

67 FLRA No. 153

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
TERRE HAUTE, INDIANA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS C-33
LOCAL 720
(Union)

0-AR-4858

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DECISION

September 25, 2014

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

I. Statement of the Case

The Agency ceased soliciting volunteers to perform particular duties on overtime and, instead, began unilaterally changing certain employees' (the grievants') work shifts so that the duties could be performed during those shifts, rather than on overtime. The Union filed, and Arbitrator George T. Roumell, Jr. resolved, a grievance challenging the change. The Arbitrator found that the Agency's prior solicitation of volunteers for overtime was a past practice that modified certain terms of the parties' agreement, and that the Agency violated the parties' agreement and a memorandum of understanding (the MOU) by unilaterally changing that practice. This case presents the Authority with three substantive questions.

The first question is whether the award is contrary to law because the subject matter of the change is "covered by" the parties' agreement and the MOU. Because the Arbitrator found only a contractual – not a statutory – failure to bargain, we find that the "covered by" doctrine does not apply and that, as a result, the award is not contrary to law as alleged.

The second question is whether the award is contrary to management's statutory right to assign work. Because the Agency does not support its management-rights claim, and the Authority's Regulations require excepting parties to support their claims, we reject the Agency's claim.

The third question is whether, in finding a past practice, the Arbitrator exceeded his authority because he disregarded a provision in the parties' agreement that prohibits arbitrators from adding to or altering the agreement. Because the Arbitrator had the authority to find that the parties modified their agreement by past practice, we find that the Arbitrator did not exceed his authority as alleged.

II. Background and Arbitrator's Award

The Agency consists of a prison complex housing approximately 3,100 inmates and employing 726 employees. The grievants work in the Agency's Correctional Systems Department (CSD) and are responsible for processing inmates arriving and departing from the prison by weekly bus or air transport. This processing requires no fewer than three CSD employees, but may require more employees depending on the number of inmates involved. The schedule of inmate transport is not fixed, and occasionally occurs at times requiring the grievants to process inmates outside of their assigned shifts. The Agency generally receives advance notice of the expected inmate-transport times.

Before March 3, 2011, if the Agency expected that inmate processing would be necessary outside the grievants' assigned shifts, supervisors would seek volunteers to work overtime. After March 3, 2011 – with little explanation other than "[i]n an effort to curtail overtime"¹ – the Agency ceased seeking volunteers to work overtime under these circumstances. Instead, the Agency began moving forward the starting times and pushing back the ending times of the grievants' previously scheduled shifts by two or more hours, so that the grievants could accomplish the inmate processing within their assigned shifts. The Agency changed the shifts only for the number of staff it determined necessary to complete the processing. Otherwise, the starting and ending times of the grievants' assigned shifts stayed as previously scheduled.

The Union filed a grievance claiming that the Agency violated several provisions of the parties' agreement, the MOU, and the Federal Service Labor-Management Relations Statute (the Statute) by changing the grievants' assigned shifts without first giving the Union notice and an opportunity to bargain.

¹ Award at 4.

When the grievance was not resolved, it was submitted to arbitration. The parties did not stipulate to, and the Arbitrator did not expressly frame, any issues. However, the Arbitrator stated that “[t]his grievance involves an interpretation of the [parties’ agreement] and the [MOU] as applied to the facts. Elementary to this *contract dispute* is the recognition that the [parties’ agreement] and the [MOU] must be construed based upon the instruments as a whole, and not from a single word or phrase.”²

Addressing the merits of the contractual dispute, the Arbitrator found that the Agency violated the parties’ agreement and the MOU by unilaterally changing the grievants’ assigned work shifts. In making this determination, the Arbitrator noted that Article 18, Section (o) – which states that “[e]mployees shall be given at least twenty-four (24) hours notice when it is necessary to make shift changes” – permits the Agency to adjust shifts in certain circumstances.³ He also noted that Article 18, Section (r) states that “[n]ormally, . . . employees . . . will remain on the shift/assignment designated by the quarterly roster,”⁴ and that the MOU states that “[n]ormally, there shall be no changes to the blank roster after it is issued.”⁵ The Arbitrator interpreted these provisions to mean that employees will “normally” work the hours previously assigned to them.⁶ The Arbitrator then looked to how the parties defined the term “normally.”⁷ The Arbitrator stated that the agreements do not define the term. Accordingly, the Arbitrator looked to how the parties defined the term in practice.

