68 FLRA No. 9

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL DETENTION CENTER
MIAMI, FLORIDA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS 33
LOCAL 501
(Union)

0-AR-4880

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DECISION

October 30, 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

Arbitrator Martin A. Soll found that the Agency violated the parties' collective-bargaining agreement when it unilaterally changed a past practice of granting employees' requests for temporary-duty assignments. This case presents the Authority with three substantive questions.

The first question is whether the award is contrary to the Authority's "covered-by"[1] and "*IRS*"[2] doctrines. As those doctrines apply only when an arbitrator resolves certain statutory issues – and the Arbitrator resolved only a contractual issue – we find that those doctrines do not apply.

The second question is whether the award fails to draw its essence from the parties' agreement. Because the Agency does not demonstrate that the Arbitrator's interpretation of the agreement is irrational, unfounded, implausible, or in manifest disregard of the agreement, the answer is no.

The third question is whether the award is based on nonfacts. Because one of the Agency's nonfact arguments challenges the Arbitrator's interpretation of the parties' agreement, and the other challenges a factual finding that was disputed at arbitration, the answer is no.

II. Background and Arbitrator's Award

The Agency is a prison complex. The parties' agreement states that employees may submit requests to the Agency for temporary-duty assignments because of non-work-related medical conditions (light-duty requests). Beginning around April 2010, the Agency denied certain employees' (the grievants') light-duty requests.

The Union filed a grievance claiming that the Agency violated a past practice and several provisions of the parties' agreement by suspending an alleged practice of accommodating all employees with non-work-related medical conditions without first giving the Union notice and an opportunity to bargain. When the grievance was not resolved, it was submitted to arbitration. Absent a stipulated issue, as relevant here, the Arbitrator framed the issue as follows: "[w]hether [the Agency's] light-duty denials violated a binding past practice and/or the [agreement's] Article 3, . . . Article 4, . . . and/or Article 18."[3]

As indicated, the case before the Arbitrator did not deal with the merits of the light-duty requests. Rather, the Arbitrator considered whether the Agency had a binding past practice of approving or disapproving *any* such requests. In doing so, he considered evidence of the Agency's approval or disapproval of light-duty requests during the fourteen years preceding the events giving rise to this dispute. He found that the Agency violated a binding past practice by denying the grievants' light-duty requests without giving the Union notice and an opportunity to bargain. In making this determination, the Arbitrator found that although the parties' agreement did not explicitly address approval and disapproval of light-duty requests, the parties had a "well[-]known and long[-]standing/fourteen-year practice at [the Agency] of allowing *all* bargaining[-]unit light[-]duty requests . . . without interruption from 1996 to . . . April 2010."[4] He also found that "no employee light[-]duty request . . . was denied or disapproved [from] 1996 to 2007" and it was undisputed that from 2007 to 2010, "[t]here was never an employee that was denied [a light-duty] accommodation."[5] This gave rise, in the Arbitrator's opinion, to a "binding past practice [and] unwritten

[1] Exceptions at 4, 17.
[2] *Id.* at 15 n.7 (emphasis added).
[3] Award at 7.
[4] *Id.* at 39 (emphasis added).
[5] *Id.* at 39-40 n.10 (internal quotation marks omitted).

contractual right [of the bargaining unit]" to the approval of such requests.[6]

Separately, the Arbitrator resolved the Union's "alternative charge that [the Agency's] light[-]duty denials also violated Articles 4 [and] 3,"[7] and found a violation of those contract provisions. The Arbitrator found that "Article 4c's language incorporates Article 3-e [and] d's language, and when read together, they collectively . . . require . . . that proposed Agency changes to 'local working conditions' will not be implemented prior to [the] Agency's notification and negotiation of such working condition[s] with the [Union]."[8] The relevant wording of these contract provisions is set forth in section IV.A. below. He further found that the Agency's "disallowance of light duty following approximately fourteen years of uninterrupted light[-]duty approvals . . . constitutes . . . and . . . qualifies as a substantial change . . . in . . . working conditions"[9] and that the Agency's "unilateral disallowance of light duty . . . in turn, violated the . . . notice and negotiation terms, conditions[,] and language of Articles 4 [and] 3" of the parties' agreement.[10]

