73 FLRA No. 131

CONSUMER FINANCIAL
PROTECTION BUREAU
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 335
(Union)

0-AR-5756

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DECISION

September 26, 2023

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

Arbitrator Roger D. Meade found the Agency violated the parties' agreement by issuing the grievant a letter of reprimand without cause. The Agency filed exceptions alleging the award is deficient on exceeded-authority and essence grounds, and that it is contrary to the Due Process Clause of the Fifth Amendment to the U.S. Constitution. We deny these exceptions because they fail to demonstrate the award is deficient.

The Agency also argues the award is contrary to public policy, and that it conflicts with management's right to discipline employees under § 7106(a)(2)(A) of the Federal Service Labor-Management Relations Statute (the Statute).[1] For the reasons explained below, we revise the test that we will apply in assessing management-rights exceptions to arbitration awards enforcing collective-bargaining agreements (CBAs). We also give the parties an opportunity to submit additional briefs regarding how the revised test applies in this case.

II. Background and Arbitrator's Award

On March 5, 2020, the Agency issued the grievant a letter of reprimand for unprofessional conduct based on a prior incident. The Union filed a grievance and the matter proceeded to arbitration.

As relevant here, the Arbitrator framed the issues as whether the Agency violated Article 3, Section 7A or Article 37, Section 1 of the parties' agreement in issuing the letter of reprimand. Article 3, Section 7A provides, "Employees have the right to Union representation at any examination of them by the [Agency] in connection with an investigation, if the employee reasonably believes that the examination may result in disciplinary action."[2] Article 37, Section 1 provides, "Disciplinary actions will be taken only for such cause as will promote the efficiency of the federal service."[3]

The Arbitrator found the Agency did not conduct an investigatory interview and only presented the grievant with the letter of reprimand at the meeting. The Arbitrator stated "it is tempting to find that the [Agency] did not specifically violate [Article 3, Section 7A] . . . because [the Agency] merely presented [the grievant] with [the] [l]etter of [r]eprimand."[4] However, the Arbitrator went on to find such a conclusion was "fatally undercut by the doctrine of just cause and due process."[5] According to the Arbitrator, "[i]t is well settled that employee discipline cannot be sustained where the employer's action is found to violate basic notions of fundamental fairness or due process."[6] The Arbitrator further found the "cause" requirement of Article 37, Section 1 was equivalent to the concept of "just cause."[7] The Arbitrator stated that just cause requires a "pre-disciplinary hearing . . . before the [Agency] has reached its disciplinary decision."[8] The Arbitrator elaborated that under just cause, "an employer [may not] hold a disciplinary meeting with an employee and, in [the] same meeting, present [the employee] with predetermined discipline."[9] As such, the Arbitrator concluded the Agency violated Article 37, Section 1 by "failing to afford [the grievant] the prior opportunity to be heard."[10]

The Arbitrator also found Article 3, Section 7A requires "a pre-disciplinary right to be confronted with [the] claimed misconduct, and the concomitant right to provide an explanation or justification."[11] The Arbitrator further found the Agency never "afforded the grievant an opportunity to be confronted with [the] conduct and . . . to provide an explanation in context or other defense."[12]

[1] 5 U.S.C. § 7106(a)(2)(A).
[2] Exceptions, Ex. 4 at 14.
[3] *Id.* at 16.
[4] Award at 9.
[5] *Id.*
[6] *Id.* at 10.
[7] *Id.*
[8] *Id.*
[9] *Id.* at 11.
[10] *Id.* at 10 (emphasis omitted).
[11] *Id.* at 11.
[12] *Id.*

Therefore, the Arbitrator concluded the Agency also violated Article 3, Section 7A. As a remedy, the Arbitrator set aside the letter of reprimand.

On August 17, 2021, the Agency filed exceptions to the award. On September 16, 2021, the Union filed its opposition to the Agency's exceptions.

III. Analysis and Conclusions

A. We deny the Agency's exceeded-authority exception.

The Agency argues the Arbitrator erred by resolving an issue not submitted to arbitration – whether the Agency violated the grievant's due-process rights.[13] Arbitrators exceed their authority if they resolve an issue not submitted to arbitration,[14] but do not exceed their authority where the award is directly responsive to the framed issues.[15]

The Arbitrator framed the issues, in pertinent part, as whether the Agency violated Article 3, Section 7A or Article 37, Section 1 in issuing the letter of reprimand to the grievant.[16] While the Arbitrator's discussion of "just[-]cause" principles included dicta concerning constitutional due-process rights, the Arbitrator did not conclude the Agency violated the grievant's constitutional due-process rights.[17] Instead, the Arbitrator found the Agency violated Article 3, Section 7A and Article 37, Section 1 of the parties' agreement "by issuing the grievant a [l]etter of [r]eprimand . . . without cause."[18] Therefore, the award is directly responsive to the framed issues, and we deny this exception.[19]

B. The award draws its essence from the parties' agreement.

The Agency argues the award fails to draw its essence from the parties' agreement in two respects.[20] The Authority will find an award is deficient as failing to draw its essence from a CBA when the appealing party establishes the award: (1) cannot in any rational way be derived from the CBA; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the CBA as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the CBA; or (4) evidences a manifest disregard of the CBA.[21] Mere disagreement with an arbitrator's interpretation and application of a CBA does not provide a basis for finding an award deficient.[22]

First, the Agency contends the agreement "does not require an investigation or an opportunity to respond to allegations before the Agency issues a letter of reprimand."[23] According to the Agency, the agreement requires such procedures only in connection with adverse actions and suspensions of less than fourteen days.[24]

The Arbitrator determined Article 37, Section 1's requirement that "disciplinary actions will be taken only for such cause as will promote the efficiency of the federal service" was "functionally equivalent" to a requirement that discipline be supported by "just cause."[25] According to the Arbitrator, just-cause principles required the Agency to give the grievant an opportunity to be heard before the Agency reached its disciplinary decision.[26] The Arbitrator also found Article 3, Section 7A requires "a pre-disciplinary right to be confronted with [the] claimed misconduct, and the concomitant right to provide an explanation or justification."[27]

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[13] Exceptions at 17.
[14] *NFFE, Loc. 1998*, 73 FLRA 143, 144 (2022).
[15] *U.S. Dep't of the Navy, Naval Med. Ctr. Camp Lejeune, Jacksonville, N.C.*, 73 FLRA 137, 141 (2022).
[16] Award at 2.
[17] *See id.* at 10.
[18] *Id.* at 13.
[19] *See NAIL, Loc. 10*, 71 FLRA 513, 515 (2020) (denying exceeded-authority exception where award was directly responsive to the framed issue); *U.S. Dep't of VA, Med. Ctr., Richmond, Va.*, 70 FLRA 900, 901 (2018) (Member DuBester concurring) (same).
[20] Exceptions at 10-14.
[21] *NAGE*, 71 FLRA 775, 776 (2020) (citing *U.S. Dep't of VA, Gulf Coast Med. Ctr., Biloxi, Miss.*, 70 FLRA 175, 177 (2017)).
[22] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Mia., Fla.*, 71 FLRA 1262, 1264 (2020) (*Miami*) (Member DuBester concurring); *SSA*, 71 FLRA 580, 581 (2020) (*SSA I*) (Member DuBester concurring) (citing *SSA*, 71 FLRA 352, 353 (2019) (Member DuBester concurring); *U.S. DOL (OSHA)*, 34 FLRA 573, 575-76 (1990)).
[23] Exceptions at 11; *see also id.* at 13 (arguing Article 3, Section 7A does not require the Agency to conduct an investigation); *id.* (arguing the "for[-]cause" provision of Article 37, Section 1 does not require the Agency to conduct an investigation or provide an employee with an opportunity to be heard before issuing a letter of reprimand).
[24] *Id.* at 13-14.
[25] Award at 10 (emphasis omitted).
[26] *Id.*
[27] *Id.* at 11 (reasoning that the contractual right to union representation at "any examination . . . in connection with an investigation" demonstrated an intention that an "examination" take place at which the grievant should have been "afforded . . . an opportunity to be confronted with his conduct and . . . permit[ted] . . . to provide an explanation in context or other defense").

