74 FLRA No. 18

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
UNITED STATES PENITENTIARY
LEAVENWORTH, KANSAS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 919
COUNCIL OF PRISON LOCALS #33
(Union)

0-AR-5813

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DECISION

November 14, 2024

_____

Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko and Anne Wagner, Members
(Member Kiko dissenting)

I. Statement of the Case

Arbitrator John F. Markuns found the manner in which the Agency temporarily reassigned, or "augment[ed]," non-custodial staff to custodial positions violated the parties' collective-bargaining agreement (CBA) and memorandum of understanding (MOU).[1] The Agency filed exceptions arguing the award fails to draw its essence from those agreements and is based on a nonfact. Because the Arbitrator failed to address contractual language that reasonably could dictate a different result, we remand this matter to the parties for resubmission to the Arbitrator, absent settlement. In doing so, we overturn Authority decisions holding that the U.S. Court of Appeals for the D.C. Circuit's (D.C. Circuit's) decision in *Federal BOP v. FLRA* (*BOP*)[2] precludes challenges to alleged misapplications of Article 18 of the CBA.

II. Background and Arbitrator's Award

During the novel coronavirus (COVID-19) pandemic, the Agency began augmenting non-custodial staff into custodial assignments without advance notice. The Union filed a grievance alleging that the MOU, entitled "Procedures for Augmentation During Mandatory Training," allows the Agency to use augmentation only when vacancies occur due to custody officers attending training.[3]

The grievance went to arbitration, where the Agency argued it could augment based on its management right to assign work and Article 18 of the CBA. The Agency asserted the MOU was inapplicable because it applies only when augmentation is used to fill vacancies created by mandatory training.

In the award, as relevant here, the Arbitrator found that, in non-emergency situations, once the Agency "chooses to staff a post without new hiring, augmentation (as opposed to voluntary or mandatory overtime) is an option only where staffing vacated posts is necessary due to training demands."[4] The Arbitrator determined that, during the pandemic, the Agency augmented employees when there were no training demands or emergency situations, disregarded reverse seniority, and did not reassign employees in a fair and equitable manner. Thus, the Arbitrator found the Agency violated the CBA and the MOU, granted the grievance in part, and directed the Agency to follow the MOU. However, the Arbitrator did not evaluate the Agency's arguments regarding Article 18.

On May 16, 2022, the Agency filed exceptions to the award, and on June 16, 2022, the Union filed an opposition.

III. Analysis and Conclusions

The Agency argues the award fails to draw its essence from the parties' agreements[5] and is based on a nonfact.[6] Both arguments rely on the same assertion: the MOU applies only to augmentation that results from custodial employees attending mandatory training, and does not prevent the Agency from using augmentation in other circumstances.[7] According to the Agency, the Arbitrator's application of the MOU beyond those limited circumstances conflicts with Article 18 of the CBA.[8]

Article 18 provides a detailed explanation of the hours of work, assignment to shifts, sick and annual

[1] Award at 69.
[2] 654 F.3d 91 (D.C. Cir. 2011).
[3] Exceptions, Attach. D. We note that the MOU was later amended in 2017, but none of the amendments affects the issues here.
[4] Award at 68.
[5] Exceptions Br. at 9-19.
[6] *Id.* at 20-22.
[7] *Id.* at 13, 21.
[8] *Id.* at 16-17.

rosters, and overtime.[9] Although the Arbitrator quoted part of Article 18 in the award's "Relevant Contract and MOU Provisions" section[10] and noted the Agency's Article 18 argument in the award's "Management's Position" section,[11] the Arbitrator did not interpret Article 18. Thus, the Arbitrator did not analyze the Agency's argument that only Article 18, and not the MOU, governed the temporary reassignments at issue in the grievance. Similarly, the Arbitrator never addressed whether Article 18 permits the Agency to temporarily reassign employees when it is short-staffed for reasons other than mandatory training.