Finally, the Arbitrator rejected the Agency's argument that it had no obligation to bargain because the subject matter of the change is "covered by" Article 18, Section L of the parties' agreement.[11] The Arbitrator quoted the "applicable" part of Article 18, Section L: "[E]mployees suffering from health conditions or recuperating from illnesses or injuries, and temporarily unable to perform assigned duties, may voluntarily submit written *requests* to their supervisors for temporary assignment to other duties."[12] The Arbitrator rejected the Agency's reliance on Article 18, Section L, finding that although it permits employees to "voluntar[ily] submit[]" light-duty requests, it "contains no light[-]duty approval or disapproval language"[13] and "is silent regarding light[-]duty approvals or disapprovals."[14] Accordingly, the Arbitrator sustained the grievance and awarded backpay to the grievants.

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

[6] *Id.* at 40.
[7] *Id.* at 42.
[8] *Id.*
[9] *Id.* at 44.
[10] *Id.* at 45.
[11] *Id.* at 44-45.
[12] *Id.* at 40.
[13] *Id.*
[14] *Id.* at 41.

III. Preliminary Matters: Sections 2425.4(c) and 2429.5 of the Authority's Regulations do not bar the Agency's claim that the award is contrary to the "covered-by" doctrine.

The Agency argues that the Federal Service Labor-Management Relations Statute (the Statute) does not require the Agency to bargain because the subject matter of the change is "covered by" Article 18, Section L of the parties' agreement.[15] Similarly, the Agency also argues that even if a past practice addressing the subject matter of the change existed, the change is "covered-by" Article 18, Section L.[16] The Union claims that the Authority should not consider those arguments because they were not raised before the Arbitrator.[17]

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the Arbitrator.[18] Contrary to the Union's claim, the record shows that, at arbitration, the Agency argued that the subject of light-duty denials is "covered by" Article 18 of the parties' agreement,[19] and that the "covered-by" doctrine barred a past-practice claim.[20] As the Agency raised these matters before the Arbitrator, we find that §§ 2425.4(c) and 2429.5 of the Agency's Regulations do not bar the Agency's exceptions regarding the "covered-by" doctrine and past practice. Therefore, we resolve these exceptions below.

IV. Analysis and Conclusions

A. The award is not contrary to law.

The Agency argues that the award is contrary to law in two respects. 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.[21] 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.[22] In

[15] Exceptions at 4.
[16] *Id.* at 17.
[17] Opp'n at 3, 7 (citing 5 C.F.R. § 2429.5).
[18] 5 C.F.R. §§ 2425.4(c), 2429.5; *see, e.g., Broad. Bd. of Governors*, 66 FLRA 380, 384 (2011).
[19] Award at 37 (Agency argued "light duty is 'covered by' Article 18").
[20] *Id.* at 33 (the Agency "is not subject to a claim of past practice because th[e] matter is explicitly addressed in the [parties' agreement]").
[21] *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)).
[22] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).

making that assessment, the Authority defers to the arbitrator's underlying factual findings.[23]

The Agency's first contrary-to-law argument is that the award is contrary to the "covered[-]by" doctrine.[24] 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.[25] In support of its argument, the Agency contends that the Arbitrator based his decision on Articles 3 and 4 of the parties' agreement – which, according to the Agency, restate the Statute's bargaining obligations, rather than impose a separate, contractual obligation to bargain.[26] The Agency asserts that the Authority made this finding in *U.S. DOJ, Federal BOP, Washington, D.C.* (*BOP I*).[27]

It is well-established that the "covered-by" doctrine applies *only* as a defense to an alleged failure to satisfy a *statutory* bargaining obligation.[28] 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."[29] So, to decide whether the "covered-by" doctrine applies, we must first determine whether the Arbitrator resolved the grievance based on a finding of a violation of a statutory or a contractual bargaining obligation.