The Arbitrator determined that the parties had defined the term “normally” by developing and following a past practice of seeking volunteers to work overtime, rather than adjusting work shifts under Article 18, Section (o).⁸ He found that this practice modified the applicable terms of the parties’ agreements, and that the modification had the force of a mutual agreement between the parties. He further found that the change in practice was a change in “working conditions” and that Article 4 of the parties’ agreement required the Agency to “notify [the Union] to negotiate about the change and not to change unless there was a mutual agreement to do so.”⁹ Article 4, quoted by the Arbitrator, states in this regard that “[t]he [Agency] will provide [the Union] expeditious notification of the changes to be implemented

in working conditions” and that such matters “shall not be changed unless agreed to in writing by the parties.”¹⁰

On this basis, the Arbitrator sustained the grievance, noting that “this [award] does not stand for the proposition that the Agency cannot take steps to control overtime[, but that] it must do so within the confines of its *contractual* obligations.”¹¹ The Arbitrator ordered the Agency to cease changing the shifts and to “adhere to the provisions of the [parties’ agreement] and [the MOU] regarding roster procedures and shift assignments for [the grievants].”¹²

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

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority’s Regulations bar some of the Agency’s exceptions.

The Agency argues that the award is based on a nonfact because the “Arbitrator uses his definition of ‘normally’ in finding that the parties created a past practice” under which the Agency solicited volunteers for overtime, rather than changing employees’ work schedules.¹³ The Agency contends that “the word ‘normally’ does not apply here because it is not a part of Article 18, [Section] (o).”¹⁴ In addition, the Agency argues that the Arbitrator’s finding of a past practice fails to draw its essence from the parties’ agreement because, in making that finding, the Arbitrator “disregard[ed]” Article 18, Section (p)(1) of the parties’ agreement.¹⁵ Specifically, the Agency contends that, under Article 18, Section (p)(1), “[i]t is management who determines when overtime is necessary.”¹⁶

Under the Authority’s Regulations, exceptions may not rely on “any evidence, factual assertions, [or] arguments . . . that could have been, but were not, presented to the arbitrator,”¹⁷ and the Authority “will not consider any [such] evidence, factual assertions, [or] arguments.”¹⁸ The Agency’s nonfact and essence exceptions essentially challenge the Arbitrator’s finding that there was a past practice of soliciting volunteers for overtime, rather than changing employees’ work schedules.¹⁹ The record shows that the Union’s argument

² *Id.* at 8-9 (emphasis added).

³ *Id.* at 10.

⁴ *Id.*

⁵ *Id.* (emphasis omitted).

⁶ *Id.*

⁷ *Id.* at 10, 15.

⁸ *Id.* at 15-16.

⁹ *Id.* at 17.

¹⁰ *Id.* (quoting Article 4, Sections (b) and (c)).

¹¹ *Id.* (emphasis added).

¹² *Id.* at 18.

¹³ Exceptions at 18 n.10.

¹⁴ *Id.*

¹⁵ *Id.* at 18 n.11.

¹⁶ *Id.*

¹⁷ 5 C.F.R. § 2425.4(c).

¹⁸ *Id.* § 2429.5.

¹⁹ Exceptions at 18 n.10.

before the Arbitrator concerned whether there was such a past practice.²⁰ The Agency could have argued to the Arbitrator that no past practice existed, and could have cited Article 18, Section (p)(1), but nothing in the record indicates that the Agency took either action. Thus, §§ 2425.4(c) and 2429.5 bar the Agency from making these arguments before the Authority,²¹ and we dismiss the nonfact and essence exceptions.

IV. Analysis and Conclusions

A. The award is not contrary to law.

The Agency argues that the award is contrary to law, specifically, the Authority's "covered[-]by doctrine"²² and management's right to assign work.²³ When exceptions involve an award's consistency with law, the Authority reviews any question of law raised by the exceptions and the award de novo.²⁴ 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.²⁵ In making that assessment, the Authority defers to the arbitrator's underlying factual findings.²⁶