Where an arbitrator fails to discuss critical contract language, which language might reasonably require a result opposite to the arbitrator's award, the award cannot be considered to draw its essence from the parties' agreement.[12] In those cases of "critical ambiguity," the Authority follows private-sector practice and remands the award for the arbitrator to address the contract provision in dispute.[13] Remand permits the arbitrator, who is the parties' choice to interpret and apply their collective-bargaining agreement, to interpret in the first instance the provision that may be dispositive of the matter.[14]

Here, Article 18 could reasonably require a result opposite to the Arbitrator's award. For example, Article 18, Section o authorizes the Agency to change "[w]ork assignments on the same shift . . . without advance notice,"[15] which arguably could permit some of the augmentation at issue here. Similarly, Article 18, Section g discusses the use of the "sick and annual roster" and "sick and annual relief"[16] to fill vacancies, which arguably conflicts with the Arbitrator's finding that augmentation "is an option only where staffing vacated posts is necessary due to training demands."[17]

Because the Arbitrator did not address Article 18, there is a critical ambiguity in the award that does not permit us to resolve the Agency's essence exception. Accordingly, a remand is appropriate to permit the Arbitrator to interpret Article 18 in the first instance.

Contrary to the dissent, we do not believe that a remand would be "futile."[18] That belief is premised on the view that, on remand, the Arbitrator could not interpret Article 18 in any way other than the way in which the dissent interprets it. However, the dissent, and the Authority precedent on which the dissent relies, misread the D.C. Circuit's decision in *BOP*. In *BOP*, the issue was whether the Federal Bureau of Prisons lacked a statutory duty to bargain over a particular staffing matter because that matter was already "covered by" Article 18.[19] In finding no statutory duty to bargain, the D.C. Circuit stated:

> Because the parties reached an agreement about how and when management would exercise its right to assign work, the implementation of those procedures, and the resulting impact, do not give rise to a further *duty to bargain*. Article 18 *therefore* covers and preempts challenges to all specific outcomes of the assignment process.[20]

In other words, the Agency has no statutory duty to *bargain* over assignments that fall within the scope of Article 18, and the Union may not successfully allege that the Agency violated the Statute by failing to *bargain* over such assignments.

However, the case before us does not involve an alleged statutory failure to bargain; it involves a purely contractual issue, i.e., whether the Agency complied with the terms of the parties' agreements. In *BOP*, the D.C. Circuit did not determine the *meaning* of, or foreclose challenges to how the Agency *applies*, Article 18. In fact, doing so in the course of applying the "covered by" doctrine would have been inconsistent with the D.C. Circuit's own repeated holding that the "covered by" doctrine is an exercise in contract "construction," not contract "interpretation."[21] Authority decisions that have relied on *BOP* to set aside arbitration awards on essence

[9] Exceptions, Attach. B, CBA (CBA) at 41-47.
[10] Award at 13; *see id.* at 7-8.
[11] *Id.* at 56; *see id.* at 60, 62-63.
[12] *See, e.g.*, *AFGE, Council 220*, 54 FLRA 156, 160 (1998) (*Council 220*) (citing *Cannelton Indus., Inc. v. Dist. 17, United Mine Workers of Am.*, 951 F.2d 591, 594 (4th Cir. 1991)).
[13] *Id.* (citing *Young Radiator Co. v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 734 F.2d 321, 326 (7th Cir. 1984)).
[14] *Id.*
[15] CBA at 46.
[16] *Id.* at 44-45.
[17] Award at 68.
[18] Dissent at 11 (quoting *SSA*, 73 FLRA 370, 374 (2022) (Dissenting Opinion of Member Kiko)).
[19] 654 F.3d at 92 (internal quotation marks omitted).
[20] *Id.* at 96 (emphasis added).
[21] *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla. v. FLRA*, 875 F.3d 667, 674 (D.C. Cir. 2017) (quoting *NTEU v. FLRA*, 452 F.3d 793, 797 (D.C. Cir. 2006)) (internal quotation marks omitted); *see also NTEU*, 452 F.3d at 796-97 ("[W]e agree with the Authority that the [u]nion has mistaken the arbitrator's application of the 'covered by' doctrine for an 'interpretation' of the national agreement.").

grounds are therefore based on a misreading of *BOP*.[22] Consequently, we overturn those Authority decisions to the extent they are inconsistent with the above principles.

Further, interpreting for ourselves what Article 18 means in the context of reviewing the Arbitrator's award would be inconsistent with the D.C. Circuit's admonitions that,

> as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the Authority may not reverse the arbitrator's award even if it is "convinced he committed serious error." Here, the Authority's sole inquiry under the proper standard of review . . . [is] whether the [a]rbitrator was "even arguably construing or applying the [CBA]." *Whether the [a]rbitrator correctly interpreted the CBA [is] beyond the scope of the Authority's review*.[23]

As such, it is wholly appropriate for us to leave it to the Arbitrator – whom the parties mutually chose to resolve their dispute[24] – to interpret Article 18 in the first instance.