The Agency provides no basis for finding the award is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement. Rather, the Agency merely argues for its preferred interpretation of the agreement. As such, we reject the Agency's first essence argument.[28]

Second, the Agency argues the award fails to draw its essence from the parties' agreement because Article 44, Section 4D precludes issues from being raised for the first time at arbitration.[29] The Agency asserts the Arbitrator ignored this requirement by allowing the Union to argue the letter of reprimand was deficient because the Agency violated the grievant's due-process rights and failed to conduct an investigation.[30]

The grievance alleged the Agency violated Article 3, Section 7A and Article 37, Section 1 in issuing the letter of reprimand.[31] The Arbitrator framed the issues as whether the Agency violated Article 3, Section 7A and Article 37, Section 1.[32] The Arbitrator sustained the grievance, finding the Agency violated Article 3, Section 7A and Article 37, Section 1 in issuing the letter of reprimand.[33] Because the issues alleged in the grievance are the same issues resolved by the Arbitrator, the Agency fails to demonstrate how the Arbitrator ignored the requirements of Article 44, Section 4D. Accordingly, we deny this exception.

C. The Agency's due-process exception misconstrues the award.

The Agency also argues the award is contrary to law because the Due Process Clause of the Fifth Amendment to the U.S. Constitution does not apply to letters of reprimand.[34] When an exception challenges an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo.[35] In applying the de novo standard of review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[36] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes they are nonfacts.[37]

The Agency's exception is based on its belief that the Arbitrator found a violation of the grievant's constitutional due-process rights. As discussed above, the Arbitrator made no such finding. Thus, the Agency's exception misconstrues the award, and we deny it on that basis.[38]

D. We revise the Authority's test for assessing exceptions alleging that an arbitrator's award enforcing a CBA provision is contrary to management rights under § 7106 of the Statute.

The Agency argues the award is contrary to public policy because it "declines to let management hold employees accountable for their misconduct."[39] Relatedly, the Agency argues that the award conflicts with management's right to discipline employees under § 7106(a)(2)(A) of the Statute.[40]

Section 7106(a) of the Statute provides, in relevant part, that *"*[*s*]*ubject to subsection (b) of this section*, nothing in [the Statute] shall affect the authority of any management official of any agency" to take various actions.[41] In turn, § 7106(b) pertinently provides that "[n]othing in this section" – in other words, § 7106 – "shall preclude any agency and any labor organization from *negotiating*" certain matters.[42] Put simply, § 7106(a) provides for various management rights,

[28] *See Miami*, 71 FLRA at 1264 (denying an essence exception because it was mere disagreement with the arbitrator's interpretation and application of the parties' CBA); *SSA I*, 71 FLRA at 581 (same); *see also SSA*, 70 FLRA 227, 230 (2017) (finding an excepting party's attempt to relitigate its interpretation of an agreement and the evidentiary weight given by the arbitrator fails to demonstrate the award is deficient); *U.S. Dep't of HUD, L.A. Field Off., L.A., Cal.*, 64 FLRA 383, 385 (2010) (denying essence exception to arbitrator's finding the "just-cause" provision of the parties' agreement required the agency to "hear . . . out" an employee prior to imposing discipline).
[29] Exceptions at 14.
[30] *Id.*
[31] Exceptions, Ex. 6 at 1.
[32] Award at 2.
[33] *Id.* at 13; *see also id.* at 10-11 (discussing due-process concepts and the disciplinary investigation in the context of deciding whether the discipline was for "cause" under Article 37, Section 1 and whether there was an "examination" within the meaning of Article 3, Section 7A).
[34] Exceptions at 6-7.
[35] *U.S. Dep't of the Interior, Nat'l Park Serv.*, 73 FLRA 418, 419 (2023).
[36] *Id.*
[37] *Id.*
[38] *See U.S. DHS, U.S. CBP*, 71 FLRA 243, 245 (2019) (Member Abbott concurring) (denying contrary-to-law exception because the agency misconstrued the award).
[39] Exceptions at 9.
[40] *Id.* at 8-9.
[41] 5 U.S.C. § 7106(a) (emphasis added).
[42] *Id.* § 7106(b) (emphasis added).

but makes those rights subject to negotiations over the matters listed in § 7106(b).[43]

However, § 7106 does not apply solely to negotiations. In *Department of the Treasury, IRS v. FLRA* (*IRS*), the U.S. Supreme Court held that, when § 7106(a) says that "nothing in [the Statute]" shall affect the listed management rights, that includes grievance arbitration under § 7121 of the Statute.[44]

Over time, the Authority has applied various tests for assessing arguments that a grievance arbitrator's award is "contrary to any law"[45] because it conflicts with management's rights under § 7106. For example, early in its history, the Authority interpreted § 7106 as limiting arbitrators' jurisdiction to hear grievances involving challenges to exercises of management rights.[46] However, the Authority later concluded that "[t]he proper phase of the arbitration proceeding in which to determine the impact or application of [§] 7106 is not at the outset so as to preclude by law an arbitrator from having jurisdiction over the matter."[47] Rather, the Authority held, "the determination as to the impact or application of [§] 7106 is to be made in connection with the arbitrator's consideration of the substantive issue presented by the grievance and any possible remedy."[48]

In addition, for many years, the Authority applied the following two-pronged test in cases involving grievances that challenged employee performance ratings:

> First, an arbitrator must find that management has not applied the established standards or has applied them in violation of law, regulation, or a provision of the parties' [CBA]. If that finding is made, an arbitrator may cancel the grievant's performance appraisal or rating. Second, if the arbitrator is able to determine based on the record what the performance appraisal or rating would have been had management applied the correct standard or if the violation had not occurred, the arbitrator may order management to grant that appraisal or rating. If the arbitrator is unable to determine what the grievant's rating would have been, [the arbitrator] must remand the case to management for reevaluation.[49]

However, that test did not assess whether the law or CBA provision that the arbitrator was enforcing was, respectively, (1) an "applicable law" within the meaning of § 7106(a)(2) of the Statute,[50] or (2) a CBA provision "on a [§] 7106(b) matter."[51] In 1997, the Supreme Court's *IRS* decision prompted the Authority to revisit its test. The Authority developed a new two-pronged test – what became known as the *BEP* framework[52] – for assessing whether an arbitrator's award was deficient because it conflicted with management rights. Under *BEP*, if the award affected a management right, then, under prong I of the test, the Authority would assess whether the award provided a remedy for a violation of either an "applicable law" within the meaning of § 7106(a)(2) (for management rights set out in that section) or a CBA provision that was negotiated under § 7106(b).[53] Under prong II, the Authority would assess whether the awarded remedy "reflect[ed] a reconstruction of what management[] . . . would have [done] if management had acted properly."[54] If the award failed either prong, then the Authority would find that the award conflicted with management rights.

