Arbitrator's finding as to small offices is not clearly erroneous. *Id.* at 24-25.

Regarding the right to determine the technology of performing work, the Agency argues that it uses telephone lines to accomplish its work and that the provision would interfere with that purpose. *See id.* at 17-18. Specifically, the Agency asserts that "[i]f the Agency were required to dedicate one of its telephone lines at each port of entry[,]" then it would reduce the Agency's

5. As there is no claim that the provision affects the right to determine the methods and means of performing work, we address only the technology of performing work.

ability to receive mission-related telephone calls. *Id.* at 18. Additionally, the Agency asserts that diverting some of its current telephone lines would significantly reduce its telephone capacity at some of its offices, such as the one in Buffalo, New York, where phones are configured in "hunt groups."[6] *Id.* at 19. Even if the Agency were to add telephone lines, the Agency contends that the provision would interfere with the purpose for which the Agency's phone technology was adopted because "the Agency would then not have the same capacity . . . and budget to allot for telephone lines to perform agency work." *Id.*

The Agency also asserts that the Arbitrator correctly found that the provision is not an appropriate arrangement under *KANG*. *Id.* at 25-26. In this regard, the Agency argues that the Union has not demonstrated that the Agency's ban on wireless communications devices had more than a minimal impact on employees, as the Union presented only three instances over the course of two years when employees missed emergency calls. *Id.* at 26-27. Further, the Agency argues that employees already have a means to receive emergency calls. *Id.* at 27. Specifically, the Agency states that it:

> instituted the following emergency notification procedures at all ports: (1) employees are given the appropriate telephone numbers to provide to their loved ones in the case of an emergency, and (2) if the loved ones use this telephone number to communicate an emergency message, the message will be given to a supervisor to ensure delivery to the employee.

Id.

C. Agency's Exceptions

The Agency asserts that the Panel and, by extension, the Arbitrator lacked jurisdiction because the provision in *Local 1122*, 47 FLRA 272, is not substantively identical to the provision at issue here. Agency Exceptions at 14-16. In addition, the Agency argues that the Arbitrator improperly accepted the Union's interpretation of the term "manned" in the provision. Agency Exceptions at 16. The Agency argues that a "manned" telephone requires that the Agency "supply or station someone to serve at the telephone line dedicated solely to receiving incoming emergency telephone messages for bargaining unit employees . . . ." *Id.* at 17. Finally, the Agency argues that the Arbitrator erroneously assumed that the provision is an arrangement under *KANG*. Agency Exceptions at 20-21. The Agency contends that the provision is not an arrangement because the Agency's restrictions on wireless communication devices did not adversely affect employees. *Id.* at 22-23.

D. Union's Opposition

Stating that the Agency did not "appeal" the Authority's initial ruling in this case, which directed the Arbitrator to determine the negotiability of the provision,[7] the Union claims that the Arbitrator had jurisdiction over the grievance. Union Opp'n at 9-10. Moreover, the Union argues that it is well settled that arbitrators may make negotiability determinations in the context of determining whether violations have taken place. *Id.* at 10. In addition, the Union argues that the Arbitrator properly interpreted the term "manned." *Id.* at 11. Finally, the Union asserts that the Arbitrator properly found the provision to be an arrangement. *Id.* at 12-14. The Union asserts that the Agency's restrictions on wireless communication devices adversely affect approximately 8,000 bargaining unit employees. *Id.* at 13.

IV. Analysis and Conclusions

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award *de novo*. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). 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. *See U.S. Dep't of Def., Dep'ts of the Army and the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

A. The Arbitrator did not lack jurisdiction.

Contrary to the Agency's claim, the Arbitrator's jurisdiction did not depend on the Panel's jurisdiction; the Arbitrator's jurisdiction resulted from the grievance alleging that the Agency committed a ULP by refusing to implement the Panel's Decision and Order. *See, e.g., NTEU*, 61 FLRA at 732 (quoting *U.S.. Dep't of the Treasury, IRS*, 23 FLRA 774, 777-78 (1986) ("An agency's refusal to implement a Decision and Order of

6. A "hunt group" is a system in which, if a phone is being used, then an incoming call "rolls over" to another phone. Transcript (Tr.) at 113-114, 121-122.

