101 FLRR 1-1151

Department of Justice, Federal Bureau of Prisons, Metropolitan Detention Center, Guaynabo, Puerto Rico and AFGE, Council of Prison Locals, Local 4052

Federal Labor Relations Authority

0-AR-3332; 57 FLRA No. 67; 57 FLRA 331

June 29, 2001

Judge / Administrative Officer

Before: Cabaniss, Chair; Wasserman and Pope, Members

Related Index Numbers

44.3821 Subjects of Bargaining, Conditions of Employment, Miscellaneous Conditions of Employment, Safety, Assignment Related to

44.5111

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

47.86 Grievances/Grievance Arbitration, Grievance Arbitration Award, Review

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

Case Summary

THE AUTHORITY UPHELD THE ARBITRATION AWARD FINDING THAT THE AGENCY'S PRACTICE OF LEAVING POSTS VACANT AND NOT ASSIGNING OVERTIME TO FILL THOSE POSTS VIOLATED THE CBA'S REQUIREMENT THAT THE AGENCY REDUCE WORK HAZARDS TO THE LOWEST POSSIBLE LEVEL.

The Union brought a grievance that the Agency was leaving posts vacant in violation of the parties' agreement. The Union argued the Agency was leaving posts vacant and not assigning overtime to fill those vacancies which violated the parties' agreement requiring the Agency to lower work hazards to the lowest possible level. The Agency argued the Union's grievance impacts on management's right to assign work and should be dismissed. The Arbitrator found the Agency's practice of reassigning employees and leaving posts vacant without using overtime violated the parties' agreement to keep work hazards to lowest possible levels. The Arbitrator ordered the Agency to cease and desist from this practice unless there is an emergency situation [101 FLRR 2-1002]. The Agency excepted to the award, arguing that it interfered with management's rights to assign employees and assign work and it did not draw its essence from the CBA. The Authority found the award did not impact on the Agency's right to assign employees. The Authority then found the award impacted on the right to assign work and reviewed it under the two-pronged test in *BEP*, 97 FLRR 1-1085. Under *BEP*, the Authority found the CBA provision was a negotiated provision and did not abrogate management's right to assign work under prong I and the award reconstructed what the Agency would have done if it hadn't violated the CBA under prong II. The Authority also rejected the Agency's essence exception. The Authority upheld the award. Chairman Cabaniss dissented, stating she would find the award interfered with both management's right to assign work as well as assign employees.

Full Text

Decision

I. Statement of the Case

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

The Arbitrator found that the Agency violated the parties, collective bargaining agreement by leaving certain work posts temporarily vacant. He ordered the Agency to cease reassigning on-duty employees to fill such vacancies except under emergency circumstances.

For the reasons that follow, we find that the

Agency has failed to show that the award is deficient under § 7122(a) of the Statute. Therefore, we deny the exceptions.

II. Background and Arbitrator's Award

The Agency creates work schedules for correctional officers in order to fill established posts at its prison facility. When an officer fails to work a scheduled shift, the Agency either assigns officers to work on an overtime basis or reassigns officers on duty to the unoccupied post. Posts that become vacant as a result of a reassignment sometimes remain vacant for the duration of the shift.

The Union filed a grievance alleging that, in leaving posts vacant, the Agency violated Article 27 of the parties, agreement.2 The grievance was submitted to the Arbitrator, where the parties stipulated to the following issue: "What shall be the disposition of the grievance, including remedy, if any?" Award at 2.

The Arbitrator found that Article 27 of the parties' agreement required the Agency to reduce hazards to its employees to the lowest possible level and that, by leaving correctional officer posts vacant, the Agency did not reduce hazards to the lowest possible level. In this regard, the Arbitrator stated that, as the Agency "made a valid case and received approval to staff all the posts on the quarterly assignment roster, it must be determined that each of those posts/positions are necessary and essential to the efficient operation" of the Agency. *Id.* at 24. The Arbitrator found, in this connection, that when posts are left vacant, "it has to have an adverse impact on safety."*Id.* The Arbitrator rejected the Agency's argument that Article 27 infringed on its management rights under § 7106 of the Statute. The Arbitrator stated, in this connection, that the right to assign employees does not encompass a right to reassign them.

Based on the foregoing, the Arbitrator concluded that the Agency violated Article 27 of the parties' agreement. As a remedy, the Arbitrator ordered the Agency to cease allowing posts to remain vacant except in emergency situations.