Later, in two decisions issued on the same day, the Authority announced that it was replacing *BEP*'s

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[43] Section 7106(b)(1) concerns the authority of agencies and unions to negotiate, "at the election of the agency," over "the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty" as well as over the "technology, methods, and means of performing work." *Id.* § 7106(b)(1). Section 7106(b)(2) addresses "procedures which management officials of the agency will observe in exercising any authority under [§ 7106]," *id.* § 7106(b)(2), and § 7106(b)(3) pertains to "appropriate arrangements for employees adversely affected by the exercise of any authority under [§ 7106] by such management officials," *id.* § 7106(b)(3).

[44] 494 U.S. 922, 928 (1990) (finding nonnegotiable a proposal that would subject to grievance arbitration claims that the agency failed to comply with an Office of Management and Budget circular related to "contracting out" work).

[45] 5 U.S.C. § 7122(a)(1).

[46] *See, e.g.*, *AFGE, AFL-CIO, Loc. 1968*, 5 FLRA 70, 79-80 (1981), *aff'd sub nom. AFGE, AFL-CIO, Loc. 1968 v. FLRA*, 691 F.2d 565 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 926 (1983).

[47] *Newark Air Force Station*, 30 FLRA 616, 634 (1987).

[48] *Id.*

[49] *U.S. Dep't of HHS, SSA*, 34 FLRA 323, 327-28 (1990) (citing *IRS, Indianapolis Dist.*, 32 FLRA 335; *SSA*, 30 FLRA 1156, 1160-61 (1988)).

[50] The Statute provides that the management rights in § 7106(a)(2) must be exercised "in accordance with applicable laws." 5 U.S.C. § 7106(a)(2).

[51] *U.S. Dep't of the Treasury, BEP, Wash., D.C.*, 53 FLRA 146, 153 (1997) (*BEP*).

[52] *Id.* at 146.

[53] *Id.* at 153.

[54] *Id.* at 154.

two-pronged analysis.[55] As in *BEP*, the Authority would first assess whether the award affected the exercise of the asserted management right.[56] If the award affected the right, then the Authority would examine, as relevant here,[57] whether the award provided a remedy for a CBA provision negotiated under § 7106(b).[58] The party arguing that the award was contrary to § 7106 had the burden to allege both that the award affected a management right under § 7106(a), and that the relevant CBA provision was *not* enforceable under § 7106(b).[59] But the Authority would no longer assess whether the remedy reconstructed what management would have done absent the contract violation.[60] Rather, in cases where the argument was raised, the Authority assessed whether the arbitrator's chosen remedy was "reasonably related to the violated [CBA] provision or the harm being remedied."[61] The Authority explained that,

> [a]s the management rights set forth in § 7106(a) are expressly '[s]ubject to' § 7106(b) . . . , an arbitrator's award that enforces a [CBA] provision that falls within one of the subsections of § 7106(b) cannot be contrary to law on management-rights grounds, even if the award affects a management right under § 7106(a) (unless the remedy is not reasonably related to the [CBA] provision or the harm being remedied).[62]

Where the particular subsection of § 7106(b) involved was § 7106(b)(3) – "appropriate arrangements for employees adversely affected by the exercise of any authority under [§ 7106] by . . . management officials"[63] – the Authority would conduct a two-step inquiry. Specifically, the Authority would assess: (1) whether the CBA provision constituted 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 "abrogate[d]," or "waived," the exercise of the management right.[64] The latter "abrogation" analysis was intended to assess whether the arrangement was "appropriate" within the meaning of § 7106(b)(3).[65]

The abrogation analysis differed from the test the Authority applied, and still applies, in negotiability cases to determine whether a bargaining proposal is within the duty to bargain as an "appropriate" arrangement under § 7106(b)(3). Under the first part of that test – initially set forth in *NAGE, Local R14-87*[66] (*KANG*) – the Authority assesses whether the proposal is intended to be an "arrangement" for employees adversely affected by the exercise of a management right.[67] However, in assessing whether an arrangement is "appropriate," the *KANG* test assesses whether the bargaining proposal "excessively interferes with" – not "abrogates" – the affected

[55] *U.S. EPA*, 65 FLRA 113, 113 n.2 (2010) (*EPA*) ("*BEP* and its 'prongs' will no longer govern disposition of exceptions alleging that an award is contrary to management rights"); *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102, 106 (2010) (*FDIC*) (Chairman Pope concurring in part) (concluding that "the restriction on arbitrators' remedial authority imposed by *BEP*'s reconstruction requirement is not warranted").

[56] *EPA*, 65 FLRA at 115; *see also U.S. Dep't of the Treasury, IRS, Ogden Serv. Ctr.*, 69 FLRA 599, 603 (2016) (Member Pizzella dissenting on other grounds) (*Ogden Serv. Ctr.*).

[57] For management rights under § 7106(a)(2), the Authority applied a different analysis if the arbitrator was enforcing an "applicable law." *See, e.g.*, *U.S. DOD, Ill. Nat'l Guard, Scott Air Force Base, Ill.*, 69 FLRA 345, 347 (2016) (*Scott AFB*). As discussed further below, the Authority has continued to do so under the management-rights test set forth in *U.S. DOJ, Federal BOP*, 70 FLRA 398 (2018) (Member DuBester dissenting). *See, e.g.*, *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Memphis, Tenn.*, 73 FLRA 26, 29 (2022) (*BOP Memphis*) (citing *AFGE, Loc. 1633*, 71 FLRA 211, 213 (2019) (*Loc. 1633*) (Member Abbott concurring; Member DuBester concurring in part and dissenting in part)).

[58] *Ogden Serv. Ctr.*, 69 FLRA at 603.

[59] *Id.*; *U.S. Dep't of the Army, U.S. Army Corps of Eng'rs, Louisville Dist., Louisville, Ky.*, 66 FLRA 426, 428 (2012); *see also U.S. Dep't of Transp., FAA, Mia., Fla.*, 66 FLRA 876, 878 (2012) (denying management-rights exception because the agency failed to claim the provisions enforced were not negotiated under § 7106(b)); *U.S. DHS, U.S. CBP*, 66 FLRA 634, 638 (2012) (reiterating that the burden was on the agency to allege the award did not enforce a contract provision negotiated under § 7106(b)); *U.S. Dep't of the Treasury, IRS, Wage & Inv. Div.*, 66 FLRA 235, 242 (2011) (denying management-rights exception because the agency failed to assert the provisions enforced were not negotiated under § 7106(b)).

[60] *FDIC*, 65 FLRA at 107.

[61] *See, e.g.*, *U.S. DHS, U.S. CBP, U.S. Border Patrol, Yuma Sector*, 68 FLRA 189, 194 (2015) (Member Pizzella dissenting on other grounds) (citing *FDIC*, 65 FLRA at 107). *But see Scott AFB*, 69 FLRA at 349 (declining to assess that issue where excepting party did not raise it).

