100 FLRR 1-1111

DOJ, Federal Bureau of Prisons, Federal Correctional Institution, Marianna, FL and AFGE, Local 4036

Federal Labor Relations Authority

0-AR-3240; 56 FLRA No. 69; 56 FLRA 467

June 28, 2000

Judge / Administrative Officer

Before: Wasserman, Chair; Cabaniss, Member

Related Index Numbers

44.5216 Subjects of Bargaining, Management Rights, Title VII/Civil Service Reform Act of 1978, Section 7106(a), Assign Work - 7106(a)(2)(B)

47.62 Grievances/Grievance Arbitration, Arbitrator, Authority

47.8611 Grievances/Grievance Arbitration, Grievance Arbitration Award, Review, Grounds, Violation of Law

47.8614 Grievances/Grievance Arbitration, Grievance Arbitration Award, Review, Grounds, Does Not Draw Its Essence From Agreement

Case Summary

AN AWARD THAT FOUND THE AGENCY VIOLATED THE AGREEMENT BY ALLOWING CORRECTIONAL OFFICER POSTS TO BE VACATED WITHOUT GOOD CAUSE WAS NOT DEFICIENT BECAUSE, AMONG OTHER THINGS, IT DID NOT VIOLATE MANAGEMENT'S RIGHT TO ASSIGN EMPLOYEES.

The Arbitrator found that the agency violated the agreement by allowing correctional officer posts to be vacated without good cause. The arbitrator stated that "[f]ailure to fill all [correctional officer] posts required was a per se violation of Article 27 and the Facility's obligation thereunder to lower inherent hazards to the lowest possible level." [100 FLRR 2-1049].

On appeal, the Authority concluded that the agency failed to establish that the award was deficient. First, the Authority determined that the award was not contrary to law. The agency alleged that the award violated its right to assign employees under the statute. Also, the agency argued that the contract provision was not an arrangement under the statute because it would not ameliorate adverse effects flowing solely from the exercise of management rights. The Authority found that the arbitration award did not require the agency to hire additional employees or fill vacant positions. And, the award did not limit the agency's ability to determine the qualifications and skills necessary for these employees to perform the duties of their position. Also, the award did not prohibit the agency outright from vacating posts. The Authority noted that the award only precluded the agency from vacating correctional officer posts on a routine basis for administrative convenience, and did permit posts to be vacated for good cause. Accordingly, the award did not concern the exercise of management's right to assign employees under the statute. Next, the Authority concluded that the award did not fail to draw its essence from the agreement. The agency argued that the arbitrator failed to follow the plain meaning of the agreement that calls for lowering hazards to the lowest possible level only where it can be done without relinquishing its rights under the statute. The Authority noted that it already concluded the agency failed to show that the award conflicted with its rights under the statute. Therefore, the agency did not establish that the arbitrator's interpretation of the statute was irrational, implausible, or unconnected to the wording of the agreement. Finally, the Authority concluded that the arbitrator did not exceed his authority. Given the deference allowed an arbitrator in fashioning a remedy, the arbitrator did not exceed his authority by directing that correctional officers may grieve allegedly unreasonable shift or assignment changes.

Full Text

Decision

I. Statement of the Case

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

The Arbitrator found that the Agency violated the parties' master agreement by allowing correctional officer posts to be vacated without good cause. For the foregoing reasons, we conclude that the Agency has failed to establish that the award is deficient. Accordingly, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

The Union filed a grievance claiming that the Agency had allowed temporary vacancies to occur in normally filled correctional officer posts in violation of the parties' master agreement. The parties stipulated to the following issue:

Did the Agency violate the Master Agreement, Article 27, s.A [sic] when it vacated correctional services posts, and, if so, what shall the remedy be?

Award at 3.

The Arbitrator found that correctional officer positions were left unfilled at times. For instance, the Arbitrator determined that on May 28, 1999, the Agency had 7 positions which were listed on the roster that day as "vacate". *Id.* at 17. The Arbitrator also found a contractual obligation to lower the "inherent hazards of a correctional environment. . .to the lowest possible level[.]"*Id.* at 12, referring to Article 27.

