65 FLRA No. 28

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL 238
(Union)

0-AR-4147

_____

DECISION

September 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 Irwin Kaplan filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

For the reasons that follow, we deny the exceptions. In so doing, we modify the Authority's existing test for determining whether a contract provision is enforceable in arbitration under § 7106(b)(3) of the Statute.[2] Specifically, in this and future cases we will make that determination by applying an abrogation (waiver) – rather than an excessive interference – standard.

II. Background and Arbitrator's Award

The parties negotiated National Reasonable Accommodation Procedures (the agreement), which provide for a National Reasonable Accommodation Coordinator (national coordinator) and local coordinators who process employees' reasonable accommodation requests. Under the agreement, the national coordinator may not delegate the duty of reviewing medical information to a local coordinator without the affected employee's approval.[3] The agreement was submitted for Agency-head review under § 7114 of the Statute. However, as the Agency did not complete the review within the thirty days allotted by § 7114(c)(3) of the Statute, the agreement went into effect.[4]

---

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

2. The Authority has employed this test as "prong 1" of its analysis of arbitrators' awards claimed to impermissibly affect management rights set forth in 5 U.S.C. § 7106(a). *See U.S. Dep't of the Treasury, Bureau of Engraving & Printing, Wash., D.C.*, 53 FLRA 146, 154 (1997) (*BEP*). By decision issued today, the Authority is further modifying the analysis set forth in *BEP* by eliminating the requirement, referred to in *BEP* as "prong II," that a remedy "reconstruct" what agency management would have done if the agency had not violated law or its agreement with the exclusive representative. *See FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102, 106-07 (2010) (Chairman Pope concurring) (*FDIC*)). Although *BEP* and its "prongs" will no longer govern disposition of exceptions alleging that an award is contrary to management rights, it remains appropriate, for the reasons discussed below, to inquire whether an award enforces a provision negotiated under § 7106(b) or an applicable law.

3. The parties' agreement provides, in pertinent part:

> Official Access to Employee's Medical Information. There may be cases where the applicant or employee is uncomfortable with the [decision-maker] or supervisor having access to the employee's medical information. In this case the applicant or employee may ask that the [national coordinator] be the only EPA official to have access to any medical information that has been provided to the Agency. . . . ***The [national coordinator] will then be responsible for transmitting only pertinent information regarding functional limitations to the [decision-maker]*** **if** ***the information is needed to make a decision regarding [an] accommodation request. Alternatively, the [national coordinator] may advise the [decision-maker] without disclosing any medical information.***

Exceptions, Ex. 2 at 17.

4. Section 7114(c)(3) of the Statute provides:

> If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representative subject to the provisions of this chapter and any other applicable law, rule, or regulation.

The Union filed a grievance alleging that the national coordinator transferred medical files to local coordinators in violation of the agreement. The parties did not resolve the grievance, and it was submitted to arbitration. The Arbitrator adopted the Union's formulation of the issue for resolution: "Whether the Agency violated the negotiated [agreement] by its [national coordinator] transferring confidential medical information of bargaining unit employees to a [local coordinator]? If so, what is the appropriate remedy?" Award at 2.

The Arbitrator concluded that, in negotiating the agreement, the parties had "voluntarily engaged in an appropriate arrangement . . . ." *Id.* at 12 (footnote omitted). The Arbitrator also stated that the parties had reached agreement on a permissive subject of bargaining. *Id.* at 13. In addition, the Arbitrator concluded that the Agency could not declare the agreement unlawful because the Agency head did not timely disapprove the agreement. *Id.* Further, the Arbitrator found that the Agency violated the agreement by transferring medical files from the national coordinator to a local coordinator. *Id.* at 14. Accordingly, the Arbitrator sustained the grievance and directed that the employees' files be returned to the national coordinator for processing. *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that it may challenge the legality of the agreement even though the Agency-head review was untimely. *See* Exceptions at 4. The Agency also argues that the award is contrary to its right to assign work under § 7106(a)(2)(B) of the Statute. In this regard, the Agency contends that: (1) it determined that medical review should be performed by a local coordinator; (2) this determination is consistent with its right to assign work; and (3) any limitation on that right is unenforceable. *Id.* Moreover, the Agency contends that the matter of delegating duties to local coordinators does not involve the "method and means" of performing work under § 7106(b)(1) of the Statute. *Id.* at 9. Finally, the Agency contends that the Arbitrator's finding that the parties reached an agreement on an appropriate arrangement is based on a nonfact. *Id.* at 12.