Additionally, we do not agree with the dissent's characterization of the well-established, private-sector doctrine of "critical ambiguity" as being "nebulous."[25] As an initial matter, we note that even the dissent has previously agreed to apply these principles.[26] Further, as the Authority has stated in response to claims similar to the dissent's, "the conditions for applying the [critical-ambiguity doctrine] are clear."[27] It applies only where: (1) a party properly raises, and makes arguments about, a particular CBA provision to the arbitrator;[28] (2) the arbitrator does not address the parties' arguments about, or otherwise interpret, the CBA provision in the award; and (3) the award appears to conflict with the provision.[29] Given these limitations, it is unsurprising that we can count on one hand the number of previous Authority decisions that have found it necessary to remand based on the doctrine.[30]

For the above reasons, we remand the award to the parties for resubmission to the Arbitrator, absent settlement, to have the Arbitrator clarify Article 18's applicability and whether, in light of the clarification, the Agency's augmentations violated the CBA or MOU. As we are remanding, and the Agency's nonfact exception relies on the same assertions made in its essence exception, we find it premature to address the nonfact exception at this time.[31]

IV. Decision

We remand the award to the parties for resubmission to the Arbitrator, absent settlement, for further findings.

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[22] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Aliceville, Ala.*, 71 FLRA 716, 717-18 (2020) (Member DuBester dissenting) (setting aside award on essence grounds); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Mia., Fla.*, 71 FLRA 660, 661-64 (2020) (Member DuBester dissenting) (same); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Phx., Ariz.*, 70 FLRA 1028, 1029-30 (2018) (Member DuBester dissenting) (same); *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Florence, Colo.*, 70 FLRA 748, 749 (2018) (Member DuBester dissenting) (same).

[23] *Nat'l Weather Serv. Emps. Org. v. FLRA*, 966 F.3d 875, 881 (D.C. Cir. 2020) (*NWSEO*) (citations omitted) (quoting *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987)) (internal quotation marks omitted); *see also U.S. DOD, Educ. Activity, Alexandria, Va.*, 73 FLRA 398, 402 (2022) (Member Kiko dissenting) (holding that the Authority will no longer follow Authority decisions applying the essence tests "in a way that do not comport with *NWSEO*").

[24] *See Council 220*, 54 FLRA at 159 ("The Authority and the courts[] defer to arbitrators in this context 'because it is the arbitrator's construction of the agreement for which the parties have bargained.'") (quoting *U.S. DOL (OSHA)*, 34 FLRA 573, 576 (1990)).

[25] Dissent at 10.

[26] *U.S. DHS, U.S. Citizenship & Immigr. Servs.*, 73 FLRA 354, 355 (2022) (*CIS*) (remanding where "the [a]rbitrator failed to address contractual language . . . that could reasonably result in a determination that the [a]rbitrator lacked the authority to issue" the award at issue).

[27] *U.S. DHS, U.S. CBP, El Paso, Tex.*, 69 FLRA 261, 266 (2016) (*El Paso*) (Member Pizzella concurring in part and dissenting in part).

[28] *Cf. U.S. Dep't of VA, Veterans Health Admin.*, 73 FLRA 855, 856 (2024) (dismissing essence arguments that relied on contract provisions the excepting party could have raised, but did not raise, to arbitrator).

[29] *Cf. MCI Constructors, LLC v. City of Greensboro*, 610 F.3d 849, 861 (4th Cir. 2010) (finding arbitration panel was not required to discuss certain contract articles because those articles "d[id] not require an opposite result from that reached by the arbitration panel").

[30] *CIS*, 73 FLRA at 354-55; *El Paso*, 69 FLRA at 266-67; *SSA, Bos. Region 1*, 59 FLRA 671, 672 (2004) (Member Pope dissenting as to application); *Council 220*, 54 FLRA at 159-60.