In concluding that the Agency was in violation of Article 27, the Arbitrator stated that "[f]ailure to fill all [correctional officer] posts required is a per se violation of Article 27 and the Facility's obligation thereunder to lower inherent hazards to the lowest possible level."*Id.* at 15. He added "correction officer posts or positions are required for the safety and security of the institution and that they should only be vacated for good cause and not on a routine basis."*Id.* at 17. "[V]acating of posts. . .increases the inherent hazards in the institution."*Id.* To support this determination, the Arbitrator noted the dangers of working in a correctional facility including: the possibility of inmate escape, physical and emotional problems facing inmates and contraband such as weapons and drugs. Accordingly, the Arbitrator sustained the grievance by finding the Agency in violation of Article 27, section a. *Id.*

As a remedy, the Arbitrator ordered the Agency to "vacate posts only for good cause and not on a routine basis for administrative convenience."*Id.* He further added, "I also direct that if a correction officer believes that his assignment or shift has been changed unreasonably to deprive him of overtime, that he be allowed to grieve the change through the parties' grievance procedure."*Id.* at 18.

III. The Award is Not Contrary to Law

A. Positions of the Parties

1. Agency's Exception

The Agency alleges that the award violates its right to assign employees under section 7106(a)(2)(A). Exceptions at 5. The Agency argues that upon finding that the award affects a management right under section 7106(a), the Authority must determine whether the award complies with the two prong test as set forth in *U.S. Department of the Treasury, Bureau of Engraving and Printing, Washington, D.C. and National Treasury Employees Union, Chapter 201,* 53 FLRA 146, 151-54 (1997) (*BEP*).

Under *BEP,* the Agency argues that once a finding is made that the award affects a section 7106(a) right, the Authority must determine whether the award provides a remedy for a violation of either applicable law, within the meaning of section 7106(a)(2) of the Statute, or a contract provision negotiated pursuant to section 7106(b). The Agency contends that if the award provides such a remedy, the Authority should find prong I satisfied and then analyze the award under prong II.

Here, the Agency argues that the award abrogates its nonnegotiable right to assign employees

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under section 7106(a)(2)(A). The Agency states that "[t]he Authority has long held that the decision whether or not to fill vacant positions is encompassed within an agency's right to assign employees under section 7106(a)(2)(A) of the Statute." Exceptions at 6, citing *International Plate Printers, Die Stampers, and Engravers Union of North America, AFL-CIO, Local 2 and Department of the Treasury, Bureau of Engraving and Printing, Washington D.C.,* 25 FLRA 113, 144-46 (1987) (Provision 35) (*International Plate*). Moreover, the Agency contends the Authority has consistently held that "proposals requiring an agency to fill vacancies interfere with management's rights under section 7106(a) of the Statute." Exceptions at 6, citing *American Federation of Government Employees, Local 1923 and U.S. Department of Health and Human Services, Health Care Financing Administration, Baltimore, Maryland,* 44 FLRA 1405, 1464-68 (1992) (Proposal 17) (*Local 1923*), and *National Treasury Employees Union and Internal Revenue Service,* 2 FLRA 281, 282-83 (1979) (second sentence) (*NTEU*); *see also American Federation of Government Employees, Local 3354 and U.S. Department of Agriculture, Farm Services Agency, Kansas City Management Office,* 54 FLRA 807, 811-12 (1998) (*City Management*).

As such, the Agency argues that this award fails the first prong of *BEP*. According to the Agency, a provision such as this can be found to have been negotiated under section 7106(b)(3) provided it does not abrogate management's rights. Here, however, the Agency argues that this is not a section 7106(b)(3) matter because the provision abrogates its right to assign employees. it bases this argument on the award which it argues precludes its ability to decide not to fill posts that are temporarily vacant in the absence of good cause. Exceptions at 10.

Finally, the Agency argues that this contract provision is not an arrangement under section 7106(b)(3) because it would not ameliorate adverse effects flowing solely from the exercise of management rights. The Agency argues that it would be bound to fill temporary vacancies caused by employee action such as calling in sick. As such, it argues that this contract provision is not an arrangement for adverse effects flowing from management's rights. Instead, the Agency argues it would ameliorate adverse effects flowing from voluntary choices of employees. *Id.* at 9.