The Arbitrator made some references to statutory matters. Specifically, after finding that the term "working conditions" is "nowhere defined in" the parties' agreement, he noted that the statutory definition of "conditions of employment" refers to "working conditions."[30] He then stated that because "the parties are subject to both the Statute and . . . Authority case law precedent, in order to resolve whether" the Agency changed "working conditions," he would "take[] notice of and . . . apply the meaning, intent[,] and application of" that term that the Authority set out in a particular decision.[31] And he found that the light-duty denials "qualif[y] as a substantial change (i.e., much greater than a de minimis change) in their working conditions/conditions of employment."[32]

Despite these references, however, the record supports a finding that the Arbitrator resolved the grievance based on a finding of a violation of a contractual bargaining obligation. In this regard, the grievance alleged only that the Agency violated a past practice and several provisions of the parties' agreement.[33] Moreover, the Arbitrator framed the issue as, in relevant part: "[w]hether . . . [the Agency's] light[-]duty denials violated . . . the [parties'agreement]."[34] And, relying on Article 3, Sections (d) and (e), and Article 4, Section (c) of the parties' agreement, the Arbitrator expressly concluded that the Agency's "unilateral disallowance of light duty . . . violated the . . . notice and negotiation terms, conditions[,] and language of Articles 4 [and] 3" of the parties' agreement.[35]

According to the Agency, the Authority has found that Articles 3 and 4 do not impose a contractual bargaining obligation, separate from the Statute's bargaining obligations.[36] The Agency is incorrect. The Authority did indeed state in *U.S. DOJ, Federal BOP, Federal Correctional Complex, Lompoc, California* (*BOP Lompoc*)[37] that Article 3, Section (c), which provides that the parties "will meet and negotiate . . . where required by 5 [U.S.C. §§] 7106, 7114, and 7117,"[38] mirrors the Statute's bargaining provisions.[39] But the Arbitrator in this case did not rely on Article 3, Section (c), but on other sections of Article 3.

Similarly, the Authority stated in *BOP I* that Article 3, Section (c) and Article 4 "specifically reference[] the parties' statutory duties."[40] But the Authority made clear in *BOP I* that this statement addressed only Article 3, Section (c)[41] and Article 4, Section (a), not the remainder of Article 4.[42] Regarding

[23] *Id*.
[24] Exceptions at 4.
[25] *Id.* at 4-5.
[26] *Id*. at 5.
[27] 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)).
[28] *See U.S. BOP, Fed. Corr. Complex, Terre Haute, Ind.*, 67 FLRA 697, 699 (2014) (*BOP, Terre Haute)*; *Broad. Bd. of Governors, Office of Cuba Broad.*, 66 FLRA 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).
[29] *BOP, Terre Haute*, 67 FLRA at 699 (citing *Broad. Bd. of Governors, Office of Cuba Broad.*, 64 FLRA 888, 891 (2010) (in turn citing *SSA, Balt., Md.*, 55 FLRA 1063, 1068 (1999))).
[30] Award at 43 (citing 5 U.S.C. § 7103(a)(14)).
[31] *Id.* (citing *U.S. Dep't of the Air Force, 355th MSG/CC, Davis-Monthan Air Force Base, Ariz.*, 64 FLRA 85, 89-90 (2009)).
[32] *Id.* at 44.
[33] *Id.* at 2.
[34] *Id.* at 7.
[35] *Id.* at 45.
[36] Exceptions at 5-6 (citing to *BOP I*, 64 FLRA at 561).
[37] 66 FLRA 978, 980 (2012).
[38] Award at 3.
[39] *BOP, Lompoc*, 66 FLRA at 980.
[40] *BOP I*, 64 FLRA at 561.
[41] *Id.*
[42] *Id.* at 561 n.5.

Article 4, the Authority expressly referenced and quoted from Article 4, Section (a).[43] Similar to Article 3, Section (c), 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."[44] But as with Article 3, Section (c), the Arbitrator in this case did not rely on Article 4, Section (a), but on a different section of Article 4.