[31] *See, e.g.*, *U.S. Dep't of HHS*, 72 FLRA 522, 525 n.28 (2021) (Chairman DuBester concurring) (finding it unnecessary to address the remaining exceptions after remanding an award for further arbitral proceedings); *U.S. DHS, U.S. Citizenship & Immigr. Servs.*, 68 FLRA 272, 275 (2015) (remanding award and finding it premature to resolve a remaining exception).

Member Kiko, dissenting:

In what has become a familiar occurrence, the Agency asks the Authority to vacate an award that limits the Agency's discretion to temporarily reassign employees from non-custodial to custodial positions (augmentation).[32] Both the Authority and U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) have held that the Agency possesses broad augmentation discretion under Article 18 of the parties' master-collective-bargaining agreement (Article 18).[33] Nonetheless, the Arbitrator issued an award that flatly contradicts this precedent and Article 18's plain wording.

The Agency suspended most training during the COVID-19 pandemic to protect the safety of inmates and staff during an unprecedented global health crisis.[34] During this time period, the Agency utilized augmentation for various reasons – none of which included training.[35] However, in resolving the parties' dispute, the Arbitrator inexplicably focused on a memorandum of understanding (MOU) the parties negotiated specifically to govern training-related augmentation.[36] Rather than resolve this dispute on the clear record before us, the majority remands, merely delaying the inevitable conclusion that the Agency's augmentation decisions did not violate applicable authority. Because there is no justifiable basis for a remand, I would consider the Agency's essence exception on the merits, grant the exception, and set aside the award, in part.[37]

As relevant here, Article 18 permits the Agency to "make shift changes . . . for employees assigned to the sick and annual leave roster," and change "[w]ork assignments on the same shift . . . without advance notice."[38] In *Federal BOP v. FLRA* (*BOP*),[39] the D.C. Circuit explained that Article 18 constitutes "an agreement about how and when management would exercise its right to assign work," which necessarily covers "decisions about substance."[40] Elaborating on Article 18's scope and meaning in *U.S. DOJ, Federal BOP, Federal Correctional Complex, Coleman, Florida v. FLRA*, the D.C. Circuit found that Article 18 "covers and preempts challenges to all specific outcomes of the assignment process," and, thus, is "the last word on the subject it addresses."[41] Relying on these decisions, the Authority has held that the Agency may exercise its Article 18 authority without triggering a duty to bargain, and has set aside arbitration awards holding to the contrary.[42]

On this point, the majority contends that previous Authority decisions erroneously relied on *BOP* because "the D.C. Circuit did not determine the *meaning* of . . . Article 18."[43] Yet the D.C. Circuit was surely interpreting Article 18 when it determined the article "reflects the parties' earlier bargaining over the impact and implementation of [management's] statutory right to assign work" and "represent[s] the agreement of the parties about the procedures by which a warden formulates a roster, assigns officers to posts, and designates officers for the relief shift."[44] In this regard, the D.C. Circuit found that the *BOP* grievance was, "at bottom[,] a complaint about the discretion Article 18 itself afford[ed]" the Agency "to adopt the very rosters about which the Union had grieved."[45] Observing that the parties negotiated Article 18 during "a period of better funding and more liberal hiring," the D.C. Circuit refused to permit the Union, the arbitrator, or the Authority to "disregard[]" Article 18's terms just because the Union had become

[32] The Authority has been resolving disputes concerning the Agency's augmentation practices for years. *E.g.*, *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Aliceville, Ala.*, 71 FLRA 716 (2020) (*FCI Aliceville*) (Member DuBester dissenting); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Mia., Fla.*, 71 FLRA 660 (2020) (*FCI Miami*) (Member Abbott concurring; Member DuBester dissenting); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Phx., Ariz.*, 70 FLRA 1028 (2018) (*FCI Phoenix*) (Member DuBester dissenting); *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Florence, Colo.*, 70 FLRA 748 (2018) (*FCC Florence*) (Member DuBester dissenting); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Fed. Satellite Low, La Tuna, Tex.*, 59 FLRA 374 (2003) (Member Pope concurring); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Lompoc, Cal.*, 58 FLRA 301 (2003) (Chairman Cabaniss concurring; Member Pope dissenting).