2. Union's Opposition

The Union contends that Article 27 was negotiated pursuant to section 7106(b). The Union further argues that Authority review requires an analysis as to whether this provision was negotiated as an appropriate arrangement and whether the Arbitrator's interpretation abrogated management's rights. Opposition at 3. Specifically, the Union notes that the excessive interference test associated with negotiability determinations is not necessary here. Instead, the Union contends that the Authority should use the abrogation standard Treasury, U.S. Customs Service set forth in *Department of the Treasury, U.S. Customs Service and National Treasury Employees Union,* 37 FLRA 309, 313-14 (1990).1

Finally, although the Union states that the Arbitrator's award "put a limitation on management's right to assign[,]" it argues that the award did not infringe to an excessive degree and only served to enforce Article 27. Opposition at 4. Accordingly, the Union contends that the exception should be denied.

B. Analysis and Conclusions

The Agency argues that the award violates its management right to assign employees under section 7106(a)(2)(A) of the Statute. As such, we review the questions of law raised by this assertion and the Arbitrator's award *de novo. See National Treasury Employees Union Chapter 24 and U.S. Department of the Treasury, Internal Revenue Service,* 50 FLRA 330, 332 (1995) (citing *U.S. Customs Service v. FLRA,* 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying a standard of *de novo* review, we assess whether an arbitrator's legal conclusions are consistent with the applicable standard of law, based on the arbitrator's underlying factual findings.

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National Federation of Federal Employees, Local 1437 and U.S. Department of the Army, Army Reserve, Development and Engineering Center, 53 FLRA 1703, 1710 (1998). In making that assessment, we defer to the Arbitrator's underlying factual findings. *See Id.*

When an agency asserts that an arbitrator's award violates management's rights, the Authority first determines whether the award affects management's rights under section 7106(a). *See U.S. Department of the Navy, Naval Undersea Warfare Center Division, Keyport, Washington and Bremerton Metal Trades Council,* 55 FLRA 884, 887 (1999) (Member Cabaniss dissenting on other grounds); *United States Small Business Administration and American Federation of Government Employees, Local 2951,* 55 FLRA 179, 184 (1999). If it does, then the Authority applies the two-prong test set forth in *BEP,* 53 FLRA at 151-54. If the award does not affect a management right, then the *BEP* analysis is not required. *U.S. Department of the Navy, Norfolk Naval Shipyard, Portsmouth, Virginia and Tidewater Virginia Federal Employees Metal Trades Council, Local 734,* 55 FLRA 1103, 1105 (1999).

This Award Does Not Affect Management's Right to Assign Employees under Section 7106(a) (2) (A)

The Authority has long held that management's right to assign employees under section 7106(a)(2)(A) includes the right to establish the necessary qualifications and skills for a position, and to assess whether employees under consideration for assignment to a position possess the requisite qualifications and skills. *See American Federation Government Employees, Local 1138, Council 214 and U.S. Department of the Air Force, Air Force Materiel Command, 645 Air Base Wing/CE, Wright-Patterson Air Force Base, Ohio,* 51 FLRA 1725, 1728 (1996); *see also National Air Traffic Controllers Association, Local C90 and U.S. Department of Transportation, Federal Aviation Administration,*

45 FLRA 469, 476 (1992); *American Federation of Government Employees, AFL-CIO and Air Force Logistics, Command, Wright-Patterson Air Force Base, Ohio,* 2 FLRA 603, 612-14 (1980), *enforced sub nom. Department of Defense v. FLRA,* 659 F.2d 1140, 1148-49 (D.C. Cir. 1981), *cert. denied,AFGE v. FLRA,* 455 U.S. 945 (1982) (*Wright-Patterson*). Moreover, the Authority has stated that the right to "fill vacant positions is encompassed within an agency's rights to hire and assign employees under section 7106(a)(2)(A) of the Statute."*City Management,* 54 FLRA at 812. Accordingly, contentions alleging the right to assign employees often concern the right to hire. *See e.g. National Treasury Employees Union and U.S. Department of the Treasury, Customs Service, Washington, D.C.,* 46 FLRA 696, 729-30 (1992); *International Plate,* 25 FLRA at 144-46.