1. The "Covered-By" Doctrine

The Agency asserts that the subject matter of the change is "covered by" Article 18, Section (o) of the parties' agreement and, therefore, the Statute did not require the Agency to bargain.²⁷ As a threshold matter, the Agency argues that the "covered[-] by" doctrine applies in this case because the Arbitrator found that the Agency violated a statutory duty to bargain.²⁸ In this connection, the Agency makes two contentions. First, the Agency contends that both parties cited the Statute in their issue statements to the Arbitrator.²⁹ Second, the Agency contends that the Arbitrator based his decision, in part, on Article 4 of the parties' agreement – which, according to the Agency, restates the Statute's bargaining obligations, rather than imposing a separate, contractual obligation to bargain.³⁰ The Agency asserts³¹ that the

Authority made this finding in *U.S. DOJ, Federal BOP, Washington, D.C. (BOP I)*.³²

It is well-established that the "covered[-]by" doctrine applies *only* as a defense to an alleged failure to satisfy a *statutory* bargaining obligation.³³ By contrast, where a dispute involves only a *contractual* – as opposed to a *statutory* – bargaining obligation, "the issue of whether the parties have complied with the agreement becomes a matter of contract interpretation for the arbitrator."³⁴ So, to decide whether the "covered-by" doctrine applies, we must first determine whether the Arbitrator found a statutory or a contractual bargaining obligation.

The record contains some passing references to the Statute. Specifically, the grievance – which the Arbitrator "granted"³⁵ – alleged a statutory violation, and the parties' issue statements to the Arbitrator mentioned the Statute.³⁶

However, the Arbitrator did not discuss the Statute, set forth the standards for a statutory duty to bargain, or state that he found a violation of the Statute. Instead, he expressed the issue before him in purely contractual terms. Specifically, he stated: "This grievance involves an interpretation of the [parties' agreement] and the [MOU]. Elementary to this *contract dispute* is the recognition that the [parties' agreement] and [the MOU] must be construed based upon the instruments as a whole."³⁷ And it is clear that, under Article 4 of the parties' agreement, he found that the Agency violated a contractual bargaining obligation.³⁸

According to the Agency, the Authority has found that Article 4 does not impose a contractual bargaining obligation, separate from the Statute's bargaining obligations.³⁹ The Agency is incorrect. The Authority did indeed state in *BOP I* that Article 4

²⁰ Exceptions, Attach. C at 33.

²¹ See *AFGE, Local 1546*, 65 FLRA 833, 833 (2011).

²² Exceptions at 4.

²³ *Id.* at 14, 16.

²⁴ *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)).

²⁵ *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).

²⁶ *Id.*

²⁷ Exceptions at 5.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 5-6.

³¹ *Id.* at 5.

³² 64 FLRA 559 (2010), *pet. for review granted, decision vacated, and remanded sub nom., Fed. BOP v. FLRA*, 654 F.3d 91 (D.C. Cir. 2011) (*BOP II*), *decision on remand, U.S. DOJ, Fed. BOP, Wash. D.C.*, 67 FLRA 69 (2012)).

³³ See *Broad. Bd. of Governors, Office of Cuba Broad.*, 66 FLRA 1012, 1012 n.5 (2012), *enforced* 752 F.3d 453 (D.C. Cir. 2014); *SSA, Balt., Md.*, 66 FLRA 569, 573 n.6 (2012) (*SSA Balt.*) (Member DuBester dissenting in part); *SSA, Headquarters, Balt., Md.*, 57 FLRA 459, 460 (2001).

³⁴ *Broad. Bd. of Governors, Office of Cuba Broad.*, 64 FLRA 888, 891 (2010) (citing *SSA, Balt., Md.*, 55 FLRA 1063, 1068 (1999)).

³⁵ Award at 18.

³⁶ *Id.* at 4-5.

³⁷ See *id.* at 8-9 (emphasis added); see also *U.S. Dep't of VA, VA Med. Ctr., Louisville, Ky.*, 64 FLRA 70, 72-73 (2009).

³⁸ Award at 17.

³⁹ Exceptions at 5-6 (citing *BOP I*, 64 FLRA at 561).