B. Union's Opposition

The Union contends that, as the Agency-head review was untimely, the Agency may not challenge the agreement in this proceeding. *See* Opp'n at 6. The Union also contends that it is not unlawful to engage in collective bargaining on proposals that limit management's statutory rights, including the right to assign work, if an agency so chooses. *Id.* at 2. In this case, the Union contends that the Agency elected to negotiate with the Union on the roles of the coordinators involved in the processing of requests for reasonable accommodations. *Id.* at 2-3. The Union also argues that the agreement concerns the method and means of providing reasonable accommodations, within the meaning of § 7106(b)(1), and an appropriate arrangement, within the meaning of § 7106(b)(3) of the Statute. *Id.* at 4. Finally, with respect to the Agency's nonfact exception, the Union states that the agreement constitutes an arrangement. *Id.*

IV. Analysis and Conclusions

A. The Agency may challenge enforceability of the agreement.

As set forth above, § 7114(c)(3) of the Statute provides that, if an agency head does not approve or disapprove a collective bargaining agreement within thirty days after the date of its execution, then the agreement "shall take effect and shall be binding on the agency and the exclusive representative *subject to the provisions of [the Statute] and any other applicable law, rule, or regulation.*"[5] 5 U.S.C. § 7114(c)(3) (emphasis added). *Accord Point Mugu Joint Council of NAGE, Local R12-33 & NFFE, Local 1374*, 8 FLRA 389, 389 (1982). Because the Agency's disapproval was served on the Union more than thirty days after the agreement was executed, the agreement as negotiated and executed by the parties became effective and binding on the thirty-first day after execution -- but did so "subject . . . to" the Statute and any applicable law, rule, or regulation. *Id.*

Consistent with these principles, and with long-standing precedent, an agency may challenge the validity of a provision in an appropriate proceeding, such as this one. *Id.* at 390; *AFGE, AFL-CIO, Local 1858*, 4 FLRA 361, 362 (1980) (even after untimely disapproval, provisions found to violate "the Statute or any other applicable law, rule or regulation" are "deemed void and unenforceable[]"). In this regard, § 7122(a)(1) of the Statute charges the Authority with setting aside arbitration awards if they are "contrary to any law, rule, or regulation[.]" 5 U.S.C.

5. This statutory language is one indication that, as discussed in more detail below, management rights may not be waived as part of the bargaining process.

§ 7122(a)(1). There is no dispute that § 7106 of the Statute constitutes a "law[]" within the meaning of § 7122(a)(1). *Cf. U.S. Marshals Serv. v. FLRA*, 708 F.2d 1417, 1421 n.5 (9th Cir. 1983) ("The management rights section of the [Statute] is a law affecting conditions of employment[]"). Thus, an arbitration award that is contrary to § 7106 must be set aside. *See U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Transfer Ctr., Okla. City, Okla.*, 57 FLRA 158, 162 (2001) (Chairman Cabaniss dissenting as to other matters) (*BOP, Oklahoma City I*) ("management rights cannot be waived[]"), *rev'd on other grounds, U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Transfer Ctr., Okla. City, Okla.*, 58 FLRA 109, 110 (2002) (Chairman Cabaniss and Member Armendariz concurring; then-Member Pope concurring as to result) (*BOP, Oklahoma City II*) (citing *Wash. Plate Printers Union, Local No. 2, I.P.D.E.U.*, 31 FLRA 1250, 1255-57 (1988)).

For the foregoing reasons, the Agency may challenge the enforceability of the agreement -- as interpreted and applied by the Arbitrator in his award -- on the basis of § 7106 of the Statute.[6]

B. The award is not contrary to § 7106(a)(2)(B) of the Statute.

When an exception involves an award's consistency with law, the Authority reviews any question of law *de novo*. *See, e.g., NTEU, Chapter 24*, 50 FLRA 330, 332 (1995). In applying *de novo* review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *See, e.g., NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

When a party contends that an award is contrary to a management right under § 7106(a) of the Statute, the Authority first assesses whether the award affects the exercise of the asserted right. *E.g., U.S. Dep't of the Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, 62 FLRA 4, 5 (2007). If the award affects the right, then, under the applicable legal framework, the Authority examines, as relevant here, whether the award provides a remedy for a contract provision negotiated under § 7106(b) of the Statute.[7] *See FDIC*, 65 FLRA at 104-05; *Dep't of the Treasury, U.S. Customs Serv.*, 37 FLRA 309, 313-14 (1990). In this regard, § 7106(a) of the Statute provides that "*[s]ubject to subsection (b)* . . ., nothing in this chapter shall affect" the exercise of management rights. 5 U.S.C. § 7106(a) (emphasis added).[8] Accordingly, if an arbitrator's award affects a management right, then the award is contrary to law unless it enforces a contract provision negotiated under § 7106(b).

