FOREIGN SERVICE LABOR RELATIONS BOARD
WASHINGTON, D.C.

UNITED STATES DEPARTMENT OF COMMERCE
U.S. FOREIGN AND COMMERCIAL SERVICE
(Agency)

and

AMERICAN FOREIGN SERVICE ASSOCIATION
(Union)

FS-AR-0009

DECISION

July 10, 2024

Before the Board: Susan Tsui Grundmann, Chairperson, and
Dennis K. Hays and Thomas J. Miller, Members
(Member Hays concurring)

I. Statement of the Case

The Foreign Service Grievance Board (Grievance Board) issued a decision finding the Agency violated the parties' collective-bargaining agreement (the CBA) and a December 2021 memorandum of understanding (the 2021 MOU) by unilaterally changing how it filled certain foreign-service positions. The Agency filed exceptions, alleging that the decision (1) fails to draw its essence from the CBA and the 2021 MOU, and (2) is based on nonfacts. The Agency also requests a stay of the Grievance Board's decision (the stay request). For the reasons discussed below, we deny the exceptions and the stay request.

II. Background and Grievance Board's Decision

In December 1996, the parties executed the CBA, which is currently renewed on an annual basis. The CBA provides a window period to request negotiations, which now occurs annually between September 19 and November 3. In addition, the CBA states that supplemental agreements "shall remain in effect concurrent with [the CBA], unless

otherwise specified."[1] In 2018, the parties agreed to an assignment policy (2018 Assignment Policy) which, as relevant here, covers "all [f]oreign[-s]ervice employees of the [d]epartment."[2] In December 2021, the parties agreed to an MOU, amending the assignment policy for filling foreign-service positions.

In September 2022, the Agency excluded, as relevant here, three positions from the bargaining unit: (1) Deputy Assistant Secretary (DAS), (2) Deputy Director General (DDG), and (3) Executive Director (ED). On November 29, 2022, the Agency notified the Union that it planned to change the procedures for filling senior foreign-service positions. The Union objected, stating the 2018 Assignment Policy – as amended by the 2021 MOU (the amended 2018 Assignment Policy) – governed how those positions should be filled. The Agency responded, stating the DAS, DDG, and ED positions were no longer within the bargaining unit, and therefore, the parties' agreements did not govern the assignment procedures for those positions. The Agency subsequently implemented the new procedures with respect to the DAS, DDG, and ED positions and, applying those procedures, made assignments to the DDG and DAS Middle East and Africa positions.

The Union filed, with the Agency, an implementation dispute alleging the Agency violated the amended 2018 Assignment Policy by changing the procedures used to fill foreign-service positions, and by using the new procedures to fill the DDG and DAS Middle East and Africa positions. The Agency denied the implementation dispute, and the Union appealed to the Grievance Board.

The Grievance Board found the amended 2018 Assignment Policy did not distinguish between bargaining-unit and non-bargaining-unit employees, because the Policy's plain, unambiguous language provides that it applies to "all [f]oreign[-s]ervice [o]fficers."[3] The Grievance Board rejected the Agency's argument that the Agency is allowed to unilaterally change the procedures for filling non-bargaining-unit positions. Specifically, the Grievance Board found that: (1) establishing procedures to fill non-bargaining-unit positions is a permissive subject of bargaining under the Foreign Service Act;[4] and (2) once an agency signs an agreement concerning a permissive subject of bargaining, "it is bound by what it negotiated, and a failure to adhere can be enforced through the implementation[-]dispute process."[5] Based on these findings, the Grievance Board concluded that the parties negotiated a uniform procedure – the amended 2018 Assignment Policy – to fill *all* foreign-service positions.

The Grievance Board further found the amended 2018 Assignment Policy controlled because the Agency did not notify the union – during the CBA's prescribed window period of September 19 to November 3 – that it intended to change its selection

[1] Decision at 24-25 (quoting Article 15, Section 3 of the CBA).
[2] Exceptions, Ex. 2, Attach. 8 (2018 Assignment Policy) at 3.
[3] Decision at 31.
[4] 22 U.S.C. § 4105(b).
[5] Decision at 33 (quoting Am. Foreign Serv. Ass'n, FSGB No. 2000-27, at 29 (Aug. 18, 2000)) (internal quotation mark omitted).

or assignment policies. As such, the Grievance Board found the Agency was required to adhere to those negotiated policies "unless or until its provisions are amended through collective bargaining."[6] The Grievance Board concluded that the Agency violated the CBA and the 2021 MOU by unilaterally changing the assignment procedures for the DDG, DAS, and ED positions.