7. In fact, the Agency filed, but withdrew, a petition for review of the Authority's decision. *Dep't of Homeland Sec. and U.S. Customs and Border Prot., Wash. D.C., v. FLRA*, No. 06-1366 (D.C. Cir. Jan. 29, 2007).

the [FSIP] requiring the parties to adopt language in their collective bargaining agreement [may] violate[] [§] 7116(a)(1) and (6) of the Statute.")). It is clear that arbitrators are authorized to resolve a ULP in a grievance setting. *NTEU*, 61 FLRA at 732 (citing *SSA, Office of Hearings and Appeals, Kansas City, Mo.*, 29 FLRA 1285, 1287 (1987)). As administrative law judges are authorized to determine negotiability issues when determining whether a ULP has been committed, the Arbitrator also was authorized to do so. *See NTEU*, 61 FLRA at 732 (citing *U.S. Dep't of Health and Human Servs., SSA, Balt., Md.*, 36 FLRA 655, 669 (1990)).

Accordingly, we deny the Agency's exception.

B. The Arbitrator did not misinterpret the provision.

The Agency contends that the Arbitrator erred when he "accepted" the Union's explanation that the term "manned" in the provision requires only that "the dedicated telephone line be in an area where an employee could hear it ring and be able to answer the call." Agency Exception at 16, Award at 9. The Agency claims that the Arbitrator erred by not specifically referencing the wording of the provision in interpreting it.

When interpreting a proposal, the Authority examines the wording of the proposal as well as the union's statement of intent. If the union's statement of intent comports with the plain wording of the proposal, then the Authority will adopt the union's interpretation. *E.g., AFGE, Local 1164*, 60 FLRA 785, 785 (2005). Moreover, it is well established that, with exceptions not relevant here, the Authority reviews an Arbitrator's award, not the reasoning or opinion accompanying the award. *See, e.g., NTEU Chapter 137*, 60 FLRA 483, 487 n.11 (2004) (*Chapter 137*) (Chairman Cabaniss concurring) (question before Authority was whether award was contrary to law and not whether the arbitrator's reasoning was correct).

Applying Authority precedent here, the Union's statement of intent comports with the plain wording of the provision. Specifically, the Union's explanation that the term "manned" means that employees will be available to answer the proposed phone lines comports with the wording of the provision, which requires only that a "manned telephone [be] available." In this regard, contrary to the Agency's claim, the provision does not "require the Agency to 'supply' and constantly station someone to serve at the telephone line dedicated solely to receiving incoming . . . messages for . . . unit employees." Agency Exceptions at 16.

Accordingly, the Arbitrator did not err by accepting the Union's explanation of the provision, and we deny the Agency's exception.

C. The provision does not affect management rights.

The right to assign work "encompasses the right to determine the particular duties to be assigned, when work assignments will occur, and to whom or what positions the duties will be assigned." *AFSCME Local 2830*, 60 FLRA 671, 673 (2005). However, the mere fact that a proposal or provision entails some kind of agency action does not necessarily implicate an agency's right to assign work. *See POPA*, 41 FLRA 795, 822-23 (1991) ("[T]o conclude that a proposal or provision interferes with management's right to assign work simply because it requires an agency to take some action would completely nullify the obligation to bargain . . . .").

The Arbitrator concluded, and there is no dispute, that the provision would not affect the Agency's right to assign work in the Agency's larger offices. Award at 9. However, the Arbitrator found that the provision would affect the Agency's right to assign work in the Agency's smaller offices. In this regard, the Arbitrator reasoned, "it is likely that there would be times when an employee would not be available to hear and answer the dedicated phone line[]" and that, "[i]n those situations, the [Agency] would have to choose between violating the requirements of the [provision] or reassigning an employee from other duties to make sure an employee was available to hear and answer the dedicated line." *Id.* at 9-10.

