

**FOREIGN SERVICE LABOR RELATIONS BOARD  
WASHINGTON, D.C.**

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**UNITED STATES DEPARTMENT OF STATE  
(Agency)**

**and**

**AMERICAN FOREIGN SERVICE ASSOCIATION  
(Union)**

**FS-AR-0007**

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**DECISION**

**September 21, 2018**

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**Before the Board: Colleen Duffy Kiko, Chairperson, and  
Stephen R. Ledford and Herman J. Cohen, Members  
(Member Cohen dissenting)**

**I. Statement of the Case**

The Foreign Service Grievance Board (the Grievance Board) found that the parties' 2014 agreement (the agreement) required the Agency to pay an award called a "[m]eritorious [s]ervice [i]ncrease[]" (MSI)<sup>1</sup> to exactly 10% of the top-ranking MSI-eligible employees. The Grievance Board found that the Agency violated the agreement when it failed to do so. The agreement states, in relevant part: "No more than [10%] of members in a competition group shall receive MSIs."<sup>2</sup> The primary question before us is whether the Grievance Board's decision fails to draw its essence from the agreement. Because the Grievance Board's decision conflicts with the agreement's plain wording, the answer is yes.

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<sup>1</sup> *U.S. Dep't of State*, FS-AR-0007 (2016) at 1 (*State*) (quoting the Foreign Service Grievance Board's 2016 Decision at 3 (First Decision)).

<sup>2</sup> *Id.* at 4 (quoting the agreement).

## II. Background and Decisions

The background of this case is set forth in detail in *U.S. Department of State (State)*,<sup>3</sup> and summarized here.

Each year, the parties negotiate procedures for identifying employees whose work performance makes them eligible for an MSI.<sup>4</sup> Under those procedures, employees would be ranked based on their performance, and the Agency typically would award MSIs to the top-ranking employees, up to a set percentage of employees in each “competitive class.”<sup>5</sup> As mentioned previously, the agreement states that “[n]o more than [10%] of members in a competition group shall receive MSIs.”<sup>6</sup> After the parties executed the agreement, the Agency notified employees that 5% of eligible employees would receive MSIs. The Union filed, with the Agency, an “implementation dispute”<sup>7</sup> alleging that the Agency violated the agreement by failing to award MSIs to the full 10% of eligible employees. When the Agency rejected the Union’s implementation dispute, the Union filed an appeal with the Grievance Board.<sup>8</sup>

In its 2016 decision (the first decision), the Grievance Board found that the Agency had not violated the agreement because, during bargaining, the Union had conceded that the wording meant that the Agency had the discretion to award MSIs to less than the full 10% of eligible employees. The Union filed exceptions to the first decision with the Foreign Service Labor Relations Board (FSLRB).<sup>9</sup>

In *State*, the FSLRB found that the first decision was based on a legal error. Because of that error, the FSLRB found that it was “premature to address” the parties’ dispute concerning the interpretation of the agreement,<sup>10</sup> and remanded the matter to the parties for resubmission to the Grievance Board to determine the meaning of the disputed wording.

On remand, the Grievance Board noted that the parties disagreed about the interpretation of the wording “no more than [10%].”<sup>11</sup> According to the Union, the agreement mandates that the full 10% of MSI-eligible employees receive MSIs. In contrast, the Agency contended that the agreement preserved the Agency’s discretion to award MSIs to less than the full 10% of eligible employees.

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<sup>3</sup> *Id.* at 2-5.

<sup>4</sup> *Id.* at 2.

<sup>5</sup> *Id.* at 3 (quoting First Decision at 4).

<sup>6</sup> *Id.* at 4 (quoting the agreement).

<sup>7</sup> 22 U.S.C. § 4114(a)-(b) (statutory description of implementation disputes); *see also State*, FS-AR-0007 at 2 (citing First Decision at 8).

<sup>8</sup> *See* 22 U.S.C. § 4114(a)(3) (describing the Grievance Board).

<sup>9</sup> *See id.* § 4114(b) (“Either party to an appeal [to the Grievance Board] . . . may file with the [FSLRB] an exception to the action of the . . . Grievance Board in resolving the implementation dispute.”).

<sup>10</sup> *State*, FS-AR-0007 at 7.

<sup>11</sup> Remand Decision at 6, 8.

The Grievance Board stated that “[i]f the language in the negotiated agreement is clear and unambiguous, [then the Grievance Board is] required to apply the language as written, without recourse to other sources to determine the parties’ intent.”<sup>12</sup> And the Grievance Board stated that it was “indisputably true” that “no more than 10% . . . by its terms means ‘10% or less.’”<sup>13</sup> Nevertheless, the Grievance Board found that the agreement was ambiguous because each party’s interpretation was plausible.