“specifically references the parties’ statutory duties.”⁴⁰ But the Authority made clear in *BOP I* that this statement addressed only Article 4, Section (a), not the remainder of Article 4.⁴¹ Article 4, Section (a) states that the parties “shall have *due regard* for the obligation imposed by 5 [U.S.C. §§] 7106, 7114, and 7117.”⁴²

In contrast, Article 4, sections (b) and (c) – which the Authority did not address in *BOP I* – recognize a contractual obligation to bargain and do not mention the Statute.⁴³ Specifically, Article 4, Section (b) states that, with respect to “matters which are not covered in supplemental agreements at the local level, all written benefits, or practices and understandings between the parties implementing [the parties’] [a]greement . . . shall not be changed unless agreed to in writing by the parties.”⁴⁴ Article 4, Section (c) states both that “[t]he [e]mployer will provide expeditious notification of the changes to be implemented in working conditions” and that “such changes will be negotiated in accordance with the provisions of [the parties’] a]greement.”⁴⁵ As the sections of Article 4 imposing these obligations do not mention the Statute, and as the Arbitrator did not otherwise discuss the Statute and made specific references to a purely contractual dispute as mentioned above, we find that the Arbitrator found only a contractual – not a statutory – obligation to bargain.

Overlooking the import of sections (b) and (c) of Article 4, the dissent argues, erroneously, that this case is controlled by the D.C. Circuit’s decision in *Federal BOP v. FLRA (BOP II)*.⁴⁶ *BOP II* held that the Agency did not have an obligation to bargain under the Statute over certain work-assignment matters not at issue here.⁴⁷ In the court’s view, the parties had resolved their respective rights and obligations under the Statute concerning those work assignment matters by agreeing to contract provisions that “covered” those matters.⁴⁸ Under the “covered-by” doctrine, questions about a party’s compliance with agreed-upon contract provisions are “properly resolved through the contractual grievance procedure.”⁴⁹ The Arbitrator in the instant case did just that. He resolved questions about the Agency’s compliance with the agreed-upon contract provisions at

issue here – which are different from the contract provisions involved in *BOP II*. Because *BOP II* does not deal with contract-compliance issues, or the contract provisions here involved, it is inapposite.

As the Arbitrator found only a contractual bargaining obligation, the “covered-by” doctrine does not apply in this case. Accordingly, we reject the Agency’s reliance on that doctrine.

2. Management’s Right to Assign Work

The Agency contends that, by interpreting Article 18, Section (o) in context with Article 18, Section (r) to find that the Agency had a past practice of seeking volunteers for overtime when inmate transport called for work outside the grievants’ assigned shifts, the Arbitrator “place[d] a burden on the exercise of management’s right to assign work.”⁵⁰ But the Agency does not offer any argument or support for this claim.

Under § 2425.6(e)(1) of the Authority’s Regulations, “[a]n exception may be subject to . . . denial if[] . . . [t]he excepting party fails to . . . support a ground” for setting aside an arbitration award.⁵¹ Consistent with § 2425.6(e)(1), where an excepting party raises a recognized ground for reviewing an arbitration award, but fails to provide any supporting arguments, the Authority denies the exception.⁵² Applying these principles, as the Agency does not provide any support for its management-rights claim, we reject the Agency’s claim.

B. The Arbitrator did not exceed his authority.

The Agency contends that the Arbitrator exceeded his authority by disregarding specific limitations on his authority set forth in the parties’ agreement.⁵³ The Agency claims that by interpreting Article 18, Section (o) along with Article 18, Section (r), to find that the Agency had acquiesced in a past practice of seeking volunteers for overtime in certain circumstances, the Arbitrator effectively added to and altered the terms of the parties’ agreement in violation of Article 32, Section (h).⁵⁴ Article 32, Section (h) provides that “[t]he arbitrator shall have no power to add to,

⁴⁰ *BOP I*, 64 FLRA at 561.

⁴¹ *Id.* at 561 n.5 (expressly referencing and quoting from Article 4, Section (a)).

⁴² Award at 17.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ 654 F.3d 91 (2011).

⁴⁷ *Id.* at 95.

⁴⁸ *Id.*

⁴⁹ *Dep’t of Navy v. FLRA*, 962 F.2d 48, 61 (D.C. Cir. 1992) (quoting *UMW, Dist. 31 v. NLRB*, 879 F.2d 939, 944 (D.C. Cir. 1989)).

⁵⁰ Exceptions at 14, 16.

⁵¹ 5 C.F.R. § 2425.6(e)(1).

⁵² See, e.g., *U.S. Dep’t of the Treasury, IRS, Wash. D.C.*, 66 FLRA 712, 715 (2012).

⁵³ Exceptions at 14 n.8 (citing Article 32, Section (h)); *id.* at 16 n.9.