In *AFGE, Local 3511*, 12 FLRA 76, 99 (1983) (*AFGE, Local 3511*), the Authority held that a proposal allowing employees to use a phone for emergency calls did not interfere with the Agency's right to assign work. Similarly, in *Dep't of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 31 FLRA 651, 660-61 (1988) (*SSA, Baltimore*), the Authority found that a proposal allowing employees to directly receive personal emergency phone calls did not interfere with the Agency's right to assign work. Both cases indicate that an occasional emergency phone call made or received by an employee does not rise to the level of affecting an agency's right to assign work under the Statute.

Applying the foregoing precedent here, there is no basis in the record to conclude that, even in "smaller" offices, requiring an employee to be available to hear and answer calls made on the dedicated line would affect the right to assign work, within the meaning of

§ 7106(a)(2)(B) of the Statute. Award at 9. We note, in this regard, the award cites no evidence, and the Agency provides none, supporting the distinction between offices of various sizes. Moreover, the Agency emphasizes that, in addition to using its telephones "to receive calls from other law enforcement agencies regarding specific terrorist alerts, the Agency must maintain open lines to receive calls from the public regarding threats or concerns, intelligence from foreign governments, and calls from the trade community." Agency Exceptions at 8. In addition, as the Agency now acknowledges, "the telephone lines are always answered." *Id.* at 20. As the ability to receive telephone calls is so critical to the Agency's operations, and as there is existing capability to respond to telephone calls, we find that, whatever the size of the office, satisfying the additional responsibility to respond to emergency calls on the dedicated line would not have more than an incidental impact on the Agency's work assignments. [8] Accordingly, we find that the provision does not affect the Agency's right to assign work. [9]

With regard to the right to determine internal security practices under § 7106(a)(1) of the Statute, the Authority has held that this right includes the authority to determine the policies and practices that are part of an Agency's plan to secure or safeguard its personnel, physical property, or operations against internal or external risks. *NTEU*, 53 FLRA 539, 581 (1997). Where the agency shows a link or reasonable connection between its objective of securing or safeguarding its personnel, property, or operations and the policy or practice designed to implement that objective, a proposal that conflicts with the policy or practice affects management's right under § 7106(a)(1). *NTEU*, 55 FLRA 1174, 1186 (1999) (Member Wasserman dissenting in part). Once [such] a link has been established, the Authority will not review the merits of the agency's plan in the course of resolving a negotiability dispute." *Fraternal Order of Police, Lodge 1-F*, 51 FLRA 143, 145 (1995) (citing *AFGE, Local 2143*, 48 FLRA 41, 44 (1993)).

In this case, the Arbitrator found that the Agency has an objective of protecting against a "wide variety of security threats" and that the Agency uses its telephones to protect against these threats, stating that "[t]he use of the Agency telephone lines is an essential part of the [Agency's] internal security practices." Award at 8-9. Thus, the award indicates that there is a reasonable connection between the Agency's internal security objectives and its practices regarding Agency telephones.

The Arbitrator also found that the provision would affect the Agency's right to determine its internal security practices if the provision were implemented by diverting some of the Agency's currently-used telephone lines, stating that this would "[r]educ[e] the number of telephone lines that the Agency has determined it needs for its own internal security practices [and] would impair those practices." *Id.* at 9. However, the Arbitrator did not consider whether the provision would affect the Agency's right to determine internal security practices if the provision were implemented by adding telephone lines. *See* Award at 8-9. The Arbitrator acknowledged (Award at 8) and the Agency concedes (Agency Opp'n at 19) that the provision could be implemented this way. Nevertheless, the Agency argues that adding telephone lines "is impractical" and "would have an implicit impact on [its] telecommunication strategy, plans, and budget to allot for telephone lines to perform agency work." [10] Agency Opp'n at 22. Additionally, the Agency claims that the provision "would still require that an employee, who is in the middle of responding to a security threat, must interrupt his security efforts in order to answer the dedicated line." *Id.*