The Grievance Board found that neither the parties’ bargaining history nor any past practice resolved the perceived ambiguity. Therefore, it considered which interpretation was “the more reasonable one based on the circumstances of the case.”<sup>14</sup> Ultimately, the Grievance Board found that the disputed wording, and its context in the agreement “as a whole,”<sup>15</sup> was sufficient to support finding that “no more than 10%” meant that the Agency was required to award MSIs to the full 10% of eligible employees.<sup>16</sup>

Consequently, the Grievance Board found that the Agency violated the agreement, and it directed the Agency to award MSIs to the full 10% of top-ranking eligible employees retroactive to October 2, 2014, with interest.

On January 8, 2018, the Agency filed exceptions to the remand decision, and on February 2, 2018, the Union filed an opposition to the Agency’s exceptions.

### **III. Analysis and Conclusion: The Grievance Board’s decision fails to draw its essence from the agreement.**

Under 22 U.S.C. § 4107, decisions of the FSLRB “shall be consistent with decisions rendered by” the Federal Labor Relations Authority (the Authority).<sup>17</sup> In other words, “Congress has directed the [FSLRB] . . . to follow . . . Authority . . . precedent, except when the [FSLRB] finds special circumstances that require otherwise.”<sup>18</sup> The FSLRB has also applied federal court precedent where there is no applicable Authority precedent.<sup>19</sup> Because no special circumstances are asserted or apparent in this case, the

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<sup>12</sup> *Id.* at 10 (citation omitted).

<sup>13</sup> *Id.* at 11.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 21.

<sup>16</sup> *Id.* at 22-23.

<sup>17</sup> 22 U.S.C. § 4107(b).

<sup>18</sup> *USDA, Farm Serv. Agency, Foreign Agric. Serv.*, FS-AR-0004 (1998) at 6 (*USDA*) (citing 22 U.S.C. § 4107(b), (c)(2)(F)).

<sup>19</sup> *E.g., id.* at 10 (citing *U.S. Dep’t of the Navy, Naval Aviation Depot, Cherry Point, N.C. v. FLRA*, 952 F.2d 1434 (D.C. Cir. 1992) (explaining a legal standard applied by the Authority)); *Am. Foreign Serv. Ass’n*, FS-AR-1 (1986) at 3 (citing *Gen. Drivers, Helpers & Truck Terminal Emps., Local No. 120 v. Sears, Roebuck & Co.*, 535 F.2d 1072 (8th Cir. 1976); *Amalgamated Meat Cutters & Butcher Workmen of N. Am., Dist. Local No. 540 v. Neuhoff Bros. Packers, Inc.*, 481 F.2d 817 (5th Cir. 1973)) (explaining that the FSLRB, like the Authority, applies principles articulated by federal courts in private-sector labor-relations cases).

following analysis applies Authority precedent where there is no relevant FSLRB precedent,<sup>20</sup> and follows federal-court precedent where appropriate.

The Agency argues that the award fails to draw its essence from the agreement because it “ignores the plain language of the agreement.”<sup>21</sup> As relevant here, to demonstrate that a decision fails to draw its essence from a collective-bargaining agreement, an excepting party must establish that the award does not represent a plausible interpretation of the agreement.<sup>22</sup> The FSLRB has found that an award fails to draw its essence from an agreement when an arbitrator’s interpretation of an agreement conflicts with the express provisions of that agreement.<sup>23</sup>

The interpretation of a collective-bargaining agreement begins with the plain meaning of the wording<sup>24</sup> and, where the plain wording provides a clear answer to a dispute, the analysis should end with that wording.<sup>25</sup> The Authority has held that arbitrators may not “look beyond” a collective-bargaining agreement to extraneous considerations to modify an agreement’s clear and unambiguous terms.<sup>26</sup> Further, words and phrases are to be given their plain and ordinary meaning, which may be discerned by the dictionary definitions of those terms.<sup>27</sup> The dictionary defines “no more than” as “a stated number or fewer.”<sup>28</sup> Therefore, the plain meaning of the agreement is that the Agency may award MSIs to 10% *or less* of the eligible employees.

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<sup>20</sup> See, e.g., *USDA*, FS-AR-0004 at 6.

<sup>21</sup> Exceptions at 3.

<sup>22</sup> *U.S. Dep’t of State*, FS-AR-0006 (2016) at 7 (citing *NTEU, Chapter 32*, 67 FLRA 354, 355 (2014); *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990) (*OSHA*)).