In contrast to the contract provisions discussed above, the provisions that the Arbitrator relied on in this case – Article 3, Sections (d) and (e), and Article 4, Section (c) – recognize a contractual obligation to bargain and do not mention the Statute. Specifically, Article 3, Section (d), Paragraph 5 states that "when locally proposed policy issuances are made, the local Union [p]resident will be notified . . . and the manner in which local negotiations are conducted will parallel this article."[45] The Authority in *BOP I* found that Article 3, Section (d) establishes an independent contractual bargaining obligation and makes no reference to any statutory bargaining obligation.[46] Article 3, Section (e) states that "[n]egotiations . . . will take place within thirty (30) calendar days of the date that negotiations are invoked."[47] And 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 "[s]uch changes will be negotiated in accordance with the provisions of [the parties' a]greement."[48] As Article 3, Sections (d) and (e), and Article 4, Section (c) 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 resolved the grievance based on a finding of a violation of a contractual – not a statutory – obligation to bargain.

Overlooking the import of Article 3, Sections (d) and (e) and Article 4, Section (c), the dissent argues, erroneously, that this case is controlled by the D.C. Circuit's decision in *Federal BOP v. FLRA* (*BOP II*).[49] *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.[50] 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.[51] Under the "covered-by" doctrine, questions about a party's compliance with agreed-upon contract provisions are "properly resolved through the contractual grievance procedure."[52] 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.

Additionally, the dissent's reliance on *BOP II*'s reference to Article 3, Section (d) to argue that Article 3, Section (d) does not create a contractual bargaining obligation is misplaced. *BOP II* did not resolve that issue, stating that "we need not decide that matter here."[53] *BOP II* ruled only that Article 3, Section (d) did not "provide[] a 'separate and independent' basis for the arbitral award" involved in that case "because the arbitral award makes no distinction between purportedly 'separate' statutory and contractual grounds for the award."[54]

As the Arbitrator resolved the grievance based on a finding of a violation of a contractual, not a statutory bargaining obligation, the "covered-by" doctrine does not apply in this case.[55] Accordingly, we reject the Agency's reliance on that doctrine to set aside the Arbitrator's determination to grant the grievance. We note that the Agency also argues that all remedies, including backpay and restored leave, must be set aside because the Agency's actions were "covered by" the parties' agreement.[56] As the "covered-by" doctrine does not apply, we reject this argument as well.

The Agency's second contrary-to-law argument is that the award is contrary to the "*IRS* doctrine."[57] The "*IRS* doctrine" applies where a party asserts that a provision of the parties' agreement permits an action alleged to be an unfair labor practice (ULP).[58] It applies only to alleged statutory refusals to bargain and other types of ULPs.[59] Because we have found that this case involves only a contractual refusal to bargain – not a

[43] *Id.* (expressly referencing and quoting from Article 4, Section (a)).
[44] Award at 4 (emphasis added).
[45] *Id.*
[46] *BOP I*, 64 FLRA at 561.
[47] Award at 4.
[48] *Id.* at 4-5.
[49] 654 F.3d 91.
[50] *Id.* at 95.
[51] *Id.*
[52] *Dep't of the Navy v. FLRA*, 962 F.2d 48, 61 (D.C. Cir. 1992) (quoting *United Mine Workers of Am., Dist. 31 v. NLRB*, 879 F.2d 939, 944 (D.C. Cir. 1989)).
[53] *BOP II*, 654 F.3d at 97.
[54] *Id.*
[55] *See, e.g., SSA Balt.*, 66 FLRA at 573 n.6.
[56] Exceptions at 15 n.6.
[57] *Id.* at 15 n.7.
[58] *SSA, Reg. VII, Kan. City, Mo.*, 55 FLRA 536, 538 (1999) (*Reg. VII*); *IRS, Wash., D.C.*, 47 FLRA 1091 (1993).
[59] *See Reg. VII*, 55 FLRA at 538.

statutory refusal to bargain or other type of ULP – the "*IRS* doctrine" does not apply. Therefore, the award is not contrary to law on this basis.

Accordingly, we reject the Agency's contrary-to-law exceptions.