In sum, the Arbitrator made no finding that, if implemented by adding telephone lines, the provision would affect the Agency's right to determine its internal security practices. Moreover, the Agency does not dem-

8. We acknowledge the Arbitrator's statement, discussed above, that "[i]n the smaller offices, it is *likely* that there would be times when an employee would not be available to hear and answer the dedicated line[]" and that, "[i]n those situations, the [Agency] would have to choose between violating the requirements of the [provision] or reassigning an employee from other duties to make sure an employee was available to hear and answer the dedicated line." Award at 9-10 (emphasis added). The dissent asserts that this is a "factual finding" that the provision would "require management to adjust the manner in which it assigns work[,]" and that this finding is entitled to "substantial deference[.]" Dissent at 14. Even assuming that the dissent is correct in this regard, the Arbitrator did not make any findings regarding how often this type of situation is "likely" to occur. Award at 9. In this connection, as set forth above, incidental impacts on management's rights do not rise to the level of actually "affect[ing]" management's rights within the meaning of § 7106 of the Statute. *See, e.g., POPA*, 41 FLRA at 822-23; *SSA, Baltimore*, 31 FLRA at 660-61; *AFGE, Local 3511*, 12 FLRA at 99. Moreover, as the Agency asserts that its telephone lines are always answered and, thus, always "manned," we find that the Agency effectively concedes that the provision has, at most, only an incidental impact on work assignments.

9. In light of this finding, it is not necessary to address the Union's contention that the award is based on a nonfact. *See, e.g., U.S. Envtl. Prot. Agency, Region 2*, 61 FLRA 671, 676 (2006).

10. As there is no basis to conclude that the Agency is raising a claim concerning its right to determine its budget, we do not address that matter.

onstrate such an effect. The Agency asserts that the provision is not practical — an assertion that relates to the provision's merits, not its negotiability — and the claim regarding the provision's "implicit impact" is unsupported. *Id.* In addition, the Agency's claim that an employee who is responding to a security threat must interrupt the response to answer the dedicated line misconstrues the provision, which only requires the dedicated line "be in an area where an employee could hear it ring and be able to answer the call." Award at 9. Nothing in the wording of the provision requires the result claimed by the Agency.

In these circumstances, we find that the provision does not affect the Agency's right to determine its internal security practices. As such, it is unnecessary for us to determine whether the Arbitrator erred in concluding that the provision is not an appropriate arrangement. *See, e.g., NFFE, Local 2050*, 35 FLRA 706, 715-16 (1990) (finding it unnecessary to determine whether proposal was an appropriate arrangement where proposal did not affect any management right).

V. Remedy

Consistent with our finding the award contrary to law, we set aside the award, the effect of which is to sustain the Union's grievance. *See NTEU, Chapter 207*, 60 FLRA 731, 735 (2005) (Chairman Cabaniss dissenting) ("The effect of the decision, setting aside the award, is to sustain the grievance."). Thus, we find that the Agency violated §§ 7116(a)(1), (5), (6) and (8) of the Statute by failing to implement the Panel's Decision and Order. As such, the issue of remedy must be addressed. *Id.*

