

67 FLRA No. 122

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 160
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
BROWNSVILLE, TEXAS
(Agency)

0-AR-4862

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DECISION

June 24, 2014

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

I. Statement of the Case

Arbitrator Maretta C. Toedt found that the Agency did not violate the parties' collective-bargaining agreement or the Federal Service Labor-Management Relations Statute (the Statute) by failing to give the Union notice and an opportunity to bargain before it sent an email prohibiting Customs and Border Protection officers from stopping for food when traveling between worksites (the food-stop ban). In this connection, she found, as relevant here, that the email did not change a condition of employment established by past practice, and that, even if it did, there was no obligation to bargain, because the subject matter of the food-stop ban is "covered by" the parties' agreement. There are two substantive questions before us.

The first question is whether the Arbitrator exceeded her authority because she failed to resolve the issue of whether the parties had established the alleged past practice and, instead, resolved an issue about a different past practice. Because the Arbitrator resolved the submitted past-practice issue, and the Union does not demonstrate that it was improper for the Arbitrator to discuss a different past practice in resolving the submitted issue, the answer is no.

The second question is whether the Arbitrator's "covered-by" finding is contrary to law. Because that finding is consistent with Authority precedent, the answer is no.

II. Background and Arbitrator's Award

When an Agency director of field operations learned that some on-duty officers were stopping for food when traveling between worksites, the Agency issued the food-stop ban, which stated, in relevant part: "When traveling [between worksites] in a government or personal vehicle while on duty, you cannot stop for food or use a drive-thru to purchase food."¹ The ban also stated that employees could not leave their worksites to purchase meals.

In response, the Union filed a grievance alleging that the food-stop ban changed a condition of employment that the parties had established by past practice, and that the Agency had therefore violated its contractual and statutory obligation to provide notice and an opportunity to bargain before issuing the ban. The grievance went to arbitration.

At arbitration, the parties were unable to stipulate to the issues. So the Arbitrator framed them, in pertinent part, as follows:

1. Whether the Agency violated . . . the [parties' agreement] . . . when it issued [the food-stop ban]. If so, what is the appropriate remedy?
2. Whether the Agency . . . violat[ed] . . . [§ 7116(a)(5) and (a)(8) of the Statute] when it did not provide the Union with advance notice and an opportunity to bargain over the [food-stop ban.] If so, what is the appropriate remedy?²

The Arbitrator determined that there was an established past practice of prohibiting employees from leaving the worksite to get food. She found that this, and several other factors not relevant here, supported a conclusion that "the Union ha[d] not established that" instances of officers stopping for food between worksites "created a past practice that became a part of the parties' negotiated agreement."³ The Arbitrator found instead that the food-stop ban was a "reaffirmation of [an] established policy," and was not a change to a condition of employment over which the Agency was required to

¹ Award at 9 (quoting Agency email) (internal quotation marks omitted) (Arbitrator's emphasis omitted).

² *Id.* at 2-3.

³ *Id.* at 16.

provide notice and an opportunity to bargain.⁴ Therefore, the Arbitrator found that the Agency did not violate the parties' agreement or the Statute when it failed to bargain before issuing the food-stop ban.

Nevertheless, "[f]or the sake of completeness,"⁵ the Arbitrator "assume[d] for the sake of argument" that the food-stop ban changed a condition of employment, and she considered the parties' other arguments.⁶ In this regard, as relevant here, the Arbitrator found that the Agency did not violate its contractual or statutory duty to bargain because: (1) the disputed subject matter was "covered by" the parties' agreement;⁷ and (2) the change was not more than "de minimis."⁸

In making her "covered-by" finding, the Arbitrator addressed three contract provisions that the Agency cited: Article 6, Section 1.B.(1); Article 34, Section 16.A. and B.; and Article 37, Section 10.D.

Article 6, Section 1.B.(1) pertinently provides that the Agency has the authority to "assign" and "direct" employees.⁹ The Arbitrator found that although this contract wording "does not directly deal with the subject matter of breaks or stopping for food," allowing officers to stop for food "does directly affect the Agency's overall ability to assign work and direct the workforce."¹⁰

As for Article 34, Section 16.A. and B., that section states:

- A. The [Agency] will ensure employees are provided rest periods during the work day for the purpose of attending to employee personal needs.
- B. Such rest periods will be of reasonable duration and will be permitted at reasonable times during the work day, to include work performed on an overtime basis, consistent with the [Agency]'s right to assign work and workload demands.¹¹