⁵⁴ *Id.* at 14 n.8; *id.* at 16 n.9.

subtract from, disregard, alter, or modify any of the terms of . . . [the parties'] [a]greement.”⁵⁵

Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance.⁵⁶ Under Authority precedent, an arbitrator may appropriately determine whether a past practice has modified the terms of a collective-bargaining agreement.⁵⁷

Here, the Arbitrator found that the Agency's practice of seeking volunteers for overtime when necessary, as opposed to changing assigned work shifts, modified the applicable terms of the parties' agreements, and that the modification had the force of a mutual agreement between the parties.⁵⁸ Therefore, the Arbitrator did not add to or alter the terms of the parties' agreements, but instead, found that the parties themselves had done so in their creation of, and acquiescence in, the past practice. As the Arbitrator had the authority to make this finding,⁵⁹ we find that the Arbitrator did not exceed his authority, and we deny this exception.

V. Decision

We dismiss the Agency's nonfact and essence exceptions and deny the remaining exceptions.

Member Pizzella, dissenting:

Major League Baseball Hall-of-Famer, Yogi Berra, once famously said, “[i]t's like déjà-vu, all over again.”¹ If he were to read this case, he probably would say that again while scratching his head in disbelief.

This is at least the sixth time that the *same Union* – AFGE, Council of Prison Locals C-33 (Council 33) – has filed a grievance against the *same Agency* – the Bureau of Prisons (Bureau) – alleging that the Bureau violated the *same provision* – Article 18 – of the *same nationwide collective-bargaining agreement*.² In each of these cases, the Bureau has attempted to implement a cost-savings measure³ (in this case, a reduction in overtime costs),⁴ and in each case Council 33 has sought to impede or delay implementation of those measures by arguing that the Bureau must first bargain with the Union *again* even though Article 18 “do[es] not give rise to a further duty to bargain.”⁵ According to Council 33's lead negotiator, Article 18 was a “complete rewrite” of the procedures by which the Bureau “assign[s] work” and “implement[s] . . . procedures” related to the assignment of work and shifts.⁶

As I have noted, time and again, the filing of repeated grievances over the same matters “unwisely consume[s] federal resources . . . and serve[s] to undermine ‘the effective conduct of [government] business.’”⁷

In this case, we again face a now familiar scenario. In an attempt “to reduce overtime costs”⁸ (a fact that is ignored entirely by the Arbitrator), the Bureau began to adjust the start or end times of the shifts of “a few” officers in order to process inmates into the prison when inmates were scheduled to arrive by bus or airlift outside of “normal duty hours.”⁹ Whenever the Bureau

¹ www.brainyquote.com/quotes (last visited September 18, 2014).

² See *AFGE, Council of Prison Locals C-33 Local 720*, 67 FLRA 157 (2013); *U.S. DOJ, Fed. BOP*, 64 FLRA 559 (2010) (*BOP I*), *rev'd by Fed. BOP v. FLRA*, 654 F.3d 91 (2011) (*BOP II*); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Fed. Satellite Low, La Tuna, Tex.*, 59 FLRA 374 (2003); *U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 57 FLRA 158 (2001); *U.S. DOJ, Fed. BOP, Mgmt. & Specialty Training Ctr., Aurora, Colo.*, 56 FLRA 943 (2000).

³ See *BOP I*, 64 FLRA at 561.

⁴ Exceptions, Attach. B., Agency's Post-Hr'g Br. (Agency's Post-Hr'g Br.) at 3.

⁵ *BOP II*, 654 F.3d at 96.

⁶ *Id.*

⁷ *U.S. DOJ, BOP, Metro. Corr. Ctr., N.Y.C., N.Y.*, 67 FLRA 442, 452 (2014) (Dissenting Opinion of Member Pizzella) (quoting 5 U.S.C. § 7101(a)(1)(B)).

⁸ Agency's Post-Hr'g Br at 3.

⁹ Award at 2-3; Agency's Post-Hr'g Br. at 3.

⁵⁵ *Id.* at 14 n.8.

⁵⁶ See *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996).

⁵⁷ See *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Tucson, Ariz.*, 66 FLRA 517, 521 (2012) (*BOP Tucson*); see also *Pan. Canal Comm'n*, 56 FLRA 451, 461 (2000).

⁵⁸ See Award at 15-16.