1. The award affects the Agency's right to assign work.

The right to assign work under § 7106(a)(2)(B) of the Statute includes 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. *See U.S. Dep't of the Treasury, U.S. Customs Serv., El Paso, Tex.*, 55 FLRA 553, 558 (1999) (citation omitted). In addition, precluding the assignment of particular functions to particular individuals or positions affects the right to assign work. *E.g., NTEU, Chapter 243*, 49 FLRA 176, 181-82 (1994) (Member Armendariz dissenting as to other matters).

Under the parties' agreement, as interpreted and applied by the Arbitrator, the Agency may not assign to local coordinators certain of the processing functions for some employees' reasonable-accommodation requests, without the employees' prior consent. Thus, the award affects management's right to assign work. *See id.* The Union claims, and the Arbitrator concluded, that the parties agreed to an appropriate arrangement for employees seeking reasonable accommodations. Award at 12; Opp'n at 4. Applying *de novo* review to the Arbitrator's

6. We agree with our concurring colleague that the statutory scheme, which permits an agency to challenge an agreement provision, raises concerns regarding the efficient conduct of collective bargaining. Concurring Opinion at 12. However, as these concerns arise from the Statute itself, it is up to Congress to address them. *See Headquarters, NASA, Wash., D.C.*, 50 FLRA 601, 619 (1995) ("Should Congress disagree with our conclusion, it can amend the laws in accordance with its policy objectives."), *enforced*, 120 F.3d 1208 (11th Cir. 1997), *aff'd*, 527 U.S. 229 (1999).

7. If an award affects a management right under § 7106(a)(2) of the Statute, then the Authority may also consider whether the award enforces an "applicable law." *U.S. Dep't of Transp., FAA*, 63 FLRA 383, 385 (2009). As there is no claim that an applicable law is involved here, we do not discuss the matter further.

8. Further, Chairman Pope notes the Supreme Court's instruction that the words "nothing in this chapter" means "nothing in the entire" Statute, including grievance arbitration under § 7121 of the Statute. *Dep't of the Treasury, IRS v. FLRA*, 494 U.S. 922, 928 (1990).

legal conclusion, we assess whether, as interpreted and applied by the Arbitrator, the parties' agreement is enforceable under § 7106(b)(3).

2. The agreement is enforceable because it was negotiated under § 7106(b)(3) of the Statute.

In determining whether a provision was negotiated under § 7106(b)(3) of the Statute, the Authority assesses whether it ameliorates the adverse effects flowing from the exercise of a management right. *E.g.*, *U.S. DOJ, Fed. Bureau of Prisons, U.S. Penitentiary, Atlanta, Ga.*, 57 FLRA 406, 410 (2001) (Chairman Cabaniss dissenting) (*U.S. Pen.*). Here, the agreement, as interpreted and applied by the Arbitrator, limits the officials who may access the medical information of employees seeking reasonable accommodations, unless an employee consents to greater information sharing. *See* Award at 3-5; *see also supra* note 3. By requiring the Agency to seek an employee's permission before transferring medical files from the national coordinator to a local coordinator, the agreement ensures that an employee's medical information is kept confidential to the greatest extent practicable. In this regard, the Authority has previously recognized:

> [E]mployees have significant privacy interests in their medical records. Medical records, by their very nature, contain sensitive information about employees' medical history, and could reveal highly personal data about employees' physical, emotional, and mental conditions. . . . [T]he release of medical records . . . without the consent of the employees[] would result in a clear invasion of the employees' personal privacy[.]

AFGE, Local 1020, 47 FLRA 258, 268 (1993). Accordingly, the agreement, as interpreted and applied by the Arbitrator, ameliorates the adverse effects flowing from the exercise of management's right to assign the work of reviewing medical files.