III. Positions of the Parties

A. Agency's Exceptions

The Agency asserts that the award impermissibly affects its rights to assign employees and work under 5 U.S.C. § 7106(a). The Agency asserts that the Arbitrator failed to properly apply Authority precedent finding a union proposal similar to the Arbitrator's interpretation of Article 27 to affect management's right to assign work. *See* Exceptions at 12-13 (discussing *AFGE, Local 1302*, 55 FLRA 1078 (1999)). The Agency further argues that the award fails Prong I of the Authority's analysis set forth in *United States Dep't of the Treasury, Bureau of Engraving and Printing, Wash., D.C.*, 53 FLRA 146 (1997) (*BEP*). In this regard, the Agency claims that, as interpreted by the Arbitrator, Article 27: (1) is not sufficiently tailored because it would ameliorate adverse effects of vacancies created by employees who voluntarily choose not to work; and (2) abrogates the Agency's right to assign employees.

Finally, the Agency contends that the award fails to draw its essence from the parties' agreement. The Agency argues that the Arbitrator failed to consider contractual wording preserving the Agency's rights under § 7106.

B. Union's Opposition

The Union asserts that "the appropriate arrangement of protecting staff safety supercedes" the Agency's right to assign work. Opposition at 4. The Union also asserts that the Agency has not shown that the Arbitrator's award does not draw its essence from the parties' agreement.

IV. Analysis and Conclusions

A. The Award is Not Contrary to the Agency's Rights to Assign Employees and/or Work

The Authority reviews questions of law raised by an arbitrator's award and an exception to it *de novo. NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citation omitted). In applying a standard of *de novo* review, the Authority assesses whether the

Arbitrator's legal conclusions are consistent with the applicable standard of law, based on the underlying factual findings. *United States Dep't of the Air Force, Warner Robins Air Force Base, Ga.*, 56 FLRA 541, 543 (2000) (citation omitted). In making such a determination, the Authority defers to the arbitrator's underlying factual findings. *Id.*

In resolving whether an award violates management's rights under § 7106(a) of the Statute, the Authority applies the framework established in *BEP*. Upon finding that an award affects a management right under § 7106(a), the Authority applies a two-prong test to determine if the award is deficient. Under Prong I, the Authority examines whether the award provides a remedy for a violation of either applicable law, within the meaning of § 7106(a)(2) of the Statute, or a contract provision negotiated pursuant to § 7106(b) of the Statute. Under Prong II, the Authority considers whether the award reflects a reconstruction of what management would have done if it had not violated the law or contractual provision at issue. *Id.*

1. Right to Assign Employees

It is well established that "the right to assign employees under section 7106(a)(2)(A) is the right to assign employees to positions."*AFGE*, 55 FLRA 1145, 1152 (1999) (citing *AFGE, AFL-CIO*, 2 FLRA 6,04, 613 (1980), *aff'd sub nom. Department of Def. v. FLRA*, 659 F.2d 1140 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 945 (1982)). The right to assign employees includes the right to refrain from assigning employees. *See AFGE, Local 3354*, 54 FLRA 807, 812 (1998) (Local 3354). The "assignment of employees" also may be implicated by temporary reassignments, details and loans.3*United States Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Marianna, Fla.*, 56 FLRA 467, 469-70 (2000) (*BOP, Marianna*) (citations omitted).

The Authority recently held that an arbitrator's award ordering an agency to comply with a contractual provision identical to Article 27,by vacating posts "only for good cause and not on a routine basis" did not affect the agency's right to assign employees. *BOP, Marianna*, 56 FLRA at 467-70. The Authority reasoned that the award "d[id] not require the Agency to hire additional employees or fill vacant positions, d[id] not limit the Agency's ability to determine the qualifications and skills necessary for the[] employees to perform the duties of their position, and d[id] not prohibit the Agency outright from vacating posts."*Id.* at 470. For the same reasons, the award in this case does not affect the Agency's right to assign employees.