⁵⁹ E.g., *BOP Tucson*, 66 FLRA at 521.

became aware that scheduled arrivals would require a change to the start or end time of officers' shifts, the impacted officers were provided with at least forty-eight hours advance notice, and the shift adjustments were no more than two hours (and "often . . . less").¹⁰ To the Bureau, this was a prudent decision that would save the Bureau (and taxpayers) from paying unnecessary overtime costs.¹¹ To Council 33, however, these minor shift adjustments constituted a "change[] in working conditions" that could not be implemented unless and until the Bureau bargained the matter with representatives from Council 33.¹²

In *U.S. DOJ, Federal BOP (BOP I)*, my colleagues found that Council 33's demand that the Bureau had to bargain before it could reassign officers from regular shifts to "relief" shifts "was not covered by Article 18 of the parties agreement."¹³ But just six months before the Arbitrator made his determination in this case, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) in *Federal BOP v. FLRA (BOP II)* reversed that decision and determined that the Bureau did not have to bargain with Council 33 before it reassigned officers because Article 18 was a "complete rewrite" of how the Bureau would "assign work."¹⁴ According to the court, Article 18 "covers and preempts challenges to all specific outcomes of the assignment process,"¹⁵ including any grievance "about the discretion Article 18 itself affords to the [Bureau]."¹⁶ In other words, the court found that shift reassignments were "cover[ed]" by Article 18 and the Bureau was relieved from any further bargaining on those matters.¹⁷

Arbitrator George T. Roumell, Jr. (apparently convinced that he understood the the law better than the court) concluded that the Agency nonetheless was obligated to bargain with the Union before it could implement any "change" to the officers' shifts and that, by failing to do so, the Bureau violated an entirely generic provision (Article 4-of which the court was aware

but considered to be irrelevant),¹⁸ that simply restated the Agency's statutory obligations¹⁹ including the duty to bargain.²⁰ In making that determination, the Arbitrator relied upon an earlier case²¹ that is not only factually inapposite to the facts of this case but that also predated the court's decision in *BOP II*.

The Bureau argues that the Arbitrator's award is contrary to law because he ignored the court's decision in *BOP II* and determined that the matter is not "covered by" Article 18.²² But, without so much as a passing nod to the court's decision in *BOP II*, the majority concludes that the "covered by" doctrine does not apply because, in their opinion, the Arbitrator's award is based on an implicit "contractual . . . obligation to bargain."²³

I agree with my colleague, Member DuBester, wherein he noted recently that cases of this nature "illustrate[] the difficulties in applying the covered-by standard."²⁴ Even though we may not agree entirely on the reasons why the Authority's current covered-by standard is inadequate, I wholeheartedly agree that "the Authority's use of the covered-by standard warrants a fresh look."²⁵ In this respect, I do not believe that a contractual provision that simply repeats the Bureau's obligation to bargain creates a separate bargaining obligation when the parties "completely rew[rote]" the procedures by which the Bureau "assign[s] work" and "implement[s] . . . procedures" related to the assignment of work and shifts.²⁶ As I noted in *AFGE, Local 12*,²⁷ circumstances such as these do not "foster work practices [that] facilitate and improve . . . the efficient

¹⁰ Award at 2-3; Agency's Post-Hr'g Br. at 3; Exceptions at 2.

¹¹ At the time these decisions were made, the Bureau was facing potential *furloughs of up to 36,600 correctional workers* even after it had made "extensive cuts to travel, training, contracts, and other areas of spending," and the Attorney General had intervened, using his Executive "authorities" to transfer funds from other departments. *Statement of Charles E. Samuels, Jr. Director of the Federal Bureau of Prisons Before the U.S. House of Representatives Committee on Appropriations Subcommittee on Commerce, Justice, Science and Related Agencies, Federal Bureau of Prisons FY 2014 Budget Request (April 17, 2013).*

¹² Award at 4, 8; Exceptions at 2-3.

¹³ 64 FLRA at 561.

¹⁴ 654 F.3d at 96.

¹⁵ *Id.* (emphases added).

¹⁶ *Id.* at 97.

¹⁷ *Id.*

¹⁸ See *BOP I*, 64 FLRA 559, 561 (2010) ("Articles 3(c), 4, and 7(b) of the parties' agreement all contain language that specifically references the parties' *statutory* duties.") (emphasis added); see also *BOP II*, 654 F.3d at 97.