[62] *U.S. DOJ, Fed. BOP*, 68 FLRA 311, 315 (2015) (Member Pizzella dissenting on other grounds) (second alteration in original) (quoting § 7106(a)) (citing *SSA, Off. of Disability Adjudication & Rev., Region VI, New Orleans, La.*, 67 FLRA 597, 602 (2014) (*SSA New Orleans*) (Member Pizzella dissenting on other grounds)).

[63] 5 U.S.C. § 7106(b)(3).

[64] *EPA*, 65 FLRA at 116-18; *see also U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 105 (2012).

[65] *See, e.g.*, *EPA*, 65 FLRA at 117.

[66] 21 FLRA 24, 31 (1986).

[67] *Id.*

management right.[68] Under that excessive-interference standard, the Authority weighs the benefits that the arrangement affords employees against the arrangement's burdens on management's rights.[69] If the benefits outweigh the burdens,[70] then the arrangement is appropriate; if the burdens outweigh the benefits, then the arrangement is *not* appropriate.[71]

For decades, the Authority also applied the excessive-interference standard in negotiability cases involving agency-head disapprovals of agreed-upon CBA provisions – as distinct from bargaining proposals that had not yet been agreed upon.[72] Then, in *NTEU*,[73] the Authority held that the *abrogation* standard being applied in arbitration cases also should apply in negotiability cases involving agreed-upon CBA provisions.[74]

Subsequently, in *U.S. Department of the Treasury, IRS, Office of the Chief Counsel, Washington, District of Columbia v. FLRA* (*IRS OCC*), the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) held:

> [W]hen an agency asserts that a contract provision falls outside [§] 7106(b)(3)'s exception to [§] 7106(a), whether the question concerns the agency's duty to bargain, *see* 5 U.S.C. § 7117(c), or the provision's consistency with law, *see id.* §§ 7114(c), 7122(a)(1), the underlying legal issue is precisely the same: does the provision represent an "appropriate arrangement[]"? In applying two different standards in these contexts, the Authority has set forth two inconsistent interpretations of the very same statutory term, and thus acted arbitrarily and capriciously.[75]

In other words, the court held that the Authority could not apply different tests, in different contexts, to determine whether an arrangement is "appropriate" under § 7106(b)(3).

In resolving management-rights exceptions to arbitration awards after *IRS OCC*, the Authority at first did not squarely address whether it would jettison the abrogation standard and return to applying excessive interference.[76] Then, in *U.S. DOJ, Federal BOP* (*DOJ*),[77] the Authority held that it would no longer apply the abrogation standard in arbitration cases.[78] The Authority reevaluated how it would analyze exceptions alleging that an arbitration award was contrary to management rights under § 7106. The Authority recognized that parties at the bargaining table rarely discussed which part of § 7106 authorized the negotiation of particular CBA provisions.[79] As such, *DOJ* eschewed focusing on which § 7106

[68] *See, e.g.*, *AFGE, Loc. 1770*, 64 FLRA 953, 959 (2010); *AFGE, Loc. 1658*, 44 FLRA 1375, 1380 (1992); *NAGE, Loc. R5-82*, 43 FLRA 25, 31 (1991); *NTEU*, 41 FLRA 1106, 1128 (1991); *NAGE, SEIU, AFL-CIO*, 40 FLRA 657, 667 (1991); *Int'l Plate Printers, Die Stampers & Engravers Union of N. Am., AFL-CIO, Loc. 2*, 25 FLRA 113, 120 (1987).

[69] *KANG*, 21 FLRA at 33; *see also, e.g.*, *NFFE, IAMAW, Fed. Dist. 1, Loc. 1998*, 69 FLRA 626, 629 (2016) (*Loc. 1998*) (Member Pizzella dissenting).

[70] *E.g.*, *AFGE, Loc. 1164*, 65 FLRA 836, 840 (2011).

[71] *E.g.*, *NFFE, Loc. 1450, IAMAW*, 70 FLRA 975, 976 (2018).

[72] *See, e.g.*, *Ass'n of Civilian Technicians, P.R. Army Chapter*, 60 FLRA 1000, 1008 (2005); *AFGE, AFL-CIO, Loc. 1409*, 28 FLRA 109, 112-13 (1987).

[73] 65 FLRA 509 (2011) (Member Beck dissenting in pertinent part), *pet. for review denied sub nom. U.S. Dep't of the Treasury, Bureau of the Pub. Debt, Wash., D.C. v. FLRA*, 670 F.3d 1315 (D.C. Cir. 2012).

[74] *Id.* at 511-15; *see also NTEU*, 66 FLRA 809, 812-13 (Member Beck dissenting), *recons. denied*, 66 FLRA 1030 (2012), *vacated and remanded*, *U.S. Dep't of the Treasury, IRS, Off. of the Chief Couns., Wash., D.C. v. FLRA*, 739 F.3d 13 (D.C. Cir. 2014) (*IRS OCC*), *decision on remand*, *NTEU*, 67 FLRA 705, 707 (2014) (Member Pizzella dissenting) (adopting *IRS OCC*'s holding "as the law of the case").

[75] 739 F.3d at 20-21.

[76] *See, e.g.*, *SSA New Orleans*, 67 FLRA at 601-03 (denying management-rights exception without specifying the standard the Authority would apply in resolving the agency's argument that the enforced provisions were not appropriate arrangements under § 7106(b)(3) because the agency failed to allege that the provisions were "not procedures within the meaning of § 7106(b)(2)").

[77] 70 FLRA 398.

[78] *Id.* at 403 ("In accordance with the D.C. Circuit's implicit rejection of abrogation, we will no longer follow that standard. Instead, we will return to the excessive interference test in order that we may return to the flexibility inherent in that standard . . . .").

[79] *Id.* at 405.

subsection could support an arbitrator's award.[80] Instead, *DOJ* established the following three-part test:

> The first question that must be answered is whether the arbitrator has found a violation of a [CBA] provision. If the answer to that question is yes, then the second question is whether the arbitrator's remedy reasonably and proportionally relates to that violation. If the answer to any of these questions is no, then the award must be vacated. But, if the answer to the second question is yes, then the final question is whether the arbitrator's interpretation of the [CBA] provision excessively interferes with a § 7106(a) management right. If the answer to this question is yes, then the arbitrator's award is contrary to law and must be vacated.[81]

DOJ set forth these questions as a foundational test for resolving management-rights exceptions to arbitration awards, and the Authority elaborated how the test applied in subsequent decisions. For example, consistent with the Authority's pre-*DOJ* management-rights tests, the Authority has applied *DOJ* only where arbitrators' "'awards or remedies affect[] a management right.'"[82] Additionally, the Authority has continued to recognize that CBA provisions affecting management's rights may nevertheless be enforceable.[83] However, the Authority has not applied *DOJ* where the arbitrator is enforcing an "applicable law" within the meaning of § 7106(a)(2) of the Statute, rather than a CBA provision.[84]

As we will explain further below, we find it is appropriate to revise the test that we will apply to resolve exceptions alleging that an arbitrator's award enforcing a CBA provision[85] (CBA-violation cases) is contrary to management's rights.

We emphasize that this test will apply only in cases where an arbitrator is enforcing a CBA provision. Like *DOJ*, it will not apply in cases where an arbitrator is enforcing an "applicable law."[86] If an arbitrator's award affects a management right and the arbitrator is not enforcing a lawful constraint on management rights, then we will set aside the award – or the pertinent part of the award – as appropriate.