We disagree with our dissenting colleague's assertion that the right to assign employees is implicated in this case. The dissent's interpretation of the right to assign employees is at odds with long-standing, unchallenged Authority precedent, and unnecessarily blurs the distinction between the management rights under § 7106(a) to assign employees and to assign work. In this regard, it is well established that a restriction on where an employee performs duties previously assigned to his or her position does not affect the right to assign employees. *See NAGE, Local R4-45*, 54 FLRA 218, 224 (1998) (citation omitted); *AFGE, AFL-CIO*, 5 FLRA 83, 86-87 (1981). Here, the Agency's correctional officers are "assigned to various posts throughout the prison on various shifts," and nothing in the record remotely suggests that they perform duties not previously assigned to their positions when they are reassigned to any given post. Award at 3.

Consistent with *BOP, Marianna*, the Authority has long held that temporary reassignments, details, and loans implicate the right to assign employees only when they require the assignment of an employee to a new position or the assignment to an employee of duties not previously assigned to his or her position. *BOP, Marianna*, 56 FLRA at 470; *NFFE, Local 1482*, 39 FLRA 1169, 1188 (1991); *AFGE, AFL-CIO*, 5 FLRA at 86-87. There is no argument that the Authority's precedent on these matters is incorrect. Accordingly, contrary to the dissent, we see no reason to overturn our recent decision in *BOP, Marianna* and alter well-settled law in order to hold that the Agency's actions in this case---which neither

reassigned employees to new positions nor assigned to them duties not previously assigned to their positions---implicate the right to assign employees.

2. Right to Assign Work

The right to assign work under § 7106(a)(2)(B) of the Statute includes the right to determine the particular duties to be assigned, when work assignments will occur, and to whom or what positions the duties will be assigned. *United States Dep't of the Treasury, United States Customs Serv., El Paso, Tex.*, 55 FLRA 553, 558 (1999) (*El Paso*) (citation omitted). The right to assign work encompasses the right to refrain from assigning work. *Local 3354*, 54 FLRA at 812.

The Authority has found that requiring an agency to assign work to more employees than the number it would otherwise choose affects the agency's right to assign work. *AFGE, Local 3807*, 54 FLRA 642, 646 (1998). Consistent with this, the Arbitrator's award in this case affects the Agency's right to assign work.

a. The Award Satisfies Prong I of *BEP*

Under Prong I, the Authority determines whether Article 27 was negotiated pursuant to § 7106(b) of the Statute. *United States Dep't of Def., Def. Logistics Agency, Red River Army Depot, Texarkana, Tex.*, 55 FLRA 523, 526 (1999). As the parties focus solely on whether Article 27 of their agreement constitutes an appropriate arrangement within the meaning of § 7106(b)(3), we limit review under Prong I to that issue. *See, e.g., Fed. Aviation Admin., Wash., D.C.* 55 FLRA 1233, 1236-37 (2000) (*FAA*). To determine whether a provision was negotiated under § 7106(b)(3), the Authority assesses, pursuant to *Dep't of the Treasury, United States Customs Serv.*, 37 FLRA 309 (1990) (*Customs Service*), whether the collective bargaining provision: (1) constitutes an arrangement under 7106(b)(3) and (2) abrogates the exercise of a management right. *See, e.g., United States Dep't of the Air Force, Seymour Johnson Air Force Base, N.C.*, 55 FLRA 163, 167 (1999). This analysis focuses on the provision as interpreted and applied by the arbitrator. *See id.*

With regard to the first aspect of the Customs Service analysis, the Agency claims that Article 27 does not constitute an arrangement because, in some instances, posts are initially vacated due to voluntary employee action, such as use of sick leave, and not because of the exercise of a management right. However, the Arbitrator did not find that the adverse effects in this case result from the initial vacancy. Instead, the Arbitrator specifically found that the "adverse impact on safety" results from the Agency's decision to leave posts vacant. Award at 23-24. The Arbitrator interpreted Article 27 as addressing "the Agency's rights to decide who to assign and/or whether or not to use overtime to *fill vacant positions*," and confirmed that Article 27 is violated "if any of the positions are *left vacant.*"*Id.* at 23, 24 (emphases added). As interpreted and applied by the Arbitrator, Article 27 addresses the Agency's actions in response to a vacancy, and ameliorates adverse effects resulting from the Agency's decision not to fill vacant positions. As such, Article 27 ameliorates the adverse effects flowing from the exercise of management's right to assign work.