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

III. Analysis and Conclusions

Under 22 U.S.C. § 4107, decisions of the Foreign Service Labor Relations Board (the Board) "shall be consistent with decisions rendered by" the Federal Labor Relations Authority (the Authority), unless "the Board finds that special circumstances require otherwise."[7] In other words, "Congress has directed the . . . Board . . . to follow . . . Authority . . . precedent, except when the [Board] finds special circumstances that require otherwise."[8] Because no special circumstances are asserted or apparent in this case, the following analysis applies Authority precedent where there is no relevant Board precedent.[9]

A. The decision does not fail to draw its essence from the agreement.

The Agency argues the Grievance Board's "interpretation that the CBA and the 2021 MOU both cover non-bargaining[-]unit positions is implausible [because] the record is devoid of any showing of a mutual understanding between the [p]arties of such coverage."[10]

To demonstrate that a decision fails to draw its essence from an agreement, an excepting party must establish that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement.[11] Mere disagreement with an arbitrator's interpretation and application of an agreement does not provide a basis for finding an award deficient.[12]

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[6] *Id.* at 35.
[7] 22 U.S.C. § 4107(b).
[8] *USDA, Farm. Serv. Agency, Foreign Agric. Serv.*, FS-AR-0004 (1998) at 6 (*Agriculture*) (citing 22 U.S.C. § 4107(b), (c)(2)(F)).
[9] *U.S. Dep't of State*, FS-AR-0006 at 7 (2016) (*State*).
[10] Exceptions Br. at 9.
[11] *State*, FS-AR-0006 at 7; *see also U.S. DOD Educ. Activity, Alexandria, Va.*, 73 FLRA 398, 402 (2022) (Member Kiko dissenting) (clarifying that the Authority will apply the essence test in a manner that is consistent with the U.S. Court of Appeals for the D.C. Circuit's admonition that "the relevant question . . . is not whether the arbitrator erred – or even seriously erred – in interpreting the contract[,]" but "whether the arbitrator was 'even arguably construing or applying the contract'").
[12] *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 73 FLRA 498, 502 (2023).

As discussed above, the Grievance Board found the amended 2018 Assignment Policy's plain language "expressly states it applies to all [f]oreign[-s]ervice employees."[13] According to the Grievance Board, this unambiguous language means that the amended 2018 Assignment Policy applies to both bargaining-unit and non-bargaining-unit employees.[14] The Grievance Board also found that, by agreeing to the 2021 MOU, the Agency elected to bargain over permissive subjects – the assignment process for non-bargaining-unit employees – and is now required to abide by such agreement.[15] The Agency argues for its preferred interpretation of the agreements, but does not demonstrate that the Grievance Board's interpretation is irrational, unfounded, implausible, or a manifest disregard of the agreements.[16] Accordingly, we deny the essence exception.

B. The decision is not based on nonfacts.

The Agency argues the decision is based on nonfacts because (1) the CBA and the 2021 MOU apply only to selections for bargaining-unit positions,[17] and (2) the Agency never agreed to engage in permissive bargaining concerning non-bargaining-unit positions.[18] To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[19] However, an arbitrator's interpretation of a collective-bargaining agreement does not constitute a fact that can be challenged as a nonfact.[20]

Both of the Agency's arguments challenge the Grievance Board's determination that the amended 2018 Assignment Policy applies to both bargaining-unit and non-bargaining-unit positions. Because these arguments amount to challenging the Grievance Board's contractual interpretation, they do not provide a basis for finding the decision is based on nonfacts.[21] Accordingly, we deny the nonfact exceptions.

C. We deny the Agency's stay request.

The Agency argues that the Board should stay the Grievance Board's decision because there is a related, pending case – a petition for clarification of the bargaining unit with the Washington Regional Office (WRO) – that must be resolved before the Board can resolve the instant dispute.[22] However, exceptions to Grievance Board decisions, by their very nature, concern *those* decisions. As such, we focus on the Grievance Board's

[13] Decision at 29 (internal quotation mark omitted).
[14] *Id.* at 31.
[15] *Id.* at 33-34.
[16] *AFGE, Loc. 2369*, 73 FLRA 772, 773 (2023) (denying essence exception that failed to demonstrate award was irrational, unfounded, implausible, or in manifest disregard of the agreement).
[17] Exceptions Br. at 11-12.
[18] *Id.* at 12-14.
[19] *Agriculture*, FS-AR-0004 at 8.
[20] *State*, FS-AR-0006 at 9.
[21] *Id.* at 9-10 (denying nonfact exception because it challenged a contractual interpretation).
[22] Exceptions Br. at 14-15.

decision, and see no basis to stay it if the representation proceeding has no bearing on it.[23] Here, the Grievance Board's decision found the amended 2018 Assignment Policy applies to bargaining-unit *and* non-bargaining unit employees – and, for the reasons discussed above, the Agency has not shown that finding is deficient. Therefore, the unit status of the positions at issue, and the outcome of the pending WRO case, have no bearing on the instant dispute – and, thus, provide no basis for staying the Grievance Board's decision.

The Agency also argues the Board should stay the Grievance Board's decision until the Board resolves its exceptions.[24] Where a party has requested stay of an arbitration award until the Authority resolved the party's arguments, the Authority has found an Authority decision resolving the parties' arguments renders the stay request moot.[25] Consistent with this principle, we find this aspect of the stay request is moot.[26]

For these reasons, we deny the stay request.