We discuss the revised test in depth below. We acknowledge that both our foregoing discussion of the evolution of the Authority's management-rights standards and our ensuing explanation of our revised test are lengthy and detailed. However, we hope that this thoroughly reasoned analysis will serve as the foundation for future decision-making, ensuring much-needed stability, predictability, and finality in this area of law. In this regard, although the test may appear complex, that is because it attempts to capture the complexity of § 7106 itself and the variety of arguments that parties may make, or not make, in individual cases. Stated broadly, the test assesses whether the arbitration award at issue affects a management right under § 7106(a) of the Statute and, if so, whether the arbitrator was enforcing or providing a remedy for a contract provision that, as interpreted and applied, falls within § 7106(b). In presenting arguments to arbitrators and the Authority, parties should specifically address all relevant steps of this revised test.

1. Question 1: Affect

As this framework will apply only in CBA-violation cases, we believe that the first question under *DOJ* – "whether the arbitrator has found a violation of a contract provision"[87] – need not be stated as a step of the test. Rather, the revised test will apply only where the arbitrator has found a CBA violation.

Instead, the first step of the revised test will specifically ask whether – rather than implicitly assume that – the arbitrator's award "affects" a management right. This approach is consistent with § 7106's plain wording, which (as stated above) provides that, with the noted exceptions, "nothing in [the Statute] shall *affect* the authority of any management official" to exercise the

[80] *Id.*

[81] *Id.* at 405-06.

[82] *BOP Memphis*, 73 FLRA at 29 (citing *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 72 FLRA 323, 325 (2021) (Chairman DuBester concurring) (quoting *U.S. Dep't of the Treasury, Off. of the Comptroller of the Currency*, 71 FLRA 387, 390 (2019) (Member DuBester dissenting in part))); *see also U.S. DOD, Def. Logistics Agency*, 70 FLRA 932, 933 (2018) (Member DuBester dissenting).

[83] *See, e.g.*, *U.S. Dep't of Educ., Fed. Student Aid*, 71 FLRA 1166, 1169 (2020) (*FSA*) (Member DuBester concurring) (stating that, although certain matters affect management rights under § 7106(a), "that does not allow an [a]gency to get out of a lawful provision that it agreed to pursuant to § 7106(b)(2)").

[84] *BOP Memphis*, 73 FLRA at 29 (citing *Loc. 1633*, 71 FLRA at 213).

[85] We use "CBA provision" in a broad sense to include agency rules and regulations that were negotiated with unions. *Cf. U.S. Dep't of Transp., FAA*, 58 FLRA 175, 179 (2002) (assessing whether a negotiated agency regulation constituted an "enforceable limitation[] on management's rights under § 7106(b) of the Statute").

[86] *E.g.*, *BOP Memphis*, 73 FLRA at 29 (citation omitted); *Loc. 1633*, 71 FLRA at 213.

[87] *DOJ*, 70 FLRA at 405.

listed rights.[88] It also is consistent with both pre- and post-*DOJ* precedent, which, as discussed above, has applied only where arbitrators' awards "affect" a management right.[89] Assessing whether an arbitrator's award "affects" a management right often requires a substantive analysis in and of itself.[90] It also can be dispositive: If an award does not affect a management right, then no other management-rights inquiries need to be conducted.[91]

We also take this opportunity to explain what we mean when we say that an arbitrator's award "affects" a management right. Under Authority precedent, an award can affect a management right in two, conceptually distinct ways. First, the arbitrator's *finding of a CBA violation* can affect a right, insofar as the arbitrator interprets or applies the CBA in a way that either limits or requires the exercise of management's rights.[92] Second, the arbitrator's *awarded remedy* can affect a right, insofar as it directs the agency to take or refrain from taking an action that involves the exercise of its right.[93] An arbitrator's award also can, and often does, have both types of effects.[94]

For example, if an arbitrator interprets or applies a CBA provision as precluding management from vacating posts under any circumstances, then the arbitrator's CBA interpretation and application could affect management rights – even if the arbitrator awards a non-objectionable remedy, or no remedy at all. Conversely, even if the arbitrator does not interpret or apply the CBA in a way that affects management rights, the arbitrator's awarded remedy – for example, directing the agency never to vacate posts – could affect management rights. If the arbitrator interprets or applies the CBA as prohibiting an agency from vacating posts under any circumstances and, as a remedy, directs the agency never to vacate them, then *both* the finding of a CBA violation *and* the remedy would affect management rights.

Thus, in resolving management-rights exceptions in CBA-violation cases, we will first ask whether the excepting party demonstrates that the arbitrator's interpretation and application of the CBA and/or the awarded remedy – depending on what the excepting party argues – "affects" the cited management right(s).[95] If neither the interpretation and application of the CBA nor the awarded remedy affects a management right, then we will deny the exception. If either the interpretation and application of the CBA or the awarded remedy *does* affect a management right, then we will move on to the inquiry discussed in the next section.

2. Question 2: § 7106(b)

As stated above, the management rights in § 7106(a) are expressly "[s]ubject to" the exceptions in § 7106(b).[96] Consistent with this plain wording, courts and the Authority repeatedly have held that § 7106(b) is an

[88] 5 U.S.C. § 7106(a) (emphasis added); *see also Dep't of the Navy, Naval Underwater Sys. Ctr. v. FLRA*, 854 F.2d 1, 5-6 (1st Cir. 1988) (noting that the Statute uses the word "affect," which "suggests a less stringent test" than "interfere with" or "negate").

[89] *See, e.g.*, *BOP Memphis*, 73 FLRA at 29.

[90] *See, e.g.*, *U.S. DOJ, Fed. BOP, Fed. Corr. Ctr., Petersburg, Fla.*, 72 FLRA 477, 479 (2021) (*BOP Petersburg*) (Chairman DuBester concurring; Member Abbott concurring); *U.S. Dep't of Transp., FAA*, 68 FLRA 402, 404-05 (2015) (*FAA*).

[91] *See, e.g.*, *BOP Petersburg*, 72 FLRA at 479; *FAA*, 68 FLRA at 404-05.

[92] *See, e.g.*, *SSA, Indianapolis, Ind.*, 66 FLRA 62, 64 (2011) (*SSA Indianapolis*) (Member DuBester dissenting in part on other grounds) (stating that, "because the [a]rbitrator's *interpretation* of the [CBA] impose[d] . . . restrictions" on the agency's right to determine when annual leave could be used and when work would be performed, the award affected management's rights (emphasis added)).

[93] *See, e.g.*, *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Beaumont, Tex.*, 62 FLRA 100, 102 (2007) (*BOP Beaumont*) (finding that "the remedy portion of the award" affected management's rights).

[94] *See, e.g.*, *U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 58 FLRA 109, 111-12 (2002) (Chairman Cabaniss concurring; Member Armendariz concurring; Member Pope concurring) (both interpretation of CBA and remedy affected management rights).