The Agency also claims, based on the same argument set forth above, that Article 27 is not sufficiently tailored. In a negotiability proceeding, determining whether a proposal or provision is sufficiently tailored is part of the analysis to determine whether the proposal or provision is an arrangement. *AFGE, Local 225*, 56 FLRA 686, 688 (2000). However, the Authority does not apply a tailoring test in resolving arbitration exceptions under *BEP*. *See United States Dep't of Justice, Fed. Bureau of Prisons, Fed. Transfer Ctr., Okla. City, Okla.*, 57 FLRA No. 40, slip op. at 6 (May 18, 2001) (Chairman Cabaniss dissenting) (*BOP, Oklahoma City*).4

With regard to the second aspect of *Customs Service*, a provision abrogates a management right "if, as interpreted and applied by the arbitrator, it precludes an agency from exercising[ ] a management right[.]"*El Paso*, 55 FLRA at 559 (citation omitted). In this case, the award limits the Agency's ability to

leave posts vacant. However, the limitation applies only to those posts that the Agency determined were necessary and which it requested, and received, approval for staffing. *See* Award at 20, 24. Nothing in the award prevents the Agency from changing its determination. Moreover, the award allows the Agency to leave posts vacant in emergency situations. As a result, the Arbitrator's award does not abrogate the Agency's right to assign work. *See, e.g., United States Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Ashland, Ky.,* 37 FLRA 1261, 1265 (1990) (restriction of agency denial of leave requests to reasons not "insubstantial" did not abrogate right to assign work). *See also El Paso,* 55 FLRA at 559 (provision preventing assignment of certain employees absent concurrent assignment of other employees did not abrogate right to assign work).

b. The Award Satisfies Prong II of *BEP*

Under Prong II, the Authority determines whether the award is a proper reconstruction of what the Agency would have done had it not violated the parties, agreement. *United States Dep't of Def., Def. Logistics Agency, Def. Distribution Ctr., Distribution Depot, Red River, Texarkana, Tex.,* 56 FLRA 690, 692 (2000). Here, the Arbitrator found that Article 27 required the Agency to refrain from leaving posts vacant. By enforcing that requirement, his award is a proper reconstruction of what the Agency would have done if it had not violated the parties' agreement. *See United States Dep't of Veterans Affairs, Med. and Reg'l Ctr., Togus, Me.,* 55 FLRA 1189, 1196 (1999).

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

The Authority will find an arbitrator's award deficient for failing to draw its essence from a collective bargaining agreement when the appealing party establishes that the award: is so unfounded in reason and fact and so unconnected with the wording and purpose of the agreement as to manifest an infidelity to the obligation of the arbitrator; does not represent a plausible interpretation of the agreement; or cannot in any rational way be derived from the agreement or evidences a manifest disregard of the agreement. *United States Dep't of Labor (OSHA),* 34 FLRA 573, 575 (1990).

The Agency has not demonstrated that the Arbitrator's interpretation of Article 27 is implausible or irrational. Moreover, consistent with the foregoing recommendation, the award is not deficient as inconsistent with the Agency's rights to assign employees and work. Accordingly, the Agency has not demonstrated that the Arbitrator's award fails to draw its essence from the parties, agreement.

V. Decision

The Agency's exceptions are denied.

1 Chairman Cabaniss' dissenting opinion is set forth at the end of this decision.

2 As relevant here, Article 27 provides:

[T]he Employer agrees to lower those inherent hazards to the lowest possible level, without relinquishing its rights under 5 U.S.C. § 7106.

3 As such, the Arbitrator's determination that the right to assign employees does not encompass a right to reassign them is erroneous. However, in view of our determination that the award in this case does not implicate the Agency's right to assign---or reassign---employees, the error does not render the award deficient.

4 For the reasons set forth in *BOP, Oklahoma City,* we adhere to the view that the analysis used by the Authority to determine whether a proposal is within the duty to bargain under § 7106(b)(3) of the Statute is not appropriate for determining whether an agreed-upon proposal incorporated into a collective bargaining agreement is *enforceable* as negotiated pursuant to § 7106(b)(3), and we reject our dissenting colleague's view to the contrary.

Dissenting Opinion of Chairman Cabaniss:

I respectfully dissent from my colleagues regarding the analysis of this case. Consistent with the Authority's precedent cited in the majority decision regarding an agency's right under § 7106(a)(2)(A) to not assign/reassign employees in situations implicated

by temporary reassignments, details, and loans, I would find that the Agency's right to assign employees is implicated as well as the Agency's right under § 7106(a)(2)(B) to assign work.1 Additionally, and consistent with the following discussion, I would find the Authority's "abrogation" test to be fundamentally flawed and overturn the Arbitrator's award for being in violation of the Agency's § 7106 rights to assign employees and assign work.