The Arbitrator found that this section "covers rest breaks" and "indicates that rest breaks are tied into Article 6 and the Agency's right to assign and direct the workforce."¹² The Arbitrator noted that the food-stop ban instructed employees not to stop for food when traveling between worksites because the officer is on duty during such travel. In addition, the Arbitrator found that the parties agreed that rest breaks for officers who do not travel are taken on premises and are paid, which means that the officer may be called to duty during a break. According to the Arbitrator, "[a]n officer stopping for food may be reachable only by cell phone if he has gone into a restaurant,"¹³ and "[i]t is not reasonable to expect management to be forced to telephone individual officers on their cell phones in the event they are needed, especially if the need involves an emergency situation."¹⁴

Additionally, the Arbitrator stated that "[s]topping for food at the officer's convenience, when the duration of the break may be variable, may also run afoul of the contractual language that rest breaks are to be of reasonable duration and taken at reasonable times."¹⁵ In this regard, the Arbitrator stated that "[m]anagement loses the ability to determine or know how long the rest break is when the officer stops to pick up food," and when officers stop for food, "this is time in which an officer is not directly available to the Agency and is time that should be counted toward the officer's paid rest break of up to [twenty] minutes."¹⁶ The Arbitrator determined that, "[b]y including this language in the [agreement], the parties have demonstrated their intention to limit what can be done during a rest break as such breaks are of short duration, defined as up to [twenty] minutes, and the officer remains on duty."¹⁷ According to the Arbitrator, the agreement "makes no provision for lunch breaks, paid or unpaid, and employees are expected to eat during lulls in activity," and this "omission signifies an intention on the part of the parties that officers covered by the [agreement] do not get lunch breaks."¹⁸ And the Arbitrator concluded that "[t]he language in the [agreement] regarding rest breaks tends to show that the parties did not want employees to be unavailable during a rest break, which includes . . . stopping for food."¹⁹

Next, the Arbitrator addressed Article 37, Section 10.D., which provides that "[s]upervisors may excuse occasional brief absences from duty of less than one (1) hour when the employee provides the supervisor

⁴ *Id.* (quoting *Dep't of Health, Educ. & Welfare, Region V, Chi., Ill.*, 4 FLRA 736, 737 (1980)) (internal quotation marks omitted).

⁵ *Id.*

⁶ *Id.* at 17.

⁷ *Id.* at 23.

⁸ *Id.* at 20.

⁹ *Id.* at 28.

¹⁰ *Id.* at 21.

¹¹ *Id.* at 30.

¹² *Id.* at 21.

¹³ *Id.*

¹⁴ *Id.* at 21-22.

¹⁵ *Id.* at 22.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

with an explanation for the absence.”²⁰ The Arbitrator found that this wording “makes it clear that: (1) employees may request brief absences from work; (2) such absences require an acceptable explanation; (3) absences must be less than one hour; and (4) supervisors must approve these brief absences.”²¹ The Arbitrator also found that “[i]f an officer is stopping to pick up food in transit between work locations, he is absent from work[,] and he may be holding up an officer at the next location.”²²

“Taking these contractual provisions together,” the Arbitrator found that

the disputed issue of stopping to pick up food while en route to another work location is more than tangentially related to subjects covered by the agreement, i.e.[,] the Agency’s right to direct the workforce, the requirement to provide rest breaks at reasonable times and of reasonable duration consistent with the Agency’s right to assign work and workload demands, and the requirement that supervisory approval be obtained for breaks of less than one hour.²³

Accordingly, the Arbitrator found that the matter of stopping for food between worksites is “covered by” the agreement and that, consequently, the Agency did not have to bargain before issuing the food-stop ban.

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

III. Analysis and Conclusions

A. The Arbitrator did not exceed her authority.

The Union argues that the Arbitrator exceeded her authority.²⁴ As relevant here, arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration or resolve an issue not submitted to arbitration.²⁵ In the absence of a stipulated issue, the

arbitrator’s formulation of the issue receives substantial deference.²⁶

The Union argues that the Arbitrator failed to resolve an issue submitted – whether there was a past practice of officers stopping for food between worksites.²⁷ But the Arbitrator expressly resolved that issue when she found that “the Union ha[d] not established that” officers stopping for food when traveling from one worksite to another “created a past practice that became a part of the parties’ negotiated agreement.”²⁸ Thus, the Union’s argument is unfounded.