[95] For purposes of this test, the term "interpretation and application" is meant in a broad sense to include not only the meaning that the arbitrator ascribed to the CBA, but also the way an agency must alter its operations to effectuate the arbitrator's interpretation. For example, imagine that an arbitrator interprets a generic provision that required an agency to prioritize employees' safety to the greatest extent practicable. Imagine further that the arbitrator stated that "the agency violated the agreement by leaving posts vacant in a manner that jeopardized employees' safety." In this scenario, the "interpretation and application" of the CBA would not be limited to the provision's generic wording about prioritizing safety, but would also include the requirement that the agency must staff the posts.

[96] *See* 5 U.S.C. § 7106(a) ("*Subject to subsection (b) of this section*, nothing in [the Statute] shall affect" the exercise of the listed rights. (emphasis added)).

exception to § 7106(a).[97] Accordingly, parties are legally required to bargain over matters falling within §§ 7106(b)(2) and (b)(3) of the Statute.[98] Further, courts and the Authority have repeatedly held that parties may – at the agency's election – lawfully bargain over matters falling within § 7106(b)(1), and that agreements over such matters also are enforceable.[99] In sum, if a provision is lawfully negotiable under § 7106(b), then it is binding on the parties who agree to it – and enforceable in arbitration.[100]

As a consequence, an arbitration award that enforces a § 7106(b) provision – whether the provision meets the criteria for § 7106(b)(1), (b)(2), or (b)(3) – cannot be contrary to § 7106 merely because the award "affects" a § 7106(a) right. For example, a CBA provision may "excessively interfere" with management rights under § 7106(a) of the Statute but still be enforceable under § 7106(b)(1).[101] Thus, part of any management-rights inquiry in CBA-violation cases is whether the CBA provision at issue is enforceable under § 7106(b), despite any effects its enforcement may have on management's rights.[102] Although *DOJ* focused on then-unresolved questions concerning excessive interference under § 7106(b)(3), it did not discuss the special considerations that are relevant to § 7106(b)(1) and (b)(2).

As the Authority observed in *DOJ*, "the vast majority of provisions are negotiated without any discussion as to the statutory authority under which a

[97] *See, e.g.*, *U.S. Dep't of the Treasury, Off. of the Chief Couns., IRS v. FLRA*, 960 F.2d 1068, 1070, 1072-73 (D.C. Cir. 1992) (*Treasury OCC*) (implicitly affirming the Authority's assertion that § 7106(b) "provides that the prerogatives reserved to management under subsection 7106(a) are subject to three exceptions"); *DOD, Army-Air Force Exch. Serv. v. FLRA*, 659 F.2d 1140, 1153 (D.C. Cir. 1981) (stating "[t]he language of [§] 7106 . . . seems to establish a hierarchy, in which the terms of *subsection (b) hold priority over those of subsection (a)*" (emphasis added)); *U.S. DHS, U.S. CBP, Laredo Field Off., Hidalgo Port of Entry*, 70 FLRA 216, 217 (2017) (implicitly finding that "§ 7106(b) . . . provides exceptions to management rights under § 7106(a)"); *U.S. Dep't of VA, Med. Ctr., Leeds, Mass.*, 68 FLRA 1057, 1058 (2015) (Member Pizzella dissenting on other grounds) (finding "contract provisions negotiated under § 7106(b) are exceptions to management's rights under § 7106(a)").

[98] *See, e.g.*, *NAGE, Inc. v. FLRA*, 179 F.3d 946, 948 (D.C. Cir. 1999) ("Section 7106(b) requires an agency to negotiate about the procedures it uses in exercising its management rights, . . . as well as the 'appropriate arrangements for employees adversely affected' by the exercise of management rights . . . .").

[99] *See, e.g.*, *Ass'n of Civilian Technicians, Mont. Air Chapter No. 29 v. FLRA*, 22 F.3d 1150, 1155 (D.C. Cir. 1994) (*Mont. Air Chapter*); *U.S. DOJ, U.S. INS v. FLRA*, 727 F.2d 481, 487 (5th Cir. 1984) (*INS*); *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 56 FLRA 393, 395 (2000) (*IRS, Wash., D.C.*), *recons. denied*, 56 FLRA 935 (2000) ("[W]hen an agency does elect to bargain and a provision that concerns a matter covered under [§] 7106(b)(1) is included in an agreement, the provision is enforceable through grievance arbitration.").

[100] *W.R. Grace & Co. v. Loc. Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757, 771 (1983) ("parties to a [CBA] must have reasonable assurance that their contract will be honored"); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 509 (1962) ("an effort [to promote collective bargaining] would be purposeless unless both parties to a [CBA] could have reasonable assurance that the contract they had negotiated would be honored"); *NTEU v. Chertoff*, 452 F.3d 839, 860 (D.C. Cir. 2006) ("no statutorily mandated *collective bargaining* system that we are aware of dispenses with the premise that negotiated agreements bind both parties – no matter what the scope of bargaining was *ex ante*"); *see FSA*, 71 FLRA at 1169 (stating that, although certain matters affect management rights, "that does not allow an [a]gency to get out of a lawful provision that it agreed to pursuant to § 7106(b)(2)").

[101] *See, e.g.*, *Mont. Air Chapter*, 22 F.3d at 1155 ("[Section] 7106(b) *is* indisputably an exception to § 7106(a)."); *id.* ("Once an agreement pertaining to a permissible subject of negotiation is reached by local agency negotiators and a union, this election to negotiate is binding upon the agency."); *INS*, 727 F.2d at 487; *U.S. Dep't of Transp., FAA, Alaskan Region*, 62 FLRA 90, 92 (2007) (finding that once an agency agrees to a § 7106(b)(1) provision, the provision becomes "fully enforceable . . . notwithstanding its possible effect on management's right[s]" under § 7106(a)); *U.S. Dep't of Transp., FAA*, 60 FLRA 159, 163-64 (2004); *IRS, Wash., D.C.*, 56 FLRA at 395; *U.S. Dep't of Com., Pat. & Trademark Off.*, 54 FLRA 360, 374 (1998) (Member Wasserman concurring in part and dissenting in part on other grounds).

[102] *Cf. Treasury OCC*, 960 F.2d at 1073 ("Arrangements for adversely affected employees will inevitably come at some cost to the exercise of management prerogatives."). The Supreme Court's decision in *IRS* – cited in *DOJ* – is not to the contrary. *DOJ*, 70 FLRA at 401-02. *IRS* involved the "applicable-law" limitation of § 7106; it did not involve § 7106(b) or address how that section operates in the context of reviewing arbitration exceptions. *See IRS*, 494 U.S. at 926-27, 927 n.3. In this regard, the Court specifically observed in a footnote:

> A qualification to § 7106 permits contract negotiations regarding 'procedures which management officials of the agency will observe in exercising' the reserved management rights. 5 U.S.C. § 7106(b)(2). *Although they call our attention to this qualification, [the union] and the FLRA rightly refrain from asserting that it governs this case*.

IRS, 494 U.S. at 927 n.3 (emphasis added).

provision is being negotiated,"[103] including whether they are being negotiated under § 7106(b). Relatedly, when the Authority reviews an arbitration award, what matters is not necessarily what the parties said about the provision at the bargaining table, but *how the arbitrator has interpreted and applied* the CBA in the arbitration award.[104] That focus is consistent with the notion that, in resolving arbitration exceptions, the Authority assesses whether "the *award*" – not the CBA itself – is deficient.[105] It also is consistent with the notion that, in resolving exceptions, the Authority defers to the arbitrator's CBA interpretation unless the award fails to draw its "essence" from the CBA.[106]

Therefore, in assessing whether the arbitrator is enforcing a lawful negotiated limitation on management rights – in other words, a provision that is enforceable under § 7106(b) of the Statute – the Authority will assess whether the CBA provision, *as interpreted and applied by the arbitrator*, is enforceable under § 7106(b).