The right of an arbitrator to interpret a collective bargaining agreement is extremely broad, but is not without limit. One discussion of this right is in the Authority's case law pertaining to essence exceptions to arbitration awards, *i.e.*, where one party challenges an arbitral interpretation of the parties, collective bargaining agreement. 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. *See* 5 U.S.C. § 7122(a); *AFGE, Council 220,* 54 FLRA 156, 159 (1998). Under this standard, the Authority will find an award deficient (based upon an essence analysis) when 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 purpose of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) evidences a manifest disregard for the agreement; or (4) does not represent a plausible interpretation of the agreement. *See United States Dep't of Labor (OSHA),* 34 FLRA 573, 575 (1990).

There is no such deferential standard, however, when an arbitrator's contract interpretation is challenged as being contrary to law, rule, or regulation: the analysis of the arbitrator's rationale is done de novo, and one looks at whether the arbitrator's reasoning is consistent with the "applicable standard of law," to determine whether the award violates § 7122(a)(1), *i.e.*, whether it is contrary to law. That "applicable standard of law" is § 7106(b)(3) in this instance, and our case law uses § 7106(b)(3) to determine whether the language in question "excessively interferes" with an agency's § 7106(a) rights. Section 7106(b)(3) does not recognize or authorize the ability to use one § 7106(b)(3) "appropriate arrangement" legal standard for the negotiation of collective bargaining agreements (which must not "excessively interfere" with § 7106(a) rights), then create a different § 7106(b)(3) "appropriate arrangement" legal standard for the interpretation of those same collective bargaining agreements (which must not "abrogate" § 7106(a) rights). This attempted distinction is not provided for by § 7106, or § 7122, and makes no sense whatsoever.

Section 7114 of our Statute confirms that a § 7106(b)(3) conflict (or other matters discussed below) does not change after the appropriate arrangement language has gone into effect. Section 7114(c)(2) reflects an agency's right to review a collective bargaining agreement to determine whether it is in accordance with "the provisions of this chapter and any other applicable law, rule, or regulation." Actions taken to ensure that a provision is "in accordance with the provisions of this chapter" include, *inter alia*, whether a provision excessively interferes with the agency's rights and thus is barred by § 7106(b)(3). *See, e.g., NTEU,* 55 FLRA 1174 (1999) (disapproval of provision caused examination to determine whether provision excessively interfered with agency rights, in conflict with § 7106(b)(3)). Section 7114(c)(3) notes that, even where an agency does not approve or disapprove an agreement under § 7114(c)(2), the agreement then goes into effect and is binding, *subject* to those same "provisions of this chapter and any other applicable law, rule, or regulation."

Authority precedent does not change this conclusion. In *AFGE, Local 1858,* 4 FLRA 361, 362 (1980), the Authority held that an agency's failure to disapprove a provision does not otherwise make enforceable a provision that is contrary to the Statute or any other applicable law, rule, or regulation. In *VA, Washington, D.C.,* 15 FLRA 948, 953 (1984), the Authority dismissed a complaint against an agency accused of refusing to abide by certain already agreed

to provisions that the agency believed were in violation of "applicable law." The Authority held that, even though the agency's disavowal of the legality of the provisions was not timely under § 7114(c)(2), "such tardiness does not alter the result" of the agency's actions because of § 7114(c)(3). *Id.* Consequently, I fail to see any basis for not finding that the standard of review under § 7114(c)(3) is the same as the standard of review under § 7114(c)(2), *i.e.,* the use of an "excessive interference" test to determine whether a matter violates § 7106(b)(3).

Also in this same vein, I find it inexplicable to single out § 7106(b)(3) for divergent treatment when assessing the term "provisions of this chapter" under § 7114(c)(2) and (3), while no other provisions or "any other applicable, law, rule, or regulation" are so treated.

In defense of its opinion, the *Customs Service* decision argues that negotiation of agreements and arbitral interpretation of those same agreements, are different. What *Customs Service* does is to conflate the distinction between an arbitrator's deference in determining what a contract means (an essence analysis) with the total lack of deference to that same interpretation in terms of whether it conflicts with law (a *de novo* analysis).