<sup>23</sup> *Id.* (citing *NTEU, Chapter 83*, 68 FLRA 945, 948 (2015)).

<sup>24</sup> *AFGE, Local 2924 v. FLRA*, 470 F.3d 375, 381 (D.C. Cir. 2006) (*Local 2924*) (citing *NAGE, Local R5-136 v. FLRA*, 363 F.3d 468, 474 (D.C. Cir. 2004)) (stating that interpretation of a contract, like a statute, begins with the plain meaning of the wording).

<sup>25</sup> *Id.* at 381 (citing *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999)).

<sup>26</sup> See *U.S. Small Bus. Admin.*, 70 FLRA 525, 528 (2018) (*SBA*) (citing *Judsen Rubber Works, Inc. v. Mfg., Prod. & Serv. Workers Union, Local No. 24*, 889 F. Supp. 1057, 1064 (N.D. Ill. 1995)); see also *NTEU, Chapter 207*, 60 FLRA 731, 733-34 (2005) (where the arbitrator found that there was a two-step selection process for the agency to determine the qualifications of an applicant for reassignment, the Authority found that the award evidenced a manifest disregard of the parties’ agreement because “nothing in the agreement” explicitly or implicitly provided for such a process); *Library of Cong.*, 60 FLRA 715, 717-18 (2005) (citing *OSHA*, 34 FLRA at 575) (where the arbitrator directed a party to pay a performance award in lieu of a performance-based pay adjustment, the Authority found that the arbitrator’s award did not represent a plausible interpretation of the agreement because the plain wording of the agreement did not permit performance awards); *U.S. Dep’t of the Air Force, Okla. City Air Logistics Command, Tinker Air Force Base, Okla.*, 48 FLRA 342, 348 (1993).

<sup>27</sup> See *AFGE, Local 2192*, 68 FLRA 481, 483 (2015) (finding judge did not err in interpreting agreement when that interpretation was consistent with the plain meaning of a word, as defined by the dictionary); see also *Summit Health, Inc. v. APS Healthcare Bethesda, Inc.*, 993 F. Supp. 2d 379, 390 (S.D.N.Y. 2014), *aff’d sub nom. APEX Emp. Wellness Servs., Inc. v. APS Healthcare Bethesda, Inc.*, No. 14-3191-CV, 2018 WL 672419 (2d Cir. Feb. 1, 2018) (applying dictionary definitions to disputed terms to find terms unambiguous); *U.S. Dep’t of VA, Kan. City VA Med. Ctr., Kan. City, Mo.*, 70 FLRA 465, 468 (2018) (applying dictionary definition of terms in the context of adjudicating a representation petition); *AFGE, Local 1206*, 70 FLRA 335, 336 & n.25 (2017) (arbitrator’s interpretation consistent with dictionary definitions of terms).

<sup>28</sup> *No More Than*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/no%20more%20than> (last accessed Sept. 18, 2018).

The Grievance Board stated that it was “indisputably true” that, by its plain terms, the phrase “no more than [10%]” in the agreement means that the Agency may award MSIs to “10% or less” of eligible employees.<sup>29</sup> As discussed above, the Grievance Board should have ended its analysis there, with the agreement’s plain wording. Instead, the Grievance Board found that, because the parties had different interpretations, the wording was ambiguous.<sup>30</sup> But wording that is clear on its face does not become ambiguous simply because the parties disagree as to its meaning.<sup>31</sup> Rather, a contract is ambiguous if it is susceptible to two different and plausible interpretations, each of which is *consistent* with the contract wording.<sup>32</sup> The interpretation adopted by the Grievance Board – that “no more than [10%]” means the Agency must award MSIs to *no less than* 10% of eligible employees<sup>33</sup> – is not consistent with the plain meaning of the agreement’s wording. Consequently, it is not a plausible interpretation of the agreement.

Accordingly, we find that the Grievance Board erred by finding the agreement ambiguous and looking beyond its plain wording.<sup>34</sup> Further, because the Grievance Board’s interpretation is not consistent with the plain meaning of the agreement’s wording, we find that the decision fails to draw its essence from the agreement.<sup>35</sup>

#### **IV. Decision**

We grant the Agency’s essence exception and set aside the remand decision.

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<sup>29</sup> See Remand Decision at 11.

<sup>30</sup> *Id.* at 10-11.

<sup>31</sup> See *Local 2924*, 470 F.3d at 383 (citing *Ameren Servs. Co. v. FERC*, 330 F.3d