[33] *See U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla. v. FLRA*, 875 F.3d 667, 676 (D.C. Cir. 2017) (*FCC Coleman*) (finding that Authority erred in concluding that Article 18's "procedures for assigning work do[] not cover all assignments devised in compliance with those procedures"); *FCI Phoenix*, 70 FLRA at 1030 (setting aside award where arbitrator's findings inconsistent with "Article 18's broad assignment discretion").

[34] Award at 23; *see also id.* at 68 (finding that "[t]raining [was] suspended throughout the pandemic").

[35] *Id.* at 27.

[36] Exceptions, Attach. D, 2015 Augmentation MOU.

[37] I would not set aside any part of the award that the Agency did not challenge in its exceptions. *See* note 34 below.

[38] Exceptions, Attach. B, Collective-Bargaining Agreement at 46.

[39] 654 F.3d 91 (D.C. Cir. 2011).

[40] *Id.* at 96.

[41] 875 F.3d at 676; *see also FCI Aliceville*, 71 FLRA at 718 (vacating arbitrator's past-practice findings because Article 18's "clear and unambiguous language" covered agency's augmentations).

[42] *See FCI Miami*, 71 FLRA at 662 (granting essence exception where arbitrator erroneously found that past practice required agency to provide opportunity to bargain before augmenting under Article 18); *FCC Florence*, 70 FLRA at 749 (finding that agency did not trigger contractual duty to bargain by exercising Article 18 augmentation authority more frequently).

[43] Majority at 4.

[44] *BOP*, 654 F.3d at 95; *see also id.* at 96 (relying on witness testimony regarding Article 18's bargaining history to find that Article 18 is "an agreement about how and when management w[ill] exercise its right to assign work").

[45] *Id.* at 97.

dissatisfied with the manner in which management chose to exercise its contractually-authorized discretion in leaner times.[46] The majority's core disagreement with the cited Authority decisions is that they "set aside arbitration awards [involving Article 18] on essence grounds."[47] But, in those decisions, the Authority was heeding *BOP*'s instruction not to "endorse[] . . . incoherent arbitral award[s]" or permit arbitrators to "disregard[]" Article 18.[48] In the instant case, the Arbitrator's failure or refusal to give effect to Article 18's plain wording cannot be considered, even under the majority's preferred standard, an "arguabl[e] constru[ction] or appl[ication of] the contract."[49]

Whether or not the Arbitrator was aware of the D.C. Circuit and Authority decisions discussed above, the Arbitrator should have understood that the MOU, *per its title and plain wording*, applied only if the Agency augmented to accommodate "mandatory training."[50] It is undisputed that the Agency did not implement any of the augmentations at issue in the grievance due to training.[51] Nevertheless, the Arbitrator found that the MOU covering "[p]rocedures for [a]ugmentation [d]uring [m]andatory [t]raining"[52] barred the Agency from augmenting employees on any ground other than mandatory training, without amending the MOU.[53] Indeed, the majority admits that Article 18, Sections o and g "could reasonably require a result opposite to the Arbitrator's award."[54] With less generous use of qualifying terms, the majority's analysis would unequivocally reflect that the award fails to draw its essence from the master agreement.[55] But instead of resolving the Agency's essence exception on the merits, the majority invokes the rarely-cited, and roundly criticized,[56] "critical ambiguity" theory to remand the award for further arbitration.[57]

Characterizing the Arbitrator's failure to adequately analyze Article 18 as a "critical ambiguity," the majority insists that the Arbitrator be allowed to "clarify Article 18's applicability" for purposes of determining whether "the Agency's augmentations violated the CBA or MOU."[58] Contrary to the majority's assertion, there is nothing ambiguous about the Arbitrator's overt, and flawed, conclusion that the MOU governed the grievance's disposition. After citing relevant Article 18 sections and summarizing the Agency's Article 18 arguments in the award,[59] the Arbitrator went on to find that the Agency could not augment "absent a bona fide emergency" or "ongoing training" unless the parties "agreed upon [further] amendments to the MOU."[60] Although the majority treats the Arbitrator's "fail[ure] to discuss critical contract language"[61] as an inadvertent or mistaken omission, the reason for the Arbitrator's failure is obvious: the Arbitrator declined to apply Article 18, finding instead that the MOU exclusively controlled whether the Agency's augmentation was proper.[62] By "consider[ing] the award . . . as a whole" and "interpret[ing] the language of the award in context,"[63] it is clear to me that the Arbitrator has already "interpret[ed]