It is apparent that the *Customs Service* decision attempted to disregard that distinction by providing arbitral deference where none is permitted. Several portions of the *Customs Service* decision are illustrative of this conflation. That decision rejected use of the excessive interference test because it "unduly impinges on the role of arbitration and arbitrators under the Statute." 37 FLRA at 315. The Authority also went on to explain that it believed Congress expected it to "narrowly review" arbitration awards. *Id.* at 315-16. The Authority's discussion is replete with references to narrow review authority and speaks in terms of *all* arbitration awards, yet we now know (and it is undisputed) that legal challenges to arbitration awards are not subject to some deferential standard regarding the arbitrator's application of law, rule, or regulation to the parties' agreement, and that the arbitration exception process does "impinge" on arbitrators as to legal issues by denying them the deference normally accorded them. While there may have been some doubt in the Authority's mind in 1990 as to the extent to which an arbitrator's legal analyses would be accorded no deference, that doubt was eliminated by the decision of *United States Department of the Treasury, United States Customs Service,* 43 F.3d 682, 686-87 (D.C. Cir. 1994), which stated that reviews of such legal questions would be "de novo."*Id.* Therefore, I view the Authority's *Customs Service* decision as providing no basis for the result urged here, and would overturn it as being in violation of §§ 7114 and 7122 of our Statute. Accordingly, I would utilize the Authority's negotiability precedent regarding "appropriate arrangements" to review the Agency's exceptions, including the use of the "tailoring" requirement for appropriate arrangements.

In assessing the Arbitrator's award against that precedent I would reach a different conclusion than the one arrived at in *United States Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Marianna, FL,* 56 FLRA 467, 469-70 (2000) (*BOP, Marianna*) because of the presence of the right to assign work argument,2 because of the more restrictive nature of this award (reassignments only in an emergency situation versus reassignments only for good cause and not on a routine basis in *BOP, Marianna*), and because it is more apparent that the award in the present case is meant to more clearly force the Agency to pay overtime than was the case in *BOP, Marianna,* even though the award here attempts to avoid making that point by not directly ordering such payment.3 In that regard as well, then, I would expressly hold that the award conflicts with Authority negotiability precedent involving these same employees, wherein the Authority found outside the duty to bargain a proposal to require the Agency, in all circumstances except emergencies, to use overtime to staff vacant positions prior to letting those positions go vacant. *See AFGE, Local 1302, Council of Prison Locals C-33,* 55 FLRA 1078 (1999).4

Accordingly, based upon the above, I would set aside the Arbitrator's award as being in conflict with the Agency's noted § 7106 rights.

1 How assignment to a different "post" differs from an assignment to another position, such as by loan or detail, is not clear cut. While changing an employee's location usually does not involve the right to assign employees, the focus of this case is not *where* an employee works so much as it is an issue of whether the Agency is going to fill enough of those positions so as to keep hazards at a sufficiently low level. In that regard, then, it could be argued that this case involves the assigning---or not assigning---of employees to these correctional officer posts. Whether to fill vacant positions and how many of those vacant positions to fill involves the right to assign. *See, e.g., AFGE, Local 3354,* 54 FLRA 807, 812 (1998), and *Int'l Plate Printers, Die Stampers, and Engravers Union of North America, AFL-CIO, Local 2,* 25 FLRA 113, 146 (1987). It might also turn out that this matter is really an issue of the number of employees under § 7106(b)(1) of our Statute, although that issue is not before us. Consistent with that reasoning, I would change my vote in *United States Dep't of Justice, Fed. Bureau of Prisons,* Fed. Corr. Inst., Marianna, Fla., 56 FLRA 467 (2000), even though the agency's assign employees argument there did not focus as clearly on this aspect of assigning employees.

2 As has been noted in the majority decision, the right to take action under § 7106(a) also include the right to not take such action, such as to not assign work to the positions in question here.

3 The parties, and the Arbitrator, made references throughout the proceedings and the award to the fact that the Union was seeking, *inter alia,* the payment of overtime for correctional officers rather than permitting the Agency to fill the vacant positions through the reassignment of other personnel.

4 Given the glaring disparity in outcomes between the negotiability case between these same parties, and the award here, the flawed nature of *Customs Service* is all the more apparent.