We emphasize that this analysis will not assess whether the arbitrator *misinterpreted* the CBA. Rather, consistent with its current practice, the Authority will continue to apply the arbitrator's interpretation of the CBA unless the excepting party demonstrates that the award fails to draw its essence from the agreement.[107]

The question then becomes *who* – the arbitrator, the excepting party, or the opposing party – has the burden of demonstrating that the CBA provision (as interpreted and applied) is enforceable under § 7106(b). As discussed above, before *DOJ*, the Authority placed a heavy burden on the excepting party – typically the agency – to demonstrate that the CBA provision at issue did *not* fall within *any* of § 7106(b)'s subsections.[108] Conversely, in most cases, *DOJ* required the party making a § 7106(b) assertion to bear the burden of proving that assertion.[109]

Having evaluated the Authority's varied approaches, we believe that placing such a heavy burden on excepting parties is unwarranted. When the parties properly raise management-rights arguments – including arguments regarding § 7106(b) – at arbitration, the arbitrator should address those arguments in the first instance. If the arbitrator has found that the CBA provision at issue is enforceable under § 7106(b), and that finding is challenged on exceptions, then the Authority should assess whether the arbitrator was correct.

However, if an arbitrator fails to address a properly raised § 7106(b) argument, then we believe that the opposing party – typically the union – should have the burden to demonstrate that the CBA provision at issue, as interpreted and applied, is enforceable under § 7106(b). Placing that burden on the opposing party is consistent with the burden shifting that the Authority applies in the negotiability context.[110] It also is consistent with the canon of statutory interpretation that "those who claim the benefit of an exception have the burden of proving that they come within the limited class for whose benefit the exception was established."[111] Further, we believe it is fairer, as it only requires the opposing party to demonstrate that *one* of the subsections of § 7106(b) applies – as opposed to requiring the excepting party to demonstrate that *none of the three* subsections of § 7106(b) applies. In this regard, § 7106(b)(1) alone covers more than one type of matter that the excepting party would otherwise need to address,[112] let alone § 7106(b)(2) and § 7106(b)(3).

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[103] 70 FLRA at 405.

[104] *U.S. Dep't of the Treasury, IRS*, 70 FLRA 792, 794 n.37 (2018) (Member DuBester dissenting) (stating that the Authority's "role in arbitration cases involving interference with management rights is to determine whether the arbitrator's *interpretation* of a negotiated provision" interferes with management rights); *id.* ("Negotiation of a provision (and determination of its negotiability) occurs just once, but, during the course of an agreement's lifetime, one or many arbitrators may interpret the meaning of that provision.").

[105] 5 U.S.C. § 7122(a) (emphasis added).

[106] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Dublin, Cal.*, 71 FLRA 1172, 1176 n.46 (2020) (*BOP Dublin*) (Member DuBester dissenting in part). As in other types of arbitration cases, awards must still withstand challenges raised in exceptions that the award does not satisfy the standards Congress established in the Statute for the Authority's review of arbitrators' awards. *See* 5 U.S.C. § 7122(a); 5 C.F.R. § 2425.6(a)-(c). Therefore, parties may continue to challenge awards affecting management rights on other recognized grounds, including, for example, essence, nonfact, or exceeded authority.

[107] *E.g.*, *BOP Dublin*, 71 FLRA at 1176 n.46.

[108] *See, e.g.*, *SSA New Orleans*, 67 FLRA at 602.

[109] *See* 70 FLRA at 404.

[110] 5 C.F.R. § 2424.25(c)(1) (providing that, in negotiability cases, the *union* "must state the arguments and authorities supporting any assertion that . . . an exception to management rights applies").

[111] 2A Norman Singer, Shambie Singer, Sutherland Statutes and Statutory Construction § 47:11 (7th ed. 2009 & Supp. Nov. 2022); *see also NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 711 (2001) ("'[T]he general rule of statutory construction [is] that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits.'" (quoting *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948))); *Schlemmer v. Buffalo, Rochester, & Pittsburg Ry. Co.*, 205 U.S. 1, 10 (1907) ("[I]f the defendant wished to rely upon this proviso, the burden was upon it to bring itself within the exception. . . . 'The general rule of law is, that a proviso carves special exceptions only out of the body of the act; and those who set up any such exception must establish it,' etc. . . . The rule applied to construction is applied equally to the burden of proof in a case like this." (quoting *Ryan v. Carter*, 93 U.S. 78, 83 (1876))).

[112] *See* 5 U.S.C. § 7106(b)(1) (involving "the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty," as well as "the technology, methods, and means of performing work").

In conducting the § 7106(b) assessment, arbitrators and parties should rely on Authority precedent and standards concerning the three subsections of § 7106(b).[113] With specific regard to § 7106(b)(3) – "appropriate arrangements" – parties should apply the test established in *KANG* (with one caveat discussed below). In *AFGE, Local 1164* – which the Authority issued after the D.C. Circuit's opinion in *IRS OCC* – the Authority rejected a union's request to apply an "abrogation" test in negotiability cases involving bargaining proposals.[114] In doing so, the Authority stated that *KANG*'s excessive-interference test "has been consistently applied by the Authority for nearly thirty years and has been upheld by courts."[115]

We continue to believe that excessive interference is the correct standard for assessing, in negotiability cases involving bargaining proposals, whether a proposal is an "appropriate" arrangement within the meaning of § 7106(b)(3). Further, we will follow the D.C. Circuit's admonition in *IRS OCC* that we may not apply different tests for "appropriateness" in different contexts.[116] Thus, in arbitration cases where § 7106(b)(3) is at issue, we will apply *KANG*'s well-established, and judicially approved, excessive-interference standard.[117]

There is one caveat to how we will apply *KANG* in the arbitration context. Under *KANG*, in determining whether a provision is an "arrangement" under § 7106(b)(3), the Authority has held the provision must be sufficiently "tailored" to compensate or benefit employees suffering adverse effects attributable to the exercise of management's rights.[118] In the arbitration context, however, the Authority previously has stated: "[B]ecause 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."[119]

We believe this reasoning is sound. As such, in applying *KANG* in the arbitration context, we will not separately conduct a tailoring analysis; we will presume that the tailoring requirement is met. However, that presumption is rebuttable: If a party argues that the tailoring requirement is *not* met for some reason, then we will consider that argument in conducting our § 7106(b)(3) analysis.

In sum, the second question under our revised management-rights test is: Did the arbitrator correctly find, or does the opposing party demonstrate, that the CBA provision – as interpreted and applied by the arbitrator – is enforceable under § 7106(b)?

If the answer to that question is no, then the Authority's action will depend on what has been found to impermissibly affect management rights. If the excepting party successfully challenges the underlying finding of a CBA violation, then the Authority will set aside *both* the finding of a violation *and* the remedy for the violation. By contrast, if the excepting party successfully challenges *only* the remedy, then the Authority will set aside only the remedy, not the underlying finding of a CBA violation. If the legally deficient remedy is the sole remedy for the CBA violation, then the Authority will, absent unusual circumstances, remand the matter to the parties for resubmission to arbitration, absent settlement, for an alternative remedy.[120]

However, if the answer to the above question is yes, then the Authority will move on to the inquiries in the next section.