¹⁹ Award at 17 (citing Article 4, in relevant part – "the Employer . . . shall have due regard for the obligation imposed by 5 [U.S.C. §] 7117").

²⁰ *Id.*

²¹ *U.S. Dep't of the Treasury, IRS, Nat'l Distrib. Ctr., Bloomington, Ill.*, 64 FLRA 586 (2010) (*IRS*). The Arbitrator's reliance on this case is misplaced. In that case, the Authority found that the agency violated both its statutory and contractual obligations to bargain because the subject provision "*d[id] not explicitly address*" the "change" that was implemented by the agency and the matter was therefore not "covered by" the provision. *Id.* at 592-93 (emphasis added).

²² Exceptions at 5.

²³ Majority at 6.

²⁴ *NTEU, Chapter 160*, 67 FLRA 482, 487 (2014) (Dissenting Opinion of Member DuBester).

²⁵ *Id.* (quoting *SSA, Balt., Md.*, 66 FLRA 569, 575 (2012) (Dissenting Opinion of Member DuBester) (internal quotation marks omitted)).

²⁶ *BOP II*, 654 F.3d at 96..

²⁷ 67 FLRA 387 (2014) (Concurring Opinion of Member Pizzella).

accomplishment of the operations of the Government.”²⁸ To hold otherwise certainly will not encourage agencies and unions to make the effort to reach broad agreements.

I also do not agree that the Arbitrator found an independent contractual violation. Relying on the Authority’s decision in *IRS, National Distribution Center (IRS)* the Arbitrator found only that “assigning [officers] to work beyond their . . . eight[-]hour day . . . was a working condition” that required the Bureau “to notify [Council 33] to negotiate about the change and not to change unless there was a mutual agreement to do so.”²⁹ The Arbitrator never found that the Bureau violated Article 4 or the Statute. On that point, he seemed to be more confused. He simply rambled that his “conclusion [was] consistent with [IRS],³⁰ a case wherein the Authority determined that the subject provision “d[id] not explicitly address” – and therefore did not cover – the matter over which the union sought to bargain.³¹ The Authority also determined, in that case, that a status quo ante remedy – a typical remedy for a statutory violation – was an appropriate remedy for the agency’s statutory violation.³²

In this case, neither party raised *any section of* Article 4 as an issue in their statement of issues to the Arbitrator,³³ and the Arbitrator himself makes *no mention of* Article 4 throughout his seventeen-page analysis other than to cut and paste a copy of Article 4 on the seventeenth page of his eighteen page award.³⁴ Nonetheless, my colleagues assert that they were able to locate where the Arbitrator specifically “found”³⁵ that Section c. of Article 4 “required [the Bureau] to ‘notify [the Union] to negotiate about the change.’”³⁶ However, the only mention of Article 4 that I am able to find throughout the entire award is the Arbitrator’s verbatim cut and paste of Sections a., b., and c. on page seventeen;³⁷ he never mentions either Article 4, or any of the three sections, throughout his entire analysis. Therefore, I am surprised that my colleagues are able to conclude *ex nihilo* that the Arbitrator found a violation of Article 4, in general, let alone a specific violation of Section c.

²⁸ *Id.* at 391 (quoting *NTEU, Chapter 32*, 67 FLRA 174, 177 (2014) (citing *U.S. DHS, CBP*, 67 FLRA 107, 112 (Concurring Opinion of Member Pizzella) (quoting 5 U.S.C. § 7101(a)(1)(B))).

²⁹ Award at 17.

³⁰ *Id.*

³¹ *IRS*, 64 FLRA at 592.

³² *Id.* at 593.

³³ Award at 8.

³⁴ Award at 17.

³⁵ Majority at 3.

³⁶ *Id.*

³⁷ Award at 17.

Contrary to their finding here, in *BOP I*, the majority determined that Article 4 *does not* create a separate contractual bargaining obligation.³⁸ In that case, the majority found that Article 4 “specifically references the parties’ *statutory duties* . . . and that Article 3(d) *stands on its own* as an unrelated bargaining provision”³⁹ that may form the basis of a contractual violation.