The Union also argues that the Arbitrator resolved an issue that was not submitted – whether there was a past practice of officers leaving the worksite to get food.²⁹ In resolving the submitted issue – whether there was a past practice of stopping for food between worksites – the Arbitrator relied on several factors, including a past practice of not allowing officers to leave the worksite to get food.³⁰ The Union provides no basis for finding that, by doing so, the Arbitrator abused the substantial deference that she receives in framing and resolving the issues.³¹ Thus, the Union’s argument provides no basis for finding that the Arbitrator exceeded her authority.

For these reasons, the Union has not demonstrated that the Arbitrator exceeded her authority.

B. The award is not contrary to law.

The Union contends that the Arbitrator’s application of the “covered-by” doctrine is contrary to law.³² The Authority reviews “de novo” an arbitrator’s legal conclusion that a matter is or is not “covered by” an agreement.³³ However, in so doing, the Authority defers to the arbitrator’s factual findings and contract interpretations.³⁴

The “covered-by” doctrine has two prongs.³⁵ Under the first prong, the Authority examines whether the subject matter of the change is expressly contained in

²⁰ *Id.* at 30.

²¹ *Id.* at 22.

²² *Id.*

²³ *Id.* at 23.

²⁴ Exceptions at 10.

²⁵ See *U.S. Dep’t of the Navy, Naval Base, Norfolk, Va.*, 51 FLRA 305, 307-08 (1995).

²⁶ See *U.S. Dep’t of the Army, Corps of Eng’rs, Memphis Dist., Memphis, Tenn.*, 52 FLRA 920, 924 (1997) (*Corps of Eng’rs*).

²⁷ Exceptions at 10-13.

²⁸ Award at 16.

²⁹ See Exceptions at 11.

³⁰ See Award at 13-16.

³¹ See *Corps of Eng’rs*, 52 FLRA at 924.

³² See Exceptions at 29.

³³ *U.S. Dep’t of the Treasury, IRS, Denver, Colo.*, 60 FLRA 893, 894 (2005) (*IRS Denver*), *aff’d sub nom. NTEU v. FLRA*, 452 F.3d 793 (D.C. Cir. 2006).

³⁴ *IRS Denver*, 60 FLRA at 894.

³⁵ *U.S. Customs Serv., Customs Mgmt. Ctr., Miami, Fla.*, 56 FLRA 809, 814 (2000).

the agreement.³⁶ The Authority does not require an exact congruence of language.³⁷ Instead, the Authority finds the requisite similarity if a reasonable reader would conclude that the contract provision settles the matter in dispute.³⁸

If the agreement does not expressly contain the matter, then, under the second prong of the doctrine, the Authority will determine whether the subject is inseparably bound up with, and thus plainly an aspect of, a subject covered by the agreement.³⁹ In doing so, the Authority will determine whether the subject matter of the proposal is so commonly considered to be an aspect of the matter set forth in the provision that the negotiations are presumed to have foreclosed further bargaining.⁴⁰

As stated previously, Article 34, Section 16 of the parties' agreement provides, in pertinent part:

- A. The [Agency] will ensure employees are provided rest periods during the work day for the purpose of attending to employee personal needs.
- B. Such rest periods will be of reasonable duration and will be permitted at reasonable times during the work day, to include work performed on an overtime basis, consistent with the [Agency]'s right to assign work and workload demands.⁴¹

The Arbitrator found that this wording "covers rest breaks and provides that breaks will be of reasonable duration and taken at reasonable times consistent with the [Agency]'s right to assign work and workload demands."⁴² And the Arbitrator found that "a rest break . . . includes . . . stopping for food."⁴³ Therefore, under the Arbitrator's interpretation, Article 34, Section 12 addresses the matter of stopping for food.

In addition, also as stated previously, Article 37, Section 10.D. of the parties' agreement provides that "[s]upervisors may excuse occasional brief absences from duty of less than one (1) hour when the employee

provides the supervisor with an acceptable explanation for the absence."⁴⁴ The Arbitrator interpreted this provision as discussing "absences from work," and found that "[i]f an officer is stopping to pick up food in transit between work locations, he is absent from work."⁴⁵ Therefore, the Arbitrator interpreted this provision's reference to "absences from duty"⁴⁶ as applying to officers who stop for food between worksites.