B. The award does not fail to draw its essence from the parties' agreement.

The Agency also argues that the award fails to draw its essence from the parties' agreement because the Arbitrator's reliance on Article 3(d) of the parties' agreement is "misplaced."[60] According to the Agency, Article 3(d) applies only to the Agency's obligation to negotiate the impact and implementation of "national policy issuances made by the Agency."[61] The Agency contends that the Arbitrator should not have relied on Article 3(d) to support his finding of a contractual bargaining obligation because this case does not involve a national policy issuance, but an alleged, local past practice concerning light-duty requests.[62]

In reviewing an arbitrator's interpretation of a collective-bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector.[63] Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective-bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective-bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement.[64]

The Agency's argument provides no basis for finding that the award fails to draw its essence from the parties' agreement. Paragraph 5 of Article 3(d) states that "when *locally proposed* policy issuances are made, the local Union [p]resident will be notified as provided for above, and the manner in which local negotiations are conducted will parallel this article."[65] It was not irrational, unfounded, implausible, or in manifest disregard of the parties' agreement for the Arbitrator to interpret this provision to support a bargaining obligation over "locally proposed policy issuances."[66] Accordingly, we find that the award does not fail to draw its essence from the parties' agreement.

C. The award is not based on nonfacts.

The Agency argues that the award is based on a nonfact in two respects. To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[67] However, an arbitrator's conclusion that is based on an interpretation of the parties' agreement does not constitute a fact that can be challenged as a nonfact.[68] In addition, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration.[69]

First, the Agency asserts that the award is based on a nonfact because, to support his finding of a bargaining obligation, the Arbitrator relied on Article 3(d) of the parties' agreement.[70] As discussed above, the Agency claims that Article 3(d) applies only to the Agency's obligation to negotiate the impact and implementation of "national policy issuances."[71] The Agency is challenging the Arbitrator's interpretation of Article 3(d), which does not constitute a fact that can be challenged as a nonfact.[72] Therefore, we find that the award is not based on a nonfact in this regard.

Second, the Agency claims that the award is based on a nonfact because the Arbitrator failed to consider evidence indicating that the Agency had no past practice of granting all light-duty requests.[73] However, the issue of the existence of a past practice was disputed at arbitration.[74] As stated above, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration.[75] Therefore, we find that the award is not based on a nonfact in this regard.

Further, the dissent's claim, that "the disapprovals [of light-duty requests] made by [the current warden could] create a past practice in favor of disapproval,"[76] is wrong for a number of reasons. Not

[60] Exceptions at 6 n.2.
[61] *Id*.
[62] *Id*.
[63] *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998).
[64] *See U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).
[65] Award at 4 (emphasis added).
[66] *Id.* at 8-9, 42.
[67] *NFFE, Local 1984*, 56 FLRA 38, 41 (2000) (Local 1984).
[68] *NLRB*, 50 FLRA 88, 92 (1995) (*NLRB*).
[69] *NFFE, Local 1984*, 56 FLRA at 41.
[70] Exceptions at 6 n.2.
[71] *Id.*
[72] *NLRB*, 50 FLRA at 92.
[73] Exceptions at 17 n.8.
[74] Award at 37.
[75] *See, e.g., NAGE, SEIU, Local R4-45*, 64 FLRA 245, 246 (2009).
[76] Dissent at 13 (emphasis omitted).

only is it inconsistent with the Arbitrator's finding of a contrary past practice. The dissent's claim also reflects a fundamental misunderstanding of past-practice principles. Under those principles, if a party does not acquiesce in the actions of the other party, then that would preclude a finding of a past practice.[77] The Union filed the grievance that ultimately was decided by the Arbitrator in this case because the Union did not acquiesce in the current warden's disapprovals of light-duty requests.

Accordingly, we reject the Agency's nonfact exceptions

V. Order

We deny the Agency's exceptions.

[77] *See NTEU, Chapter 207*, 60 FLRA 731, 734 (2005).

Member Pizzella, dissenting:

Just thirty-five days ago, in *U.S. DOJ, Federal BOP, Federal Correctional Complex, Terre Haute, Indiana* (*BOP III*), I predicted that "I would not be surprised . . . [to] see [AFGE, Council of Prisons Locals C-33] (AFGE, Council 33) again trying out new arguments to demand new negotiations" over Article 18,[1] a provision which the U.S. Court of Appeals for the District of Columbia Circuit (the court) found to preclude all new demands to bargain.[2]

And, just as I predicted . . . I did not have to wait long.

