**65 FLRA No. 154**

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS
LOCAL 4052
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
METROPOLITAN DETENTION CENTER
GUAYNABO, PUERTO RICO
(Agency)

0-AR-4650

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DECISION

April 27, 2011

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

## I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Mark I. Lurie filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

The Arbitrator concluded that the Agency violated the parties' settlement agreement (Settlement Agreement) by unilaterally repudiating it, but that any remedy would excessively interfere with management's rights to determine its internal security practices and to assign work. For the reasons set forth below, we set aside the award and remand this matter to the parties for resubmission to the Arbitrator, absent settlement, to determine an appropriate remedy.

## II. Background and Arbitrator's Award

Housing units at the Agency's Metropolitan Detention Center (MDC) in Guaynabo, Puerto Rico are designed to hold up to 140 inmates; the parties stipulated that a housing unit is overcrowded when 150 inmates are assigned to a single unit. Award at 4. To resolve a previous grievance regarding overcrowding, the parties entered into the Settlement Agreement, which, among other things, required the Agency to staff one additional officer, a "number two officer," to any housing unit at MDC that contained over 150 inmates.[1] Exceptions, Attach. 2 at 1; *see also* Award at 5 n.3.

Several years after entering into the Settlement Agreement, the Agency notified the Union that it would no longer assign a number two officer to housing units that had populations exceeding 150 inmates. Award at 2. The Union presented a grievance alleging that the Agency violated the Settlement Agreement by unilaterally repudiating it. Opp'n at 1. The grievance was not resolved and was submitted to arbitration. *Id.* at 2. The Arbitrator framed the relevant issue to be resolved as:

> Is the . . . Settlement [Agreement] a grievance settlement that is currently in effect, lawful in its purpose (contingent staffing) and enforceable according to its terms? And, if so, can its prescribed remedy be lawfully enforced by the Arbitrator and, if the remedy cannot be lawfully enforced, what should the remedy be?[2]

Award at 2 (emphasis omitted).

The Arbitrator found a general correlation between overcrowding in detention facilities and assaults on officers by inmates. *Id.* at 8. He also found that, "[w]here overcrowding has been a contributing factor to such assaults, paying staff to work overtime can reduce the assault rate." *Id.*

1. The Settlement Agreement acknowledges that the parties "agreed to the limit of 150 inmates per unit, before a number two officer was assigned." Exceptions, Attach. 2 at 1. The parties also agreed to pay overtime to any number two officer assigned as a result of overcrowding. *Id.*

2. The Agency argued to the Arbitrator that the Settlement Agreement was of finite duration implemented to address a specific situation at the time of the agreement. Award at 5. The Arbitrator found that the Settlement Agreement constituted a binding grievance settlement and found that the Agency violated the Settlement Agreement by unilaterally repudiating it. *Id.* at 19. Because no exceptions were filed to the Arbitrator's resolution of these issues, they are not before us.

However, the Arbitrator determined that most of the assaults at MDC were related, not to overcrowding, but to either an "officer's intercession in a crime in progress" or an "inmate with mental health problems." *Id.* at 10. Moreover, according to the Arbitrator, it was reasonable for the Agency to conclude that its enforcement of the Settlement Agreement could impose an unreasonable burden on its officers. *Id.* at 9. Therefore, the Arbitrator concluded that there was "no compelling need" to assign a number two officer at MDC when it is overcrowded. *Id.* at 11-12.

The Union argued before the Arbitrator that the Settlement Agreement did not excessively interfere with any management right because it did not "preclude the accomplishment of the Agency's internal security objectives" or "limit the Agency's capacity to relieve overcrowding." *Id.* at 13. The Agency responded that the Settlement Agreement excessively interfered with its rights to determine internal security and assign work because it "left no circumstance in which the Agency could not assign a [n]umber [two] [o]fficer" to an overcrowded facility, including emergency situations. *Id.* at 18.