[46] *Id.*; *see also id.* (finding the Authority "endorsed an incoherent arbitral award and embraced an unreasonably narrow view of" Article 18).
[47] Majority at 4.
[48] *BOP*, 654 F.3d at 97; *see also id.* ("The Authority abused its discretion by approving an award so patently at odds with itself.").
[49] Majority at 4-5 (quoting *Nat'l Weather Serv. Emps. Org. v. FLRA*, 966 F.3d 875, 881 (D.C. Cir. 2020) (*NWSEO*)).
[50] MOU at 1; *see also* Exceptions Br. at 13-14 (arguing "the MOU is intended to only cover situations when the Agency makes the decision to augment bargaining unit positions *during* mandatory training," as reflected by MOU's title "Procedures for Augmentation During Mandatory Training").
[51] *See* Exceptions, Attach. C, Grievance at 2 (alleging that the Agency "has been reassigning [and] augmenting staff by citing 'other circumstances' as the reason"), *id.* (asserting that the Agency wrongfully used augmentation "as a means to reduce or eliminate . . . overtime"); Award at 57-62 (summarizing Agency's position that augmentation was necessary "due to the [n]ational [e]mergency related to COVID-19").
[52] MOU at 1.
[53] Award at 68-69.
[54] Majority at 3.
[55] *See id.* (observing that Article 18 "*arguably* conflicts" with the award and "*arguably could* permit . . . the augmentation at issue" (emphasis added)).
[56] *See U.S. DHS, U.S. CBP, El Paso, Tex.*, 70 FLRA 623, 625 (2018) (Member Abbott concurring; Member DuBester dissenting) (Concurring Opinion of Member Abbott) (disagreeing with critical-ambiguity theory's premise that "any purported ambiguity in an arbitrator's award which can be called 'critical' may form the basis of a remand"); *U.S. DHS, U.S. CBP, El Paso, Tex.*, 69 FLRA 261, 270 (Separate Opinion of Member Pizzella) (rejecting critical-ambiguity theory as a mechanism that "permits the Authority to do whatever it wants to do with an award with which it does not agree"); *SSA, Bos. Region 1*, 59 FLRA 671, 673-74 (2004) (Dissenting Opinion of Member Pope) (dissenting from majority's "sham" reliance on a "manufacture[d]" critical ambiguity to avoid resolving exception on merits).
[57] Majority at 3.
[58] *Id.* at 5.
[59] *See* Award at 7-8 (citing Art. 18, §§ n, o, p), 60 (noting Agency's position that "management exercised its right to assign work as the parties agreed to in Article 18"), 61-62 (noting Agency's argument that "the local MOU only addresses augmentation during mandatory training," while "Article 18[,] Section o gives [m]anagement the right to change [w]ork [a]ssignments on the same shift without advance notice").
[60] *Id.* at 68; *see also id.* (concluding that under the MOU, "augmentation . . . is an option only where staffing vacated posts is necessary due to training demands").
[61] Majority at 3.
[62] Award at 68.
[63] *U.S. DHS, U.S. CBP*, 69 FLRA 1, 3 (2015).

Article 18 in the first instance."[64] Moreover, because the Arbitrator's interpretation fails to draw its essence from the master agreement, I would set aside any findings and remedies arising from that error,[65] including the Arbitrator's directive, "except in clearly defined emergency situations," to discontinue augmentation "outside of the existing [MOU] . . . until any additional proper negotiations have been conducted . . . and to make whole any staff damaged."[66]

While I agree that arbitrators should have the opportunity to address contract provisions that may determine a grievance's outcome, I cannot abide using the nebulous "critical ambiguity" theory when, as here, an arbitrator acknowledges dispositive and unambiguous contract language but simply refuses to apply it. Under these circumstances, the instant case is clearly distinguishable from *U.S. DHS, U.S. Citizenship and Immigration Services* (*CIS*).[67] Unlike the Arbitrator here, the arbitrator in *CIS* never addressed the relevant contract article in any way. Furthermore, *CIS* does not refer to the arbitration award containing a "critical ambiguity."[68]

Ultimately, the Arbitrator's conclusion that the Agency could augment only in accordance with the MOU draws its essence from the master agreement or it does not. To the extent the majority maintains that the Authority's essence review is cabined to "whether the [a]rbitrator was even arguably construing or applying" the contract,[69] I remind the majority that federal courts have repeatedly recognized that an arbitration award may be vacated when the arbitrator ignores the plain language of the contract.[70]