When the Authority finds an arbitration award deficient, the Authority "may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations." 5 U.S.C. § 7122(a). As we find that the Agency committed a ULP, a remedy under § 7118(a)(7) of the Statute is appropriate. *Cf. NTEU, Chapter 168*, 55 FLRA 237, 242 (1999) (remedy under § 7118(a)(7) not appropriate where arbitrator appropriately found no violation of § 7116(a)(1) of the Statute). In cases where an alleged ULP is adjudicated pursuant to the statutory ULP procedures set forth in § 7118 of the Statute, "a cease-and-desist order accompanied by the posting of a notice to employees . . . are provided in virtually all cases where a violation [of § 7116] is found." *F.E. Warren Air Force Base, Cheyenne, Wyo.*, 52 FLRA 149, 161 (1996). In addition, when, under the statutory ULP procedures, the Authority finds that a party has committed a ULP by failing to implement a Decision and Order of the Panel, the Authority orders the violating party to cease and desist from failing to comply with the Decision and Order, and also orders the party to incorporate the provision into the parties' agreement and to post notices to employees. *See, e.g., Headquarters, Nat'l Guard Bureau, Wash., D.C., Nev. Air Nat'l Guard, Reno, Nev.*, 54 FLRA 316, 325-26 (1998), *petition for review denied sub nom., ACT, Silver Barons Chapter v. FLRA*, 200 F.3d 590 (9th Cir. 2000). No basis is urged for taking different action here. In fact, the Agency concedes that "an order to comply with the Panel's [Decision and Order] would be appropriate if the Authority grants the Union's exceptions[.]" Agency Opp'n at 29. Therefore, we will direct the Agency to cease and desist from failing to comply with the Panel's Decision and Order, to incorporate the provision into the parties' collective bargaining agreement, and to post notice of its compliance with the Decision and Order at all affected ports.

The Union's request that the Agency be ordered to provide the Union with a letter explaining its compliance methodology within 30 days from the date of this decision, Union Exceptions at 25, is consistent with Authority precedent. *U.S. Dep't of the Treasury, Internal Revenue Serv. and Internal Revenue Serv., Austin Dist., and Internal Revenue Serv., Houston, Dist.*, 23 FLRA 774, 783 (1986) (agency ordered to comply with Panel decision and order and to notify union of agency's compliance in writing). *See also, e.g., U.S. Dep't of Labor, Wash., D.C.*, 61 FLRA 825, 826 (2006) (agency ordered to notify regional director in writing of steps taken to comply with Authority order within 30 days of the decision date); *U.S. Dep't of Def., Def. Distrib. Depot, Anniston, Ala.*, 61 FLRA 108, 109 (2005) (same). Therefore, pursuant to § 7122(a) of the Statute, we will direct the Agency to provide the Union with a letter explaining its compliance methodology within 30 days from the date of this decision.

Finally, we note that, in remedying ULPs, the Authority generally does not set a date by which a party's compliance must be completed; instead, a respondent is required to notify a regional director of steps taken to comply. *See, e.g., id.* Neither party demonstrates a reason to depart from this practice. Accordingly, we deny the Agency's request that it be granted 180 days in which to comply and the Union's request that the Agency be provided 30 days for compliance.

VI. Decision

The Agency's exceptions are denied. The award is deficient insofar as the Arbitrator found that the Agency's failure to implement the Panel's Decision and

Order did not violate the Statute. We direct the Agency to: (1) cease and desist from failing to implement the Panel's Decision and Order: (2) incorporate the Panel-imposed provision into its collective bargaining agreement with the Union; (3) post a notice to employees; and (4) provide a letter to the Union explaining the Agency's compliance methodology.

APPENDIX

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORTY

The Federal Labor Relations Authority has determined that the United States Department of Homeland Security, United States Customs and Border Protection, Washington, D.C., has violated the Federal Service Labor-Management Relations Statute (the Statute). Pursuant to the Authority's Decision in 0-AR-4062 (64 FLRA No. 70 (2010)), we hereby notify all employees that:

WE WILL NOT fail to implement the Decision and Order of the Federal Service Impasses Panel in Case No. 04 FSIP 100.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights assured by the Statute.

WE WILL incorporate the provision imposed by the Panel in Case No. 04 FSIP 100 into our collective bargaining agreement with the National Treasury Employees Union.

WE WILL provide a letter to the National Treasury Employees Union explaining our compliance methodology.

U.S. Department of Homeland Security, U.S. Customs and Border Protection, Washington, D.C.