AFGE, Council 33 and the Bureau of Prisons (Bureau) seem to be acting out a sequel to the movie Groundhog Day. As Phil (played in the movie by Bill Murray) asked in a perpetual state of confusion: "Didn't we do this yesterday?"

In this case, AFGE, Council 33 tries one more variation of the same argument that they have tried six times before.[3] In this sequel, Council 33 argues that Article 18, requires the Bureau to bargain before a warden may exercise their prerogatives under Article 18, Section L to consider, and then approve or deny, requests for light-duty. In this case, Warden Linda McGrew annoyed Council 33 when she did not approve two such requests.

The problem for Council 33 is that the Warden McGrew followed the letter of Article 18, Section L, which specifies "the procedures by which the Bureau 'assign[s] work' and 'implement[s] . . . [a] procedure[] related to the assignment of work and shifts,"[4] in the words of AFGE, Council 33's lead negotiator. I can understand that Council 33 may not like how these procedures, when exercised by management officials, sometimes turn out, but these are the procedures that Council 33 *agreed to* when they negotiated the national collective bargaining agreement. These are also procedures that the court has recognized as management prerogatives that are covered by Article 18.[5] The court

[1] 67 FLRA 697, 704 (2014) (Dissenting Opinion of Member Pizzella) (*BOP III*).
[2] *Fed. BOP v. FLRA*, 654 F.3d 91 (2011) (*BOP II*).
[3] *BOP III*, 67 FLRA at 701 n.1 (Dissenting Opinion of Member Pizzella); *see also AFGE, Council of Prisons 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).
[4] *BOP III*, 67 FLRA at 701.
[5] *BOP II*, 654 F.3d at 96.

has determined that Article 18, itself, precludes further bargaining.[6]

Specifically, Article 18, Section L sets forth a detailed process whereby officers may request a "light[-]duty assignment[]," [7] typically to accommodate injuries the officers have received either on- or off-duty. [8] Using the procedures outlined in that provision, two employees submitted requests for light duty in July 2010[9] and September 2010.[10]

Warden McGrew evaluated each request on a "case[-]by[-]case basis," just as she was supposed to under the terms of Article 18, Section L.[11] She evaluated all of the documentation that each officer provided to her and consulted with the Chief Medical Officer[12] and representatives from the human resources and legal departments. After evaluating all of this information, the warden denied both requests. The evidence provided to her did not demonstrate that the officers would be "[]able to respond to an emergency.[13] In particular, the warden was concerned that the medical condition of each officer posed "not only a risk for [himself] but for other employees,"[14] and that she would not be able to "ensure" the safety and security of the officers[15] because "an employee who can't run can be taken as a hostage at any time."[16]

At the time, Warden McGrew had only been on the job for eight months and these were the only two requests that she denied.[17] But, by the time of the arbitration, she had approved at least one other request and permitted other pre-existing light-duty assignments to continue.[18]

Despite the fact that the warden followed the procedures set forth in Article 18, Section L, AFGE, Council 33, grieved the warden's disapproval of those *two requests.*[19]

According to the Union, the warden's immediate predecessor created a past practice when he exercised his discretion differently during his tenure.[20] Arbitrator Martin Soll agreed because Warden McGrew's predecessor,[21] John Rathman, had approved ten requests for light duty over the course of three years.[22] Arbitrator Soll concluded that the Bureau violated, *not* Article 18, Section L, *but* Articles 3 and 4 – two generic provisions which, as discussed below, do not create a separate bargaining obligation.

Arbitrator Soll focused *exclusively* on the light-duty requests that the prior warden had approved[23] but failed to consider any of the light-duty assignments that Warden McGrew had approved or permitted to stand.[24] The Arbitrator also considered the testimony of Eric Young, a Union representative who served on a "roster committee" (and claims that he kept tabs on each and every light duty request made by any officer at any time in order to ensure that "no employee *was ever denied* light duty")[25] but failed to consider other grievances filed by the Union that demonstrate earlier requests for light duty also had been denied.[26]