3. Questions 3 and 4: Reasonably correlated remedy

As discussed above, an arbitrator's chosen remedy – separate and distinct from the arbitrator's CBA interpretation and application – can affect a management right.[121]

As discussed repeatedly above, § 7106(a) is subject to § 7106(b). Technically, by its plain terms, § 7106(b) addresses what may be negotiated – not what arbitral remedies may be awarded.[122] However, we

[113] *See, e.g.*, *AFGE, Loc. 1748, Nat'l Council of Field Lab. Locs.*, 73 FLRA 233, 235-36 (2022) (explaining how the Authority determines whether contract wording concerns the numbers, types, or grades of employees or positions within the meaning of § 7106(b)(1)); *NTEU*, 70 FLRA 100, 104 & nn.80-82 (2016) (determining whether contract wording was a procedure through comparison to previous cases where the Authority analyzed § 7106(b)(2)).

[114] 67 FLRA 316, 317-18 (2014) (*Loc. 1164*) (Member Pizzella concurring).

[115] *Id.* at 318.

[116] 739 F.3d at 20-21.

[117] *See Loc. 1164*, 67 FLRA at 318.

[118] *See KANG*, 21 FLRA at 31; *see also Loc. 1998*, 69 FLRA at 629.

[119] *SSA Indianapolis*, 66 FLRA at 65.

[120] *See, e.g.*, *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, San Juan, P.R.*, 66 FLRA 81, 88-89 (2011). "Unusual circumstances" may include, for example, situations where a union argues that there is only one appropriate remedy for a violation, and that is the remedy that is set aside on management-rights grounds. We note that an arbitrator's alternative remedy on remand will itself be subject to exception on the basis that it conflicts with a management right in § 7106.

[121] *See, e.g.*, *BOP Beaumont*, 62 FLRA at 102 (finding that "the remedy portion of the award" affected management's rights).

[122] *See* 5 U.S.C. § 7106(b) (nothing in § 7106 "shall preclude any agency and any labor organization from *negotiating*" certain types of matters (emphasis added)).

believe that, if an arbitrator's remedy reasonably correlates to the enforced § 7106(b) provision – as interpreted and applied by the arbitrator – then the remedy cannot be found deficient on management-rights grounds. By contrast, if the remedy does not have such a reasonable correlation, we will find it is not adequately tied to an enforceable limitation on management's rights, and we will set it aside.

For example, imagine a situation where an arbitrator finds that the agency violated a just-cause CBA provision by disciplining an employee. If the arbitrator remedies that violation by mitigating or setting aside the discipline, then the remedy would reasonably correlate to the enforced provision, as interpreted and applied by the arbitrator. If, however, the arbitrator's remedy directs the agency to *promote* the employee, then that remedy would not reasonably correlate to the enforced provision, as interpreted and applied.

Therefore, the next questions the Authority will ask under our revised management-rights test are, respectively:

- Does the excepting party challenge the remedy separate and apart from the underlying CBA violation? If no, then the Authority will deny the exception. If yes, then the Authority will ask:

- Does the excepting party demonstrate that the remedy fails to reasonably correlate to the enforced provision, as interpreted and applied by the arbitrator? If no, then the Authority will deny the exception. If yes, then the Authority will set aside the remedy. If it is the sole remedy for the CBA violation, then the Authority will, absent unusual circumstances, remand for an alternative remedy.

4. Summary: Revised Test

Taking all of the above together, our revised test for assessing management-rights exceptions to arbitration awards in CBA-violation cases is as follows:[123]

> 1. Does the excepting party demonstrate that the arbitrator's interpretation and application of the CBA and/or the awarded remedy affects the cited management right(s)? If no, then deny the exception.
>
> If yes:
>
> 2. Did the arbitrator correctly find, or does the opposing party demonstrate, that the CBA provision – as interpreted and applied by the arbitrator – is enforceable under § 7106(b)?
>
> If no, then:
>
> (a) If the excepting party successfully challenges the underlying finding of a CBA violation, then the Authority will set aside *both* the finding of a violation *and* the remedy for the violation;
>
> (b) If the excepting party successfully challenges *only* the remedy, then the Authority will set aside only the remedy. If it is the sole remedy, then, absent unusual circumstances, the Authority will remand the matter to the parties for resubmission to arbitration, absent settlement, for an alternative remedy.
>
> If the answer to question 2 is yes:
>
> 3. Does the excepting party challenge the remedy separate and apart from the underlying CBA violation? If no, then deny the exception.
>
> If yes:
>
> 4. Does the excepting party demonstrate that the remedy fails to reasonably correlate to the enforced provision, as interpreted and applied by the arbitrator? If no, then deny the exception. If yes, then set aside the remedy and, if it is the sole remedy for the CBA violation, then, absent unusual circumstances, remand for an alternative remedy.

[123] The Authority will not necessarily apply all of the steps of this test in every case. For example, if it is clear that the CBA provision is enforceable under § 7106(b), then the Authority may assume, without deciding, that the interpretation and application of the CBA and/or the awarded remedy "affects" a management right.

5. Application and Additional Briefing

Next, we must consider whether to apply the revised test in this case. "Consistent with principles of administrative law, the Authority has held that 'in general, agencies must apply the law in effect at the time a decision is made, even when that law has changed during the course of a proceeding . . . unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."[124] Here, there is no statutory direction or legislative history that warrants declining to apply our revised test. We also do not believe that applying the revised test would work a manifest injustice to the parties.

However, we believe it would be appropriate to give the parties an opportunity to submit additional briefing. Specifically, the parties may file briefs addressing how the revised test applies in this case and whether there is any need to remand the case for further development of the record. The parties are directed to file any additional briefs no later than **October 26, 2023**. The parties should submit briefs to:

Erica Balkum
Chief, Office of Case Intake and Publication
Federal Labor Relations Authority
Docket Room, Suite 200
1400 K Street NW.
Washington, D.C. 20424-0001

IV. Decision

We reserve judgment on the Agency's public-policy and contrary-to-law exceptions regarding management rights and, as outlined above, we give the parties the opportunity to submit additional briefs regarding our revised management-rights test. We deny the Agency's remaining exceptions.

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[124] *U.S. EPA*, 72 FLRA 114, 115 n.18 (2021) (Chairman DuBester concurring; Member Kiko concurring; Member Abbott concurring) (citing *U.S. Dep't of the Navy, Mare Island Naval Shipyard, Vallejo, Cal.*, 49 FLRA 802, 811 (1994) (quoting *Aaacon Auto Transp., Inc. v. Interstate Com. Comm'n*, 792 F.2d 1156, 1161 (D.C. Cir. 1986))); *see also U.S. Dep't of Com., Nat'l Oceanic & Atmospheric Admin., Off. of Marine & Aviation Operations, Marine Operations Ctr., Norfolk, Va.*, 57 FLRA 559, 563 (2001) (citing *U.S. Dep't of the Army, U.S. Army Rsrv. Pers. Ctr., St. Louis, Mo.*, 49 FLRA 902, 903 (1994); *Pan. Canal Comm'n*, 39 FLRA 274, 277 (1991)).