_____
(Agency)

Dated: _____ By:_____
(Signature) (Title)

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Member Beck, Dissenting:

I conclude that the subject proposal affects the Agency's right to assign work. A contractual obligation that requires a particular telephone line to be "manned" at all times directly interferes with management's flexibility in how it utilizes its workforce. If implemented, this proposal would require that one employee be made available to respond to calls placed to this particular telephone — and thus be unavailable to perform other duties elsewhere. Therefore, I cannot agree with the Majority that the Agency committed an unfair labor practice when it failed to implement the Panel's Decision and Order. [1]

When we review an arbitrator's finding related to the negotiability of a proposal and that finding determines whether an unfair labor practice has occurred, we conduct a *de novo* review but accord substantial deference to the Arbitrator's factual findings. *GSA*, 54 FLRA 1582, 1587-88 (1998); *Louis A. Johnson VA Med. Ctr. Clarksburg, W. Va.*, 15 FLRA 347, 351 (1984). Here, the Arbitrator found, as a factual matter, that the provision would require management to adjust the manner in which it assigns work. Award at 9-10. This factual finding leads inexorably to the conclusion that the provision affects management's right to assign work. *U.S. Dep't of Justice, Fed. BOP, Fed. Corr. Complex, Beaumont, Tex.*, 62 FLRA 100, 102 (2007) (the assignment of specific duties to identified individuals affects management's right to assign work); *AFGE Local 3694*, 58 FLRA 148, 149-50 (2002) (proposal requiring agency to assign specific types of duties to particular employees affects management's rights to assign work); *U.S. Dep't of Justice, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 57 FLRA 331, 332 (2001) (citations omitted) (the right to assign work includes the right to determine the particular duties assigned, what positions will be assigned, and the right to refrain from assigning work). [2] The Majority has chosen to reject this factual finding and substitute its own, new factual determination that "whatever the size of the office, satisfying the additional responsibility to respond to emergency calls on the dedicated line would not have more than an incidental impact on the Agency's work assignments." Majority at 9. In this regard, the Majority's approach represents a departure from the very high degree of deference that we typically accord to arbitral factual finding. *U.S. Dep't of the Treasury, IRS, Agency-wide Shared Services, Florence, Ky.*, 63 FLRA 574, 578 (2009); *NATCA*, 60 FLRA 398, 400 (2004).

Further, the cases cited by the Majority — *AFGE Local 3511* and *SSA, Baltimore* — are readily distinguishable from the instant situation. The proposals in those cases permitted employees to place or receive calls in emergency situations, which, by definition, would be rare occurrences. However, no affirmative and constant burden was placed on the Agency to dedicate an employee at all times to the "manning" of a particular telephone line, as is the case here. The burden placed on the Agency here is qualitatively and quantitatively different from the burdens placed on management in *AFGE Local 3511* and *SSA, Baltimore*.

It is also not clear to me that the provision constitutes an appropriate arrangement. [3] The Union did not establish that the proposal would be more effective than the Agency's established emergency contact procedures. Award at 8; Agency Opposition at 20-27, citing Agency Exhibit 3 and Tr. 95-97, 113. See *POPA*, 56 FLRA 69, 80 (2000).

Because the provision interferes with management's right to assign work, and because the Union did not establish that the benefits to employees outweigh this interference, I would find that the provision is outside the Agency's duty to bargain and that the Agency did not commit an unfair labor practice.

1. I join the Majority in concluding that the Arbitrator had jurisdiction to address the Union's ULP charge and, in order to do so, was required to address the negotiability of the Union's proposal. I also agree that the Arbitrator did not err by accepting the Union's explanation of the term "manned" and that the provision required the Agency to ensure that employees be available to answer telephones dedicated to emergency calls.

2. Chairman (then-Member) Pope, in a concurring opinion in *U.S. Dep't of Justice, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, cited *DOJ/BOP Guaynabo* for the proposition that an Agency's decision whether to leave posts vacant is integral to its right to assign work. 58 FLRA 291, 296 (2003), citing concurring opinion in *U.S. Dep't of Justice, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 58 FLRA 109, 117 (2003).

3. The Majority does not reach this question because they determine that the provision does not affect management's rights to assign work.