The Arbitrator, in "[r]econstructing what [m]anagement would have done under these circumstances," found that the Agency would have assigned a number two officer only when overcrowding was accompanied by "additional, aggravating risk elements." *Id.* at 20. He, therefore, concluded that enforcement of the Settlement Agreement would excessively interfere with management's rights to determine its internal security practices and assign work. *Id.* at 20-21. The Arbitrator then decided that "no remedy can be or is awarded." *Id.* at 21.

## III. Positions of the Parties

### A. Union's Exceptions

The Union argues that the award is contrary to 5 U.S.C. § 7106(b)(3) of the Statute because the Arbitrator misapplied the test in *United States Department of the Treasury, Bureau of Engraving & Printing, Washington, D.C.*, 53 FLRA 146 (1997) (*BEP*). Exceptions at 5. The Union contends that the Arbitrator's reconstruction of what management would have done is improper because the "additional, aggravating risk" standard had no basis in law, regulation, or the Settlement Agreement. *Id.* at 8-9 (emphasis omitted).

The Union also asserts that the Authority should reinstate an "abrogation" standard and discontinue use of an "excessive interference" test when evaluating a remedy's effect on the exercise of a management right. *Id.* at 10-21. The Union argues that, applying an abrogation standard here, the Authority should remand the case to the Arbitrator to fashion an appropriate remedy, or, alternatively, should itself determine whether any remedy would abrogate the exercise of a management right. *Id.* at 21. According to the Union, the Arbitrator or the Authority could award a remedy that would allow the Agency to choose not to enforce the Settlement Agreement in emergency situations. *Id.* at 21-22 (citing *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Transfer Ctr., Okla. City, Okla.*, 58 FLRA 109 (2002) (*BOP, OKC*)). The Union also argues that such an exception may not be necessary because the Settlement Agreement does not abrogate management's rights. Exceptions at 22-23 (citing *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Transfer Ctr., Okla. City, Okla.*, 57 FLRA 158 (2001)).

Finally, the Union argues that several of the Arbitrator's findings are nonfacts, fail to draw their essence from the Settlement Agreement or the parties' agreement, or are contrary to the Statute. Exceptions at 6-10. According to the Union, the Arbitrator's conclusion that inmate assaults are unrelated to overcrowding fails to draw its essence from the Settlement Agreement or the parties' agreement and is a nonfact. *Id.* at 6-7. The Union also contends that the Arbitrator's finding that the officers "have not treated the threat as if it were real and immediate" by accepting overtime pay is a nonfact and fails to draw its essence from the parties' agreement. *Id.* at 8 (emphasis omitted). Further, the Union argues that the Arbitrator's use of a "compelling need" standard for determining whether a number two officer is necessary does not draw its essence from the Settlement Agreement or the parties' agreement and is contrary to the Statute. *Id.* at 9-10. The Union also claims that the Arbitrator did not consider all of the remedies it had requested and, therefore, his award does not draw its essence from the parties' agreement and he exceeded his authority. *Id.* at 10.

### B. Agency's Opposition

The Agency argues that the Arbitrator correctly applied the "excessive interference" test set forth in *BOP, OKC*. Opp'n at 5-6. The Agency contends that the Arbitrator correctly determined that an award

requiring it to comply with the Settlement Agreement would excessively interfere with its rights "because it leaves *no* circumstance under which the Agency could not assign a number two officer" when the population of a housing unit at MDC was overcrowded. *Id.* at 7. Also, the Agency claims that, even under an abrogation standard, enforcement of the Settlement Agreement would abrogate its rights because it would be forced to assign a number two officer "without any exception, limitation, or any room for the exercise of management discretion . . . ." *Id.* at 11.

The Agency also argues that the Union does not provide any support for its argument that the Arbitrator's findings fail to draw their essence from the Settlement Agreement or the parties' agreement. *Id.* at 12. According to the Agency, the Union's nonfact arguments simply constitute disagreement with the Arbitrator's conclusions. *Id.* at 15-16. The Agency also argues that the Arbitrator's decision not to grant certain remedies requested by the Union draws its essence from the parties' agreement because an arbitrator has great latitude in fashioning remedies. *Id.* at 13-14.