The right to assign employees is not limited to just the initial hiring of an individual; it can also arise in circumstances involving the selection of employees for personnel actions subsequent to the initial selection of the individual for employment. *See, e.g., National Association of Government Employees, Local R4-45 and U.S. Department of Defense, Defense Commissary Agency, Central Region, Virginia Beach, Virginia,* 54 FLRA 218, 223 n.4 (1998). However, the right is not necessarily triggered by every permanent selection action. *Id.* at 223-25 (permanent reassignment action involved, but right to assign not implicated.) Further, the right to assign employees may also be implicated by temporary personnel actions involving temporary reassignments, details and loans. *See U.S. Department of the Navy, Philadelphia Naval Shipyard, Philadelphia, Pennsylvania and Planners, Estimators, Progressmen and Schedulers Union, Local 2,* 2 FLRA at 612-13.

The arbitration award in this case does not require the Agency to hire additional employees or fill vacant positions, does not limit the Agency's ability to determine the qualifications and skills necessary for these employees to perform the duties of their position, and does not prohibit the Agency outright from vacating posts. To the contrary, and as already noted, the award precludes the Agency only from vacating correctional officer posts on a routine basis

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for, administrative convenience, and does permit posts to be vacated only for "good cause."

The Award does not mandate any specific actions by the Agency as to how it must comply with the award, or establish any criteria as to what will or will not constitute "good cause" for vacating a post. It is possible that the Agency, in complying with this award, might determine that it needs to take such actions as cancellation of annual leave and training, use supervisory and management personnel to fill these positions, use overtime assignments, or some other action in order to comply with the award. While some or all of these actions could arguably have an effect on various management rights such as the assignment of work or the internal security practices of the Agency, as was recently argued by the Agency, *see American Federation of Government Employees, Local 1302, Council of Prison Locals C-33 and U.S. Department of Justice, Federal Bureau of Prisons, Florence Colorado,* 55 FLRA 1078 (1999)2 regarding overtime, the Agency has chosen to challenge the award here on the sole basis of its alleged impact on the Agency's right to assign employees.

The Agency's cited cases fail to support the conclusion that this award interferes with management's right to assign employees. In *Internatinal Plate.,* 25 FLRA at 144-46, the Authority found a proposal nonnegotiable which directed the agency to hire employees for vacant positions. That resolution, *i.e.,* hiring employees, concerned a situation vastly different from the present matter. In *Local 1923,* 44 FLRA at 1465-68, the Authority found that a proposal that would require the hiring of a specific number of employees also affected management's right to hire and assign. Furthermore, in *NTEU,* 2 FLRA at 282-83, a proposal was deemed nonnegotiable to the extent that it required the agency to fill vacant positions, not temporary posts as we have here. Finally, in *City Management,* 54 FLRA at no, 812-13, the Authority found a proposal which the union interpreted as requiring management to fill/backfill "otherwise vacant positions" interfered with management's right to assign employees.

Accordingly, this award does not concern the exercise of management's right to assign employees under section 7106(a)(2)(A). *See U.S. Department of the Treasury, Internal Revenue Service, Indianapolis District and National Treasury Employees Union, Chapter 49,* 49 FLRA 55, 57 (1994), citing *American Federation of Government Employees, AFL-CIO, Local 3369 and Social Security Administration, Cypress Hills District Office,* 31 FLRA 1110, 1111-12 (1988). Given these circumstances, we reject this Agency exception.

IV. The Award Does Not Fail to Draw its Essence from the Parties, Collective Bargaining Agreement

A. Positions of the Parties

1. Agency's Exeption

The Agency argues that the Arbitrator ignored the plain language of Article 27, section a., which calls for lowering hazards to the lowest possible level only where it can be done "without relinquishing its [management's] rights under 5 U.S.C. 7106." Exceptions at 11. The Agency contends that under its terms Article 27 is limited in its application to circumstances that would not interfere with management relinquishing its rights under section 7106(a). As such, the Agency asserts that the Arbitrator's ultimate conclusion is "completely disconnected" from the appropriate interpretation of Article 27 because it affects management's rights under 7106(a) to leave certain posts vacant. *Id.* at 12. Therefore, the Agency argues that the award fails to draw its essence from the agreement.