Therefore, even applying the legal standard set forth by the Arbitrator in his award – that a past practice must be "long[standing]," "mutually agreed upon and/or . . . accepted by both parties," and "not at variance or in conflict with . . . explicit written terms . . . of the parties' [agreement]" – his conclusion is deficient.[27] Under Article 18, Section L. of the parties' agreement, Warden McGrew was responsible to determine whether the officers' conditions supported approval of light duty.[28] She determined that *these two requests* did not.[29]

In other words, the *approvals* made by Warden McGrew's predecessor could no more create a *past practice in favor of approval* than could the *disapprovals* made by Warden McGrew create a *past*

[6] *Id.*
[7] Award at 10.
[8] *Id*. at 29.
[9] *Id.* at 11.
[10] *Id*. at 14.
[11] *Id.* at 27.
[12] *Id.* at 29.
[13] *Id.* at 27.
[14] Exceptions, Attach. B, (Agency Closing Br.) at 10 (citing Tr. Day 4 at 247) (internal quotation marks omitted); *see also* Award at 29 ("Article 18 [Section L] says that [the warden] will review the employee's request, their request. I did review based on their medical restrictions. Now, that was my responsibility to review and to ensure that that person would be *able to work in an environment* which is *safe and secure for the employee and for other employees*. And I, at that time, upon looking at that individual case, determined that that person *was not able to work* [*safely*] within that environment.") (emphases added)).
[15] *Id.* at 29.
[16] *Id*. at 27.
[17] *Id.* at 28.
[18] Agency's Closing Br. at 22 (citing Tr. Day 4 at 121-22) and 23 (citing Tr. Day 4 at 178).
[19] *Id.* at 5, 7.
[20] Award at 26.
[21] *Id.* at 25.
[22] *Id.* at 26.
[23] *Id.* at 25.
[24] *Id.* at 30
[25] *Id.* at 32.
[26] *Id.* at 13 n. 6 and 17-18 n. 8.
[27] *Id.* at 38 (citing Elkouri & Elkouri, *How Arbitration Works* (Martin M. Volz & Edward P. Goggins eds., 6th ed. 2003) 606 (internal citations omitted)).
[28] *Id.* at 28.
[29] *Id.* at 29.

practice in favor of disapproval that would be binding on a future warden that will succeed her.

As I noted in sequel number 6 in this ongoing saga – *BOP III* – the lead negotiator for Council 33 acknowledged that Article 18 is a "complete rewrite" of the procedures by which the Bureau assigns work.[30] And, in a ruling that is apparently of no consequence to Arbitrator Soll, or my colleagues, the court determined that Article 18, "*covers and preempts* challenges to *all specific outcomes* of the assignment process."[31]

It is apparent to me that court was speaking to the "procedures" that are used by the warden *to evaluate* light-duty requests and has nothing to do with whether any individual request is approved or denied. The fact that Warden Rathman exercised his discretion "favorably to the officers" [32] by approving their light-duty requests is of no consequence here. The fact of the matter is that Arbitrator Soll may not simply "disregard[]" the broad scope of the parties' agreement.[33]

The process by which Warden McGrew considered the requests and exercised her discretion is a matter that is already "cover[ed]" by Article 18, [34] and the Bureau had no further obligation to ask Council 33 for their permission before she denied the requests.

But, as the majority has held every time AFGE Council 33 has argued that the Bureau has a new duty to bargain over the matters already covered by Article 18, my colleagues once again conclude that the "covered-by" doctrine does not apply because the Arbitrator based his award on "a *contractual* bargaining obligation."[35]

I disagree in several respects.

My colleagues assert that Articles 3, Sections (d) and (e) and Article 4, Section (c) create separate *contractual* bargaining obligations, that are not covered by Article 18, even though they previously determined, in *BOP I*, that Articles 3(c) and 4 do not impose a separate *contractual* bargaining obligation because those provisions simply "reference"[36] and "restate"[37] *statutory* obligations that are already imposed by 5 U.S.C. §§ 7106, 7114, and 7117.[38] But, now, in an attempt to rewrite *BOP I*, the majority explains that when they said "*Article 4* . . . specifically references the parties *statutory* duties,"[39] they really meant to say *only* "*Article 4, Section (a)*," even though in that case they distinguished the "*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 *only Article 3, Section d.* (but not Article 4 or Article 7, Section (b)) created a *contractual* obligation to bargain."[40]