IV. Decision

We deny the Agency's exceptions and the stay request.

[23] *Cf. U.S. Dep't of the Army, U.S. Army Corps of Eng'rs, Nw. Div.*, 69 FLRA 226, 228 (2016) (Member Pizzella dissenting) (denying exception to arbitration award where "[i]t was not necessary for the [a]rbitrator to, and she did not, determine the bargaining-unit status of any position").
[24] Exceptions Br. at 14-15.
[25] *U.S. DHS, U.S. CBP*, 68 FLRA 807, 809 (2015).
[26] *SSA*, 71 FLRA 652, 653 (2020) (finding party failed to demonstrate stay of Federal Service Impasses Panel's (Panel's) exercise of jurisdiction was appropriate, where "no case *related* to the parties' dispute before the Panel was pending . . . in any judicial forum.") (emphasis added)).

Member Hays, concurring:

I concur in the Board's decision to deny the Agency's exceptions and the stay request. I add the following to express my concern over how this dispute unfolded, in the hope that the parties can avoid such gridlock in the future.

The Agency, in their submission, notes on several occasions that "the record is devoid of any showing of a mutual understanding between the [p]arties."[1] This was clearly the case, and both the Agency and the Union could have put greater effort into overcoming that obvious problem. This lack of mutual understanding is somewhat surprising because the Agency and the Union had proven they were capable of working well together – as evidenced by the earlier negotiations over the Agency's request to remove several senior officials from the bargaining unit.[2] In that instance, the two parties presented their concerns and positions and, after negotiation, a mutually acceptable outcome was reached. Had that process been followed in this instance, the need for higher review might have been avoided.

Primary responsibility for this lack of understanding, however, rests with the Agency. As the proponent of a change to long-standing practice, the Agency should have anticipated the Union might have concerns about how the new process would be implemented. Thus, the Agency should have been prepared to offer their justification for the proposed action. Instead, it appears they started from the position that they had no obligation to negotiate with the Union, and they stayed with this long after it should have been clear this was not the case. Next, the Agency proposed an artificial deadline for an agreement outside the normal window for negotiations that had been in effect for decades.[3] Again, no credible justification was given for an exception to standard practice. The Agency then repeatedly insisted the Union provide "counterproposals," seemingly as a precondition to negotiations.[4] This despite several back-and-forth exchanges between the parties that identified their respective concerns, but which, granted, did little to resolve any of their differences. The Agency's most damaging action, however, was their failure to hold meetings with the Union to discuss all of the above and perhaps find some common ground.[5]

Months into this, no "mutual understanding" had been developed and frustration was building on both sides. The January 13, 2023 email from Director General Venkatarama stating that "management agrees that the dispute falls within the scope of [p]ermissive [b]argaining" and that the parties "will be able to find common ground to

[1] Exceptions Br. at 9, 11-12; *see also id.* at 10 (asserting "the record is devoid of any information to show that the parties had a mutual understanding of whether certain positions were outside of the bargaining unit"), 12 (asserting "there is nothing in the record to show that the parties ever shared a mutual understanding that the revised 2021 Assignments Policy addressed non-bargaining[-]unit positions").
[2] *See* Decision at 7-8 (providing an overview of the negotiations on the removal of certain positions from the bargaining unit).
[3] *Id.* at 11 & n.3.
[4] *Id.* at 11-12.
[5] *See* Exceptions, Ex. 2, Ex. A at 1.

move forward with the important selection process"[6] – along with the Union's position that negotiated changes were possible, but "unilateral[]" ones were not[7] – should have provided a starting point for both sides. It didn't. Instead, the Agency cancelled – without explanation – two scheduled meetings between the Director General and the Union president and vice president.[8] These slights presumably contributed to the Union's decision to file its implementation dispute.

For its part, the Union might have accepted a preliminary meeting with the theatrically titled Director of Global Talent Management to more formally put its positions and concerns into the official record. Such a meeting might have led to a follow-on meeting with the Director General and an opportunity to determine if the most senior management of the Foreign Commercial Service was fully aware of the history and implications of this dispute.

This case developed due to a lack of understanding between the parties. And this lack was directly due to a breakdown in the collective-bargaining process. The parties were prepared to exchange letters and emails, but were unable to figure out how to have the face-to-face encounters that might have led to a mutually acceptable agreement. With a small amount of mutual effort, this can be avoided in the future.

As an aside, while it is certainly permissible to believe strongly in your position, it is less helpful to denigrate the judgment and integrity of a distinguished review body, such as the Foreign Service Grievance Board, because they do not agree with you. Likewise, presumptively instructing a higher authority, such as the Foreign Service Labor Relations Board, as to what actions they should take is also often counterproductive.

[6] *Id.*, Attach. 5 at 1.
[7] *Id.*, Attach. 4 at 2.
[8] Decision at 11.