2. Union's Opposition

The union contends that "the question of the interpretation and application of the collective bargaining agreement is a question solely for the arbitrator whose interpretation and application is what the parties bargained for." Opposition at 4. As such, the Union claims "[t]o the extent that the award concerns the construction of the agreement no basis can be provided for finding the award to be deficient."*Id.* Moreover, the Union states that "an arbitrator's award can not [sic] be determined as not

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drawing its essence from the agreement on the basis that the arbitrator misconstrued or misapplied the agreement."*Id.*, citing *Department of Health and Human Services, Social Security Administration, Louisville Kentucky District and National Federation of Federal Employees, Local 1790,* 10 FLRA 436 (1982).

The Union further argues that the Arbitrator reasonably interpreted Article 27 of the parties' agreement. The Union contends that the Arbitrator found Article 27 to be an appropriate arrangement under 7106(b). As such, the Union asserts that the Agency is in mere disagreement as to the Arbitrator's interpretation of this Article. Opposition at 4.

B. Analysis and Conclusions

For an arbitrator's award to be found deficient as failing to draw its essence from a collective bargaining agreement, it must be established that the award: (1) cannot in any rational way be derived from agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purpose of the collective bargaining agreement as to "manifest an infidelity to the obligation of an arbitrator"; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *U.S. Department of Defense, Defense Logistics Agency, Defense Distributions Center, New Cumberland, Pennsylvania and American Federation of Government Employees, Local 2004,* 55 FLRA 1303, 1307 (1999); *United States Department of Labor (OSHA) and National Council of Field Labor Locals,* 34 FLRA 573, 575 (1990).

The Agency bases this exception on its belief that the award improperly conflicts with its rights under section 7106(a). As such, the Agency alleges that the award fails to conform with the contractual language which mandates lowering inherent hazards to the lowest possible level only where the Agency does not relinquish its rights under section 7106(a).

However, as noted, *supra,* the Agency has not shown that the award conflicts with its argued section 7106(a) right to assign employees. Therefore, as it has not been shown that the award causes the Agency to relinquish any of its section 7106 rights, it cannot be said that the Arbitrator's award or interpretation of Article 27, is irrational, implausible, or unconnected to the wording of the agreement. As such, the Agency has not shown that the award fails to draw its essence from the parties' agreement. *See American Federation of Government Employees, Local 2004 and U.S. Department of Defense, Defense Logistics Agency, Defense Distribution Region East, New Cumberland, Pennsylvania,* 55 FLRA 6, 9 (1998).

V. The Arbitrator Did Not Exceed His Authority

A. Positions of the Parties

1. Agency's Exception

The Agency argues that part of the Arbitrator's remedy resolves an issue not submitted to arbitration. Specifically, the Agency contends that the Arbitrator exceeded his authority by stating the following at page 18 of the Award: "I also direct that if a correction officer believes that his assignment or shift has been changed unreasonably to deprive him of overtime, that he be allowed to grieve the change through the parties, grievance procedure.".

The Agency asserts that the parties stipulated to the following issue:

Did the Agency violate the Master Agreement, Article 27, s.A [sic] when it vacated correctional services posts, and, if so, what shall the remedy be?

Exceptions at 3. As such, the Agency argues that the Arbitrator "clearly exceeded his authority" by "imposing a remedy to a question that was not before him[.]"*Id.* at 13.