## IV. Analysis and Conclusion: The award is contrary to § 7106 of the Statute.

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 & 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.*

The Union contends that the Arbitrator erred in finding that the Settlement Agreement excessively interfered with management's rights to determine its internal security practices and to assign work. The Authority recently revised the analysis that it applies when reviewing management rights exceptions to arbitration awards. *See U.S. Envtl. Prot. Agency*, 65 FLRA 113, 115 (2010) (Member Beck concurring) (*EPA*); *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102, 106-07 (2010) (Chairman Pope concurring) (*FDIC, S.F. Region*). Under the revised analysis, the Authority first assesses whether the award affects the exercise of the asserted management right. *EPA*, 65 FLRA at 115. If so, the Authority examines whether the award provides a remedy for a violation of either an applicable law, within the meaning of § 7106(a)(2) of the Statute, or a contract provision that was negotiated pursuant to § 7106(b) of the Statute. *Id.* In determining whether the award enforces a contract provision negotiated under § 7106(b)(3), the Authority assesses: (1) whether the contract provision constitutes an arrangement for employees adversely affected by the exercise of a management right; and (2) if so, whether the arbitrator's enforcement of the arrangement abrogates the exercise of the management right. *EPA*, 65 FLRA at 116-18. In concluding that it would apply an abrogation standard, the Authority rejected continued application of an excessive interference standard. *Id.* at 118. Furthermore, in setting forth the revised analysis, the Authority rejected the continued application of the "reconstruction" requirement set forth in *BEP*. *FDIC, S.F. Region*, 65 FLRA at 106-07.

The Arbitrator concluded that enforcement of the Settlement Agreement would "excessively interfere with the Agency's right to determine its internal security practices" and its right to assign work and, thus, that "no remedy can be or is awarded." Award at 20-21. However, the revised analysis requires us to determine whether the award abrogates the exercise of a management right.[3] An award abrogates the exercise of a management right if the award precludes the agency from exercising the right. *U.S. Dep't of Transp., Fed. Aviation Admin.*, 65 FLRA 171, 174 (2010). The Arbitrator's award does not preclude the Agency from exercising its rights to determine its internal security practices or to assign work because the Settlement Agreement does not require the Agency to assign a number two officer in all cases. Rather, the Settlement Agreement imposes this requirement only when the population at a housing unit at MDC reaches 150 inmates. *See U.S. Dep't of Justice, Fed. Bureau of Prisons, U.S. Penitentiary, Atlanta, Ga.*, 57 FLRA 406, 411 (2001) (finding that the arbitrator's award did not abrogate management's rights where the agency was not required to fill vacant posts in all situations). Therefore, the Settlement Agreement

3. The parties do not dispute that the Settlement Agreement affects management's rights to determine internal security practices and assign work. Opp'n at 8. Additionally, the parties do not dispute that the Settlement Agreement is an arrangement.

does not abrogate the cited management rights, and the Arbitrator erred by finding that he could not enforce it and provide a remedy. Accordingly, we set aside the award and remand this matter to the parties for resubmission to the Arbitrator, absent settlement, to determine an appropriate remedy.[4]

## V. Decision

The award is set aside, and the matter is remanded to the parties for resubmission to the Arbitrator, absent settlement, to determine an appropriate remedy.[5]

4. Member Beck agrees with the conclusion to remand this matter for the determination of an appropriate remedy. For the reasons discussed in his concurring opinion in *EPA*, 65 FLRA 113, Member Beck concludes that, where, as here, the parties have agreed to a settlement provision, it is inappropriate for the Arbitrator to determine that the provision is not enforceable because it purportedly conflicts with statutory management rights. *Id.* at 120 (Concurring Opinion of Member Beck). Therefore, because the Arbitrator found that the Agency violated the Settlement Agreement by unilaterally repudiating it, Member Beck agrees that this matter should be remanded for the determination of an appropriate remedy.

5. Because the Union's remaining exceptions challenge the analysis that underlies the Arbitrator's conclusion that we set aside, it is unnecessary to address them. *See U.S. Dep't of Def., Def. Logistics Agency, Def. Contract Mgmt. Command, Def. Contract Mgmt. Area Operations Bos., Bos., Mass.*, 53 FLRA 210, 217 n.9 (1997).