The Agency asserts that the agreement is not an arrangement because the award does not enforce a provision that is tailored to benefit employees adversely affected by the exercise of a management right. However, because an arbitration award necessarily applies an agreement provision to actual, aggrieved parties, arbitration awards are inherently tailored to adversely affected employees, and the Authority does not conduct a tailoring analysis in resolving exceptions to arbitration awards. *E.g.*, *U.S. Pen.*, 57 FLRA at 410 n.5 (tailoring is part of the determination as to whether an arrangement is within the *duty to bargain*, not whether "an agreed-upon [provision,] incorporated into a collective bargaining agreement[,] is *enforceable* as negotiated pursuant to § 7106(b)(3)"). Therefore, the Agency's assertion provides no basis for finding that the award does not enforce an arrangement.[9]

Under the Authority's current standard for reviewing arbitral enforcement of provisions allegedly negotiated under § 7106(b)(3), the Authority determines whether an arrangement is "appropriate" by applying an excessive interference test. *See BOP, Oklahoma City II*, 58 FLRA at 110. A provision excessively interferes with the exercise of a management right if the benefits afforded employees under the provision are outweighed by the burdens on the exercise of management's rights. *Id.* at 111. This is consistent with the test that the Authority applies in the negotiability context. *Nat'l Ass'n of Indep. Labor, Local 7*, 64 FLRA 1194, 1197 (2010) (*NAIL*).

This case provides an opportunity for the Authority to reexamine whether "excessive interference" is the appropriate standard to use in proceedings reviewing arbitration awards. On reexamination, we find, for the following reasons, that it is more appropriate to assess whether a contract provision, as interpreted and applied by an arbitrator, "abrogates" – i.e., waives – management rights under § 7106(a) of the Statute. In so doing, we return to a standard adopted by the Authority twenty years ago. In particular, in *Department of the Treasury, United States Customs Service*, 37 FLRA 309 (1990) (*Customs Service*), the Authority established abrogation as the standard to be used in

9. We note that, in some arbitration decisions, the Authority has referenced tailoring in determining whether a provision is enforceable under § 7106(b)(3). *See, e.g.*, *U.S. Dep't of Veterans Affairs, St. Cloud VA Med. Ctr., St. Cloud, Minn.*, 62 FLRA 508, 510-11 (2008); *U.S. Dep't of Commerce, Patent & Trademark Office*, 60 FLRA 839, 842 (2005); *NLRB*, 60 FLRA 576, 579 (2005) (Chairman Cabaniss concurring; then-Member Pope dissenting as to other matters). However, the dicta in these cases merely recognized that awards necessarily tailor relief to the harms suffered by adversely affected employees; none of the decisions set aside an award for failing to satisfy a tailoring analysis. *Cf. NTEU, Chapter 207*, 60 FLRA 731, 735 (2005) ("*As applied to the grievant*, [the provision] was a *properly tailored arrangement* that did not excessively interfere with management's rights." (Emphases added.)). Insofar as these decisions may be interpreted as requiring a tailoring analysis, they will no longer be followed.

the arbitration context. The Authority acknowledged that the abrogation standard differed from the excessive interference standard that the Authority applies in the negotiability context. In deciding that a different framework was warranted in reviewing arbitration awards, the Authority stated, in pertinent part:

> We expect that, as part of their negotiation process in reaching agreement on the provision, including it in their collective bargaining agreement, and subjecting the agreement to agency head review for legal sufficiency under [§] 7114(c) of the Statute, the parties will have assessed the effect of the provision on management's rights and the benefits to employees from the provision . . . .
>
> In our view, [the abrogation] approach to cases . . . more fully carries out the purposes of the Statute because it recognizes the fundamental differences under the Statute between the process for negotiation of a collective bargaining agreement and the process for enforcement of the collective bargaining agreement. The issue and determination of whether an arbitration award is deficient under [§] 7122(a)(1) is fundamentally different from the issue and determination of the extent of the duty to bargain under [§] 7117 of the Statute . . . .

Customs Service, 37 FLRA at 314-15.

The Authority acknowledged in *Customs Service* that there is an outer limit to what the parties may permissibly negotiate. In this regard, the Authority stated that "management rights are not waivable[.]" *Id.* at 316. However, the Authority found that "enforcement of an arrangement negotiated by the parties that does not abrogate management's rights does not involve a question of waiver." *Id.* Thus, the Authority found that if, as interpreted and applied by an arbitrator, an arrangement did not abrogate a management right, then the arrangement was appropriate – i.e., enforceable – and an arbitration award enforcing the provision would not be set aside by the Authority as contrary to § 7106. *Id.* at 317.