As I have stated previously, there is no justification for directing a remand when "[r]emanding is futile."[71] In this case, there are no findings the Arbitrator could reach on remand that would overcome the substantial precedent and unambiguous contractual wording supporting the Agency's exercise of its augmentation discretion.[72] Certainly, the Authority does not facilitate an "effective and efficient [g]overnment" by requiring the parties to spend additional time and money at arbitration when the outcome is a foregone conclusion.[73] Accordingly, I would find that the award fails to draw its essence from the master agreement and set aside the deficient findings and remedies identified herein.[74]

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[64] Majority at 5.

[65] The Arbitrator addressed separately the Union's claim that the Agency violated Article 28 of the master agreement by failing to protect employees from safety hazards. Award at 70 (finding that the Agency required employees "to work in specific areas designated as foot hazard areas without providing safety footwear"), 71 (directing the Agency "to provide [s]afety-toed footwear consistent with Article 28" to employees "assigned duties in any area classified as a foot hazard area"). As the Agency's exceptions do not challenge this aspect of the award, I would not address it. *See, e.g.*, *AFGE, Loc. 1164*, 54 FLRA 856, 856 n.1 (1998).

[66] Award at 71.

[67] 73 FLRA 354 (2022).

[68] Majority at 5.

[69] *Id.* at 4-5 (quoting *NWSEO*, 966 F.3d at 881).

[70] *See, e.g.*, *Monongahela Valley Hosp. Inc. v. United Steel, Paper & Forestry, Rubber, Mfg., Allied Indus. & Serv. Workers Int'l Union AFL-CIO CLC*, 946 F.3d 195, 199-200 (3d Cir. 2019) (vacating arbitrator's award because arbitrator ignored contract's plain language when interpreting contract terms that were "simply not susceptible to more than one reasonable interpretation" (quoting *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Skinner Engine Co.*, 188 F.3d 130, 146 (3d Cir. 1999))); *Mountaineer Gas Co. v. Oil, Chem. & Atomic Workers Int'l Union*, 76 F.3d 606, 610 (4th Cir. 1996) (where arbitrator "ignored the unambiguous language" of employer's drug policy to modify penalty, arbitrator "created an award that failed to draw its essence from the CBA"); *Int'l Bhd. of Elec. Workers, Loc. 429 v. Toshiba Am., Inc.*, 879 F.2d 208, 210-11 (6th Cir. 1989) (where contract did not permit arbitrator to review disciplinary penalty, court affirmed vacatur of arbitrator's award because arbitrator's reinstatement remedy demonstrated a "total disregard of the [contract's] plain language").

[71] *SSA*, 73 FLRA 370, 374 (2022) (Dissenting Opinion of Member Kiko).

[72] *See FCC Coleman*, 875 F.3d at 676 (holding that Article 18 "covers and preempts challenges to all specific outcomes of the assignment process" and "is the last word on the subject it addresses"); *BOP*, 654 F.3d at 95 (finding that Article 18 "represent[s] the agreement of the parties about the procedures by which a warden formulates a roster, assigns officers to posts, and designates officers for the relief shift"); *FCI Phoenix*, 70 FLRA at 1029-30 (affirming, "in accord with the D.C. Circuit," the Agency's "broad assignment discretion" under Article 18).

[73] 5 U.S.C. § 7101(b); *see U.S. Dep't of the Army, Army Materiel Command, Army Sec. Assistance Command, Redstone Arsenal, Ala.*, 73 FLRA 356, 366-67 (2022) (Dissenting Opinion of Member Kiko) (disagreeing with "majority['s] refus[al] to" consider party's exception on the merits "where doing so would improve government operations and preserve government resources").

[74] Because the Agency's nonfact exception challenges the same findings and remedies that I would set aside on essence grounds, I would not address that exception. Exceptions Br. at 20-22; *see U.S. Dep't of the Army, U.S. Army Dental Activity, Fort Jackson, S.C.*, 72 FLRA 672, 674 n.37 (2022) (Chairman DuBester dissenting on other grounds) (finding it unnecessary to address remaining exceptions after setting aside award on essence grounds).