The majority also asserts that Article 3, Section (d) creates a separate contractual obligation to bargain, even though the court already held that Article 3, Section (d) did not create such a duty in *BOP II*.[41] According to my colleagues, however, the court's determination – that Article 3, Section (d) did not create a "separate" bargaining obligation – only applied to "that case."[42] I do not agree. The court observed that "we doubt a contractual provision covering a management decision would not also cover a policy issuance to the same effect"[43] in rejecting the Authority's interpretation that "Article 3(d) require[d] the Bureau to negotiate over any 'national policy issuance' that affects the officers' conditions of employment."[44]

From my perspective, the court's guidance is clear and not simply a hint that may be selectively disregarded.

In this respect, I agree with the court that a *contractual* provision that simply repeats the Bureau's

[30] 67 FLRA 697, 701 (2014) (Dissenting Opinion of Member Pizzella) (citing *BOP II*, 654 F.3d at 96).
[31] *BOP II*, 654 F.3d at 96 (emphases added).
[32] *Id*. at 97.
[33] *Id.*
[34] *Id*.
[35] Majority at 5 (emphasis added).
[36] *BOP I*, 64 FLRA at 561 (Article 4 "contains *language* that *specifically references* the parties' *statutory* not contractual] duties.") & 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.").
[37] *BOP III*, 67 FLRA at 699 (Dissenting Opinion of Member Pizzella) (citing *Broad. Bd. of Governors, Office of Cuba Broad.*, 64 FLRA 888, 891 n.4 (2010) ("where a provision *restates* a provision of the Statute, the Authority 'must exercise care' to ensure that an arbitral *interpretation* of the contract provision is consistent with the Authority precedent interpreting the *statutory* provision.") (emphases added) (internal citation omitted)).
[38] 67 FLRA at 703 (Dissenting Opinion of Member Pizzella) (citing *BOP I*, 64 FLRA at 561 (Article 4 "contains *language* that *specifically references* the parties' *statutory* [not contractual] duties.") & 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.").
[39] *BOP I*, 64 FLRA at 561 (Article 4 "contain[s] *language* that *specifically references* the parties' *statutory* [not contractual] duties.").
[40] *See* 67 FLRA at 703 n.42 (Dissenting Opinion of Member Pizzella)
[41] *BOP II*, 654 F.3d at 97.
[42] Majority at 7 (citing *BOP II*, 654 F.3d at 97).
[43] *BOP II*, 654 F.3d at 97.
[44] *Id.*

statutory obligation to bargain does not create a *separate* bargaining obligation.

To the contrary, the court was quite clear[45] that Article 18 broadly addresses "how and when" the Bureau will "assign work"[46] and "*covers and preempts* challenges to *all specific outcomes* of the assignment process."[47] The process, by which an officer requests a light-duty assignment and the warden evaluates and makes a decision on that request is part of that assignment process. As such, the warden's decisions concerning light duty are covered by Article 18, and the Bureau has no further obligation to bargain regardless of how other wardens may have used their discretion in the past.

I believe that the majority – just as Phil (in Groundhog Day) when he answered his own question: "what day is today?" by observing that: "today is tomorrow; [i]t happened" – once again "embrace[s] an unreasonably narrow view of what [Article 18] 'covers[.]'"[48] I would conclude, consistent with the guidance that the court provided in *BOP II*, that the Arbitrator's award is contrary to law.

Therefore, I dissent.

The fact that we have had to address this question seven times, for the same parties over the same article, also suggests to me that "the Authority's use of the covered-by standard warrants a fresh look."[49]

Thank you.

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[45] 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).

[46] *BOP II*, 654 F.3d at 96.

[47] *Id*. (emphases added).

[48] *BOP III*, 67 FLRA at 704 (Dissenting opinion of Member Pizzella).

[49] *BOP III*, 67 FLRA at 702 (Dissenting Opinion of Member Pizzella) (citing *SSA Balt., Md.*, 66 FLRA 569, 575 (2012) (Dissenting Opinion of Member DuBester) (internal quotation marks omitted)).