Subsequently, in *BOP, Oklahoma City II*, 58 FLRA at 110, the Authority reversed *Customs Service*. However, the majority in *BOP, Oklahoma City II* lacked a common rationale for doing so. In this regard, Chairman Cabaniss relied primarily on a finding that the Statute does not permit the use of one § 7106(b)(3) standard in the negotiability context and a different standard in the arbitration context. *Id.* at 113. Member Armendariz, by contrast, relied primarily on a finding that the Authority had not found an award to be deficient on abrogation grounds and, thus, application of the test had "effectively render[ed] the test meaningless and remove[d] all of its utility." *Id.* at 115.

We find the rationale in *Customs Service* more persuasive than the separate rationales in *BOP, Oklahoma City II*. In so finding, we begin with the plain wording of the Statute. *See, e.g., U.S. Dep't of the Army, N. Cent. Civilian Pers. Operation Ctr., Rock Island, Ill.*, 59 FLRA 296, 301 (2003) (Chairman Cabaniss concurring). In this regard, neither § 7106(b)(3) nor any other provision of the Statute defines the standard to be used in determining whether an award is contrary to § 7106 and, as a result, contrary to law under § 7122(a)(1). Thus, the Statute does not expressly preclude the Authority from distinguishing between the standards used to determine whether a matter is within the duty to bargain under § 7106(b)(3) and the standard used to determine whether an award is contrary to law under § 7122(a)(1).

Further, as discussed in *Customs Service*, the negotiability and arbitration contexts are different in ways that warrant different analyses. In the negotiability context, where parties disagree over whether a proposal is within the duty to bargain under § 7106(b)(3), it is necessary that *the Authority balance* the competing burdens on management's rights against the benefits provided employees. *See NAIL*, 64 FLRA at 1197. By contrast, in the arbitration context, bargaining has concluded and it is reasonable to conclude that the *parties have balanced* the burdens and benefits themselves. As the Authority stated in *BOP, Oklahoma City I*, 57 FLRA at 162:

> parties should assess during bargaining the effect of the provision on management's rights and the benefits to employees from the provision. In other words, employers and unions should determine, through the collective bargaining process, what provisions best fit their working conditions and what arrangements are "appropriate." Thus, [the abrogation standard] reflects a justifiable reluctance on the part of the Authority to substitute its judgment on the wisdom of bargaining, or the merits of particular terms, for that of the parties who

have reached agreement on the contract provision.

Moreover, it is beyond dispute that many matters that are not within the duty to bargain are nevertheless not contrary to law. For example, an agency has no statutory duty to bargain over a matter encompassed by § 7106(b)(1) of the Statute. Nevertheless, once agreement has been reached over such a matter, it may not be disapproved by an agency head under § 7114(c)(3) and is fully enforceable in arbitration. *See U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 56 FLRA 393, 395 (2000). Likewise, although there is no duty to bargain over matters that do not concern conditions of employment, agreements reached on those matters are fully enforceable. *See AFGE, Local 3302*, 52 FLRA 677, 680-83 (1996). Thus, the Statute recognizes that agency management is permitted to agree to a broader range of matters than those strictly within its duty to bargain. No basis is provided to conclude that the situation is any different when management rights under § 7106(a) are involved. Accordingly, short of waiver, agency management is permitted to agree to proposals affecting its management rights.

Finally, deference to parties' bargaining choices is consistent with the statutory "policies of: (1) promoting collective bargaining and the negotiation of collective bargaining agreements; and (2) enabling parties to rely on the agreements that they reach, once they have reached them." *NTEU*, 64 FLRA 156, 158 (2009) (Member Beck dissenting). Particularly after over thirty years' experience under the Statute, it is proper and reasonable to respect the choices and agreements made by the parties at the bargaining table.[10]

Based on the foregoing, we find that, in resolving exceptions to arbitration awards involving contract provisions alleged to be enforceable under § 7106(b)(3) of the Statute, we will assess whether the arrangement abrogates – i.e., waives – management rights. We will no longer apply an excessive-interference standard, and *BOP, Oklahoma City II* and other Authority decisions that have applied that standard in arbitration will no longer be followed.[11]