2. Union's Opposition

The Union counters that in its original grievance it sought sanctions or awards deemed appropriate by the Arbitrator. opposition at 5. As such, the Union argues that the Arbitrator was merely "exercising his authority under the stipulated issue as to what the remedy will be in finding that the agency had violated Article 27 of the parties negotiated agreement."*Id.* The Union suggests that it is clear that the overtime

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remedy was contained within the grievance. Moreover, the Union contends that the overtime remedy language was incorporated into the award as "an inhibitor to prevent management from using administrative convenience to vacate correctional posts without the possibility of further grievance action."*Id.*

B. Analysis and Conclusions

Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority or award relief to those not encompassed within the grievance. *See American Federation of Government Employees, Local 1617 and U.S. Department of the Air Force, San Antonio Air Logistics Center, Kelly Air Force Base, Texas,* 51 FLRA 1645, 1647 (1996). In the absence of a stipulated issue, the arbitrator's formulation of the issue is accorded substantial deference. *See U.S. Department of the Army Corps of Engineers, Memphis District, Memphis. Tennessee and National Federation of Federal Employees, Local 259,* 52 FLRA 920, 924 (1997). Moreover, when an exception concerns whether the remedy awarded by the arbitrator exceeded the arbitrator's authority, we grant the arbitrator broad discretion to fashion a remedy that the arbitrator considers to be appropriate. *See U.S. Department of Defense, Dependents Schools and Overseas Education Association,* 49 FLRA 658, 663 (1994) (*DODDS*).

In this award, the parties agreed that the following was the issue the Arbitrator was to resolve:

Did the Agency violate the Master Agreement, Article 27, s.A [sic] when it vacated correctional services posts, and, if so, what shall the remedy be?

Award at 3. The Agency contends that the Arbitrator exceeded his authority by directing that correctional officers may grieve allegedly unreasonable shift or assignment changes. The Agency directs the Authority's attention to *Veterans Administration and American Federation of Government Employees, Local 2798,* 24 FLRA 447 (1986) (*Local 2798*), in support of this exception.

In *Local 2798,* the Authority found the arbitrator had exceeded his authority by fashioning a remedy where the underlying issue was resolved in favor of the agency. The Authority held:

[W]e conclude that the Arbitrator exceeded his authority when he failed to confine his decision and any possible remedy to the issues submitted as he unambiguously framed them. The Arbitrator clearly specified the issue on the merits to be whether the grievant's termination was in violation of the collective bargaining agreement or applicable law and regulation and, if so, what remedy [was] appropriate. When the Arbitrator answered precisely that issue by concluding that the grievant's termination did not violate the agreement or any applicable law and regulation, the Arbitrator had decided the merits of the issue submitted to him. By further ruling that the grievant be informed of and be allowed to apply for agency vacancies and directing the remedial relief set forth in paragraph 3 of the award, the Arbitrator exceeded his authority by deciding, and awarding a remedy concerning an issue not submitted to arbitration.. . .Arbitrators may legitimately bring their judgment to bear in reaching a fair resolution of a dispute as submitted to or formulated by them, but they may not decide matters which are not before them.

Local 2798, 24 FLRA at 451.

Here, the Arbitrator was tasked with resolving whether the Agency was in violation of the parties' master agreement when it would not fill post/duty station vacancies. Moreover, the Arbitrator specifically noted that the grievance stated in part that "[c]hanging an employees work assignment or shift, to avoid paying overtime, places undue stress on the employee and their families." Award at 5.

Unlike *Local 2798,* the remedy as fashioned by the Arbitrator is sufficiently linked to the resolution of this matter. Specifically, the Union disclosed in its grievance that Agency shift changes resulting in the vacating of posts may occur to "avoid paying

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overtime" As noted in *DODDS,* the Authority "permit[s] an arbitrator to extend the award to issues that necessarily arise from the issue as formulated[.]"*DODDS,* 49 FLRA at 663. Therefore, given the deference allowed an arbitrator in fashioning a remedy, the Arbitrator did not exceed his authority by directing that correctional officers may grieve allegedly unreasonable shift or assignment changes.

VI. Decision

The Agency's exceptions are denied.

1 The union specifically cites *Department of the Treasury, U.S. Customs Service and NTEU,* 90 FLRA 1-1459. We construe this cite as an erroneous cite to a commercial reporting service's coverage of the noted 37 FLRA case.

2 In that case the Agency argued, and the Authority found, that a proposal mandating the use of overtime in non-emergency circumstances before a correctional officer post could be vacated was inconsistent with the Agency's right to assign work. The Authority did not address the Agency's argument that the proposal also was inconsistent with its tight to determine its internal security practices.

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