Just as in this case, the arbitrator in *BOP I* addressed the question of whether the Agency was required to bargain concerning a change in staffing procedures that the Agency asserted was covered by Article 18.⁴⁰ In his lengthy analysis, the arbitrator focused on Article 18 and determined that the Agency violated its *statutory duty to bargain* but also mentioned, in passing, that several other obscure provisions – Articles 3(c) and (d), Article 4, and Article 7(b) – established a “separate” *contractual obligation to bargain* that the Agency also violated.⁴¹ But the majority specifically found, that of the obscure provisions mentioned by the arbitrator, *only “Article 3(d) . . . stands on its own”* to establish a *contractual duty to bargain* and that, in contrast, Article 3(c), Article 4 (*not “Article 4, Section (a)”* as the majority now claims⁴²), and Article 7(b) all “specifically reference[] the parties’ *statutory duties*.”⁴³ In the end, however, the court in *BOP II* reversed the Authority because it found that the Agency had no obligation, *statutory or contractual*, to bargain.⁴⁴

Therefore, I cannot decide if I am more surprised that the majority would set out to rewrite *BOP I* or that they would conclude yet again, contrary to the court’s determination in *BOP II*, that the Bureau must bargain with Council 33 before it can adjust the start or

³⁸ *BOP I*, 64 FLRA at 561 (Article 4 “contains *language* that *specifically references* the parties’ *statutory* not contractual] duties.”) & n.5.

³⁹ *Id.* at 561 n.5 (“Article 4(a) requires the parties to have ‘due regard’ for *obligations imposed* on it by these *statutory* – [5 U.S.C. §§ 7106, 7114, and 7117] – sections.”).

⁴⁰ *Id.* at 559.

⁴¹ *Id.* at 561.

⁴² Majority at 6. Interestingly, the majority in *BOP I* identified specific subsections of Articles 3 and 7, but not of Article 4. In fact, the majority found that Article 3, Section c. established a statutory obligation whereas Article 3, Section d. (but not Article 4 or Article 7, Section (b)) created a contractual obligation to bargain. In a footnote that only adds to the confusion, the majority quoted from Article 4, Section a. but never stated that the other subsections of Article 4 – Sections (b) and (c) – create a separate contractual, as opposed to statutory, obligation to bargain. Their reference to Article 4, in its entirety, in the decision would indicate otherwise considering the attention they paid to the subsections of Articles 3 and 7.

⁴³ *BOP I*, 64 FLRA at 561.

⁴⁴ *BOP II*, 654 F.3d at 96.

end times of the shifts of a “few” officers,⁴⁵ a matter that is clearly covered by Article 18.

The Court in *BOP II* was quite clear⁴⁶ that Article 18 addresses “how and when” the Bureau will “assign work”⁴⁷ and “covers and preempts challenges to all specific outcomes of the assignment process.”⁴⁸ From my perspective, the process by which the Bureau decided to adjust officers’ schedules is simply part of that assignment process and how the Bureau decided to assign work. Therefore, the Bureau’s decisions are covered by Article 18, and the Bureau has no further obligation to bargain.

Just as in *BOP II*, I believe that the majority once again has “embraced an unreasonably narrow view of what [Article 18] ‘covers’” and that the Arbitrator’s award is “incompatible with . . . the terms [and] the purpose” of the Statute.”⁴⁹ I would conclude that the Arbitrator’s award is contrary to law.

Even though the D.C. Circuit determined that all negotiations over the matters, processes, and procedures covered by Article 18 were accomplished at the bargaining table, I am concerned that neither my colleagues, nor AFGE, Council 33, have taken heed of the court’s clear instruction on this point. I would not be surprised, therefore, if we see AFGE Council 33 again trying out new arguments to demand new negotiations. But,

then, to borrow one more time from the words of that great philosopher, Yogi Berra: “[i]t ain’t over till it’s over.”⁵⁰

Thank you.

⁴⁵ Award at 2-3; Agency’s Post-Hr’g Br. at 3.

⁴⁶ The Court sharply rebuked the Authority, in this respect, for “embrac[ing] an *unreasonably narrow view* of what [Article 18] ‘covers’” and “simply defer[ing] to . . . and *endors[ing] an incoherent arbitral award.*” *BOP II*, 654 F.3d at 97 (emphases added).

⁴⁷ *Id.* at 96.

⁴⁸ *Id.* (emphases added).

⁴⁹ *Id.* at 97 (citing *Dep’t of Navy v. FLRA*, 962 F.2d 48, 53 (D.C. Cir. 1992)).

⁵⁰ www.brainyquotes.com/quotes (last visited September 18, 2014).