Applying the abrogation standard here, as interpreted and applied by the Arbitrator, the agreement limits the officials who may access the medical information of employees seeking reasonable accommodations, unless an employee consents to greater information sharing. *See* Award at 3-5; *see also supra* note 3. Specifically, the agreement ensures that, upon an employee's request, only the national coordinator will have access to the employee's full medical file, unless the employee thereafter consents to further dissemination. *See* Exceptions, Ex. 2 at 16-20. However, the Agency is incorrect in asserting that, under the agreement, local coordinators cannot assist in developing reasonable accommodations. *See* Exceptions at 7-8. In this regard, the Arbitrator found that, although there are "limit[s]" on the national coordinator's ability to share confidential medical information, the national coordinator is permitted to share with local coordinators or supervisors "the 'functional limitation' an employee faces, if the information is needed to make a decision" regarding a reasonable-accommodation request. Award at 12 n.4. Moreover, the agreement limits the national coordinator's ability to disclose certain employee medical information only where an employee requests such protection. Thus, the agreement will not necessarily preclude disclosure of employee medical records to local coordinators in all cases. The agreed-upon arrangement preserves the Agency's "right to request, obtain[,] and evaluate medical information in order to make a determination whether the employee qualifies for a [reasonable accommodation]." *Id.*

Consistent with the foregoing, we find that the agreement does not abrogate the Agency's right to

10. We therefore find the parties' agreement to a particular provision a relevant consideration in assessing whether the provision, as construed and applied by an arbitrator, constitutes an appropriate arrangement under § 7106(b)(3). However, because management rights may not be waived in collective bargaining, we are not able to join our concurring colleague in finding that the parties' agreement should be treated as a binding concession by the agency that the provision is a permissible limitation on management rights under § 7106(b). *See* Concurring Opinion at 12. Nevertheless, as stated previously, we agree with the concurrence that by permitting an agency to challenge a provision after agreement, the statutory scheme raises concerns regarding the efficient conduct of collective bargaining.

11. We note that our analysis calls into question whether abrogation also should be the standard applied in negotiability cases involving contract provisions (where agreement has been reached and subsequently disapproved), rather than proposals. *See BOP, Oklahoma City I*, 57 FLRA at 162 ("it appears appropriate to reexamine at the first opportunity the application of the excessive interference standard in cases where a provision has been disapproved under § 7114(c)"). However, as that issue is not raised here, we leave it for another day.

assign work. Thus, the agreement is enforceable under § 7106(b)(3) of the Statute and the award is not contrary to § 7106(a)(2)(B).[12]

C. The award is not based on a nonfact.

The Agency contends that the Arbitrator's finding that the parties reached an agreement on an appropriate arrangement is based on a nonfact. An arbitrator's conclusion that is based on an interpretation of the parties' collective bargaining agreement does not constitute a fact that can be challenged as a nonfact. *See NLRB*, 50 FLRA 88, 92 (1995). In finding that provisions of the parties' agreement constitute an appropriate arrangement, the Arbitrator interpreted and applied the language of the agreement. *See* Award at 14 ("The grievance is sustained . . . [because the] Agency[] . . . violated the [agreement] . . . ."). Thus, the Arbitrator's interpretation of the agreement as an appropriate arrangement cannot be challenged as a nonfact. Therefore, we deny the Agency's nonfact exception.

V. Decision

The Agency's exceptions are denied.

12. Because we have found that the award properly enforces an appropriate arrangement, it is unnecessary to address the award's alternative finding that the agreement resulted from negotiations on a permissive subject of bargaining under § 7106(b)(1) – namely, the methods or means of performing work.

Member Beck, Concurring:

I join Chairman Pope and Member DuBester in concluding that the Agency's exceptions should be denied. I also applaud my colleagues' move to abandon the "excessive interference" standard for assessing whether a contract provision that is being enforced by an arbitrator violates management's rights. Where I break ranks with my colleagues, however, is at their belief that we should engage in *any* assessment of whether a contract provision that is being enforced by an arbitrator violates management's rights.

The design of our Statute indicates that Congress intended for the evaluation of whether a given contract proposal impermissibly interferes with management rights to occur at the collective bargaining stage of the parties' labor relations -- not at the much later stage where the proposal has been adopted by the parties as a binding contract provision and arbitration about that provision has occurred. Once a proposal has been agreed to and has become a binding contract provision, the time for arguments about management's rights has passed.