The Union does not claim that the Arbitrator's contractual interpretations fail to draw their essence from the parties' agreement. Accordingly, we defer to the Arbitrator's interpretations.⁴⁷ And these interpretations – that stopping for food while on duty is both a "rest period[]"⁴⁸ under Article 34, Section 16 and an "absence[]" from duty"⁴⁹ under Article 37, Section 10.D. – support her conclusion that the subject matter of stopping for food is "covered by" the parties' agreement. In this connection, even assuming that the agreement does not "expressly contain" the matter of stopping for food under the first prong of the "covered-by" test⁵⁰ – an issue we need not decide – that matter is "inseparably bound up with, and thus plainly an aspect of,"⁵¹ rest periods and absences from duty. In this regard, given the arbitral findings that stopping for food is a rest period and an absence from duty, there is no basis for finding that the parties should have anticipated further bargaining over that matter.⁵²

In addition, while purporting to challenge the Arbitrator's interpretation of the "covered-by" doctrine, the Union effectively concedes that Article 37, Section 10.D. addresses the matter of stopping for food. Specifically, the Union states that: (1) Article 37, Section 10.D. "certainly demonstrates that local supervisors are 'responsible management officials' for purposes of the past practice at issue";⁵³ and (2) "the . . . [a]greement and the Arbitrator's award make it clear that, for purposes of the instant case, local supervisors are 'responsible management officials' under the law."⁵⁴ In other words, the Union claims that Article 37, Section 10.D. "demonstrates" that local supervisors are responsible management officials with authority to condone the alleged past practice of stopping for food.⁵⁵

³⁶ *Id.*

³⁷ *Fed. BOP v. FLRA*, 654 F.3d 91, 94-95 (D.C. Cir. 2011).

³⁸ *U.S. Dep't of HHS, SSA, Balt., Md.*, 47 FLRA 1004, 1018 (1993) (*SSA, Balt.*).

³⁹ *Id.*

⁴⁰ *NTEU*, 66 FLRA 186, 189-90 (2011).

⁴¹ Award at 30.

⁴² *Id.* at 21 (emphasis deleted).

⁴³ *Id.* at 22.

⁴⁴ *Id.* at 30.

⁴⁵ *Id.* at 22.

⁴⁶ *Id.*

⁴⁷ *IRS Denver*, 60 FLRA at 894 (in applying de novo review, Authority defers to arbitrators' contract interpretations).

⁴⁸ Award at 30.

⁴⁹ *Id.*

⁵⁰ *SSA, Balt.*, 47 FLRA at 1018.

⁵¹ *Id.* (alteration, citation, and internal quotation marks omitted).

⁵² *NTEU*, 66 FLRA at 189-90.

⁵³ Exceptions at 17.

⁵⁴ *Id.*

⁵⁵ *Id.*

If, as the Union claims (and the Agency does not dispute), Article 37, Section 10.D. identifies the specific Agency officials having authority to authorize the specific practice (stopping for food) in dispute here, it necessarily follows that the provision “covers” that practice.

In arguing that the Arbitrator erred in finding the matter “covered by” the agreement, the Union challenges the Arbitrator’s reasoning in various respects. Specifically, the Union contends that the Arbitrator: injected her “personal opinion”⁵⁶ regarding the reasonableness of the alleged practice and found the matter “covered by” the agreement because she “simply doesn’t like the policy implications of a contrary conclusion”;⁵⁷ and never found the practice “expressly contained in” or “inseparably bound up with” the agreement.⁵⁸ In assessing whether an arbitrator’s award is contrary to law, the Authority assesses the arbitrator’s legal conclusions, not his or her underlying reasoning.⁵⁹ Therefore, the Union’s challenges to the Arbitrator’s reasoning provide no basis for finding the Arbitrator’s “covered-by” conclusion deficient.

The Union also argues that, under the Arbitrator’s analysis, “the Union is precluded from bargaining over any topic that falls within the general range of the Agency’s right to assign and direct work.”⁶⁰ As an initial matter, the Arbitrator did not make such a finding. And to the extent that the Union is referring to the Arbitrator’s interpretation of the management-rights provision of the parties’ agreement – Article 6, Section 1.B.(1) – we find it unnecessary to rely on that provision in reaching our “covered-by” conclusion. For these reasons, the Union’s argument does not demonstrate that the Arbitrator’s “covered-by” conclusion is contrary to law.

Further, the Union contends that this case is “very similar”⁶¹ to *U.S. Customs Service, Customs Management Center, Miami, Florida (Customs Florida)*.⁶² In *Customs Florida*, the Authority found that employee attendance at, and participation in, the annual “Florida Law Enforcement Games”⁶³ (Florida Games) in a different city from the employees’ worksite was not “covered by” the agreement at issue there.⁶⁴ The Authority found that: the agreement did not mention participation in any games, let alone the Florida Games;

and the Florida Games were not inseparably bound up with either a contract provision involving a particular ongoing individualized fitness program that took no more than three hours a week, or a “catch[-]all,” administrative-leave provision that permitted supervisors to grant administrative leave for up to fifty-nine minutes to employees who are unavoidably tardy reporting to work.⁶⁵ The Authority also reviewed the parties’ bargaining history and found that the parties did not contemplate attendance and participation at the Florida Games when the cited contract provisions were negotiated.⁶⁶

By contrast, here: the parties’ agreement mentions rest periods and absences from duty, which the Arbitrator found included stopping for food; and the Arbitrator did not find, and the Union does not cite, any evidence regarding bargaining history that supports the Union’s position. And that the agreement does not mention food is consistent with the fact that the officers involved in this dispute do not have periods set aside to eat. Instead, as the Arbitrator found, the officers do not get lunch breaks, and are “expected to eat during lulls in activity.”⁶⁷ Therefore, *Customs Florida* is distinguishable and does not provide a basis for finding that the Arbitrator’s “covered-by” conclusion is deficient.

In addition to its arguments regarding the “covered-by” doctrine, the Union challenges the Arbitrator’s application of the “de minimis” standard.⁶⁸ The Authority has held that, when an arbitrator has based an award on separate and independent grounds, an appealing party must establish that all of the grounds are deficient in order to demonstrate that the award is deficient.⁶⁹ The Arbitrator’s finding that the Agency’s food-stop ban was “covered by” the agreement provides a basis – separate and independent from her application of the “de minimis” standard – for her conclusion that the Agency did not violate the Statute by failing to bargain. As the Union has not demonstrated that the Arbitrator’s “covered-by” conclusion is deficient, and that finding provides a separate and independent basis for her finding of no statutory violation, it is unnecessary to resolve the Union’s “de minimis” argument.

It is likewise unnecessary to resolve the Union’s contention that the Arbitrator erred in finding that the food-stop ban did not breach “the terms of a lawful past practice.”⁷⁰ As the Union does not claim that the parties’

⁵⁶ *Id.* at 32.

⁵⁷ *Id.* at 34.

⁵⁸ *Id.* at 35.

⁵⁹ *NTEU, Chapter 32*, 67 FLRA 174, 176 (2014).

⁶⁰ Exceptions at 35.

⁶¹ *Id.*

⁶² 56 FLRA 809 (2000).

⁶³ *Id.* at 809.

⁶⁴ *Id.* at 814.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Award at 22.

⁶⁸ Exceptions at 22-28.

⁶⁹ *See, e.g., U.S. DHS, ICE*, 66 FLRA 880, 885 (2012); *Office & Prof’l Employees Int’l Union, Local 268*, 54 FLRA 1154, 1158-59 (1998).

⁷⁰ Exceptions at 36.

agreement imposes bargaining obligations that differ from those imposed by the Statute, and as the Union has not shown that the Agency violated its statutory bargaining obligations, the Union also provides no basis for finding that the Agency violated its contractual bargaining obligation.

Further, the Union does not argue that the Agency violated a substantive provision of the contract (a provision other than one requiring bargaining). Moreover any such argument would be inconsistent with the Union's position that the subject of the food-stop ban is not covered by the parties' agreement: *the Agency could not have violated a substantive contract provision unless the contract provision "covers" the subject matter at issue.*⁷¹ And such arguments, if properly made, are reviewed using the deferential "essence" standard,⁷² even if the argument is that an alleged past practice modified the parties' agreement.⁷³ As the Union has not filed an essence exception, the Union has provided no basis for the Authority to assess whether the parties modified their agreement by past practice.

IV. Decision

We deny the Union's exceptions.

Member DuBester, dissenting:

I disagree with the majority's resolution of the covered-by issue and its determination to uphold the Arbitrator's award in this case. The Arbitrator found that the Agency was not obligated by the Federal Service Labor-Management Relations Statute to bargain with the Union before instituting a ban on employees stopping to pick up food for themselves or others when traveling between worksites (the food-stop ban). Because the Arbitrator erred in concluding that the practice of stopping to pick up food when traveling between worksites is "covered by" the parties' agreement, is not a "past practice," and has a de minimis impact on employees, I would grant the Union's contrary-to-law exceptions.

The contract provisions on which the majority relies do not satisfy either prong of the covered-by standard. The majority relies on contract provisions addressing rest periods and a supervisor's authority to excuse "brief absences from duty" when an employee provides the supervisor with "an acceptable explanation."¹ Plainly, the practice of employees stopping to pick up food for themselves or others when traveling between worksites is not expressly addressed by either of these contract provisions.

Similarly, the practice is not "inseparably bound up with and . . . thus . . . plainly an aspect of . . . a subject expressly covered by the contract."² Nothing suggests that either party considered picking up food when traveling between worksites a "rest period." Nor is there any indication that anyone considers employees "absent from duty" during any part of their transit between worksites. To hold in these circumstances, as the majority does, that picking up food when traveling between worksites is "plainly an aspect" of "rest periods" or "absences from duty" imposes an interpretation of the contract on the parties that they could not reasonably have anticipated.

More generally, this is one more case that illustrates the difficulties in applying the covered-by standard.³ And the majority's decision adds to the case law one more reason that "the Authority's use of the covered-by standard warrants a fresh look."⁴

Contrary to the Arbitrator's findings, moreover, the practice of stopping to pick up food when traveling between worksites is also a "past practice." Regarding

⁷¹ Cf. *SSA, Balt., Md.*, 66 FLRA 569, 573 n.5 (2012) (Member DuBester dissenting) ("[A] change cannot violate a contract provision unless the contract provision 'covers' the subject matter of the change.").

⁷² See, e.g., *NTEU, Chapter 190*, 67 FLRA 412, 413-14 (2014) (Authority applies "deferential" essence standard when reviewing an arbitrator's interpretation of a collective-bargaining agreement).

⁷³ *AFGE, Local 801*, 64 FLRA 791, 792 n.3 (2010) ("The Authority applies the essence standard when determining whether an arbitrator properly interpreted a past practice.").

¹ Majority at 6-7.

² *U.S. Dep't of HHS, SSA, Balt., Md.*, 47 FLRA 1004, 1018 (1993) (citations omitted).

³ See, e.g., *SSA, Balt., Md.*, 66 FLRA 569, 575 (2012) (Dissenting Opinion of Member DuBester).

⁴ *Id.* at 576.

the elements of a past practice, as the Arbitrator found, the “evidence appears to establish longevity and repetition, acceptance and acquiescence.”⁵ That the practice was followed primarily by officers on the midnight shift,⁶ or by a relatively small number of officers,⁷ does not provide a basis for a different conclusion. Nor does the Arbitrator’s concern about “upper-level management[’s] acquiesce[nce] in this practice.”⁸ Not only were “a number of supervisors and some senior officers . . . aware of officers stopping for food”; it is also undisputed that supervisors would sometimes order food.⁹ And the practice is not of recent vintage. The Arbitrator credited evidence that employees were stopping for food three or four times a week for as long as seventeen years.¹⁰ Viewed in the context of this long history, the Arbitrator’s conclusion, that the practice of stopping to pick up food is not a past practice, is contrary to law.

My colleagues also err by deciding the case without resolving the past practice issue – whether stopping to pick up food when traveling between worksites is a past practice. Past practices establish conditions of employment, incorporated into parties’ agreements, that “may not be altered by either party absent agreement or impasse following good faith bargaining.”¹¹ The award is based on the finding that the Agency was not bound by an obligation of any kind regarding employees stopping to pick up food when traveling between worksites. But the award – and this case – would necessarily be different had the Arbitrator concluded that the parties were bound by a past practice specifically dealing with that matter. Because the Union properly challenges the Arbitrator’s legal conclusion on that issue as contrary to law, and because reversing the Arbitrator’s ruling would undermine the award’s legal foundation – and reverse the Arbitrator’s ruling on one of the two issues she framed – my colleagues should resolve rather than bypass the issue.

Finally, I disagree with the Arbitrator’s conclusion that the impact of the Agency’s food-stop ban on employees is *de minimis*, and with the Arbitrator’s consideration of and reliance on, among other things, the number of officers affected.¹²

⁵ Award at 14.

⁶ *See id.* at 15.

⁷ *See id.*

⁸ *Id.*

⁹ *Id.* at 13.

¹⁰ *Id.*

¹¹ *U.S. Dep’t of the Air Force, U.S. Air Force Academy, Colo.*, 65 FLRA 756, 758 (2011); *see, e.g., U.S. Dep’t of HHS, Nat’l Inst. for Occupational Safety & Health, Cincinnati Operations, Cincinnati, Ohio*, 52 FLRA 217, 223-24 (1996).

¹² Award at 20.

Accordingly, I would grant the Union’s exceptions and set aside the Arbitrator’s conclusion that the Agency did not violate the Statute by failing to give the Union notice and an opportunity to bargain before it instituted the food-stop ban.