Our Statute sets forth, at § 7106(a), certain critical management functions that are reserved to agency management (e.g., making determinations about budget, internal security, and the assignment of work). These are collectively known as "management rights." At the same time, at § 7106(b), the Statute unequivocally provides that an agency may agree to limitations on these management rights. The Statute expressly makes the management rights outlined in § 7106(a) "subject to" limitations that are negotiated pursuant to § 7106(b). Further, § 7106(b) tells us that "nothing" about § 7106(a) shall preclude the parties from negotiating limitations on management rights as described in § 7106(b). Reading § 7106 as a whole, one must conclude that Congress deemed the preservation of management rights to be important, and that it deemed the parties' freedom to negotiate limitations on these rights to be at least as important.

Our Statute also makes clear as crystal that management need not agree to impermissible limitations on its § 7106(a) management rights. When confronted with a collective bargaining proposal that, if implemented and enforced, would unduly infringe on management rights, agency negotiators may declare such a proposal to be non-negotiable. Whether the proposal is negotiable -- that is, whether it is or is not a permissible limitation on management rights -- then becomes a question to be

resolved by the Authority. 5 U.S.C. §§ 7105(a)(2)(E), 7117(c). In addition, even if agency negotiators fail to raise negotiability objections during bargaining and tentatively agree to a union's proposal, the proposal may still be rejected as a result of agency head review. 5 U.S.C. § 7114(c).

Simply put, our Statute provides Federal agencies with ample opportunity to challenge a contract proposal based on its perceived interference with § 7106(a) management rights *before* such a proposal becomes a binding contract provision. Agencies are well aware that, if they do not reject a proposal at the bargaining table or through the mechanism of agency head review, the proposal "shall take effect and shall be binding." 5 U.S.C. § 7114(c)(3).

I presume that Federal agencies do not heedlessly agree to include in their collective bargaining agreements provisions that, if enforced in a reasonably foreseeable fashion, would impermissibly interfere with their management rights. As my colleagues correctly assert, once bargaining has taken place and a particular contract provision has been adopted, "it is reasonable to conclude that the *parties have balanced* the burdens and benefits themselves." Majority at 8 (emphasis in original). By agreeing to include in its collective bargaining agreement a provision that affects the management rights described in § 7106(a), the agency concedes that the provision is a permissible limitation on those rights under § 7106(b).

Consequently, once a contractual dispute has progressed to arbitration and the arbitrator has enforced a contract provision that was accepted by the agency as a permissible limitation on its management rights, the pertinent question is not whether the provision itself is an appropriate arrangement nor whether it excessively interferes with a § 7106(a) management right. Rather, at that point, the question is simply whether the remedy directed by the arbitrator enforces the provision in a reasonable and reasonably foreseeable fashion -- in other words, whether the remedy draws its essence from the agreement.

My colleagues note that, even after a proposal has been agreed to and has become a binding contractual provision, it remains "subject to the provisions of [the Statute]." 5 U.S.C. § 7114(c)(3). Therefore, they conclude, "an arbitration award that is contrary to § 7106 must be set aside." Majority at 4. I agree with this proposition. When an arbitral remedy affecting management rights is not properly derived from the contract provision that is being enforced, it "imposes a constraint on management rights that was not agreed to by the parties" and will be set aside. *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102, 107 (2010); *see also id.* at 107 n.6. Thus, we ensure that a contract provision remains "subject to" the Statute by vacating an arbitral remedy that impermissibly interferes with management rights protected by § 7106(a) because it strays from the permissible limitation on management rights that the agency agreed to pursuant to § 7106(b).

I join in my colleagues' stated desire to show "deference to the parties bargaining choices" and I concur that "it is proper and reasonable to respect the choices and agreements made by the parties at the bargaining table." However, enabling parties, after the fact, to challenge as illegal contract provisions to which they voluntarily agreed does not reflect such deference and respect. And it profoundly undermines a principal goal of our Statute, which is "to provide the parties to [a collective bargaining] agreement with stability and repose with respect to matters reduced to writing in the agreement." *Dep't of the Navy, Marine Corps Logistics Base v. FLRA*, 962 F.2d 48, 59 (D.C. Cir. 1992).

To allow an agency to challenge the propriety of a given proposal under § 7106 *during* collective bargaining is consistent with Congress' mandate that our Statute "be interpreted in a manner consistent with the requirement of an effective and efficient Government." 5 U.S.C. § 7101(b). To allow an agency to mount a challenge under § 7106 *after* the agency has agreed to the provision and *after* an arbitrator has issued an award enforcing that provision can hardly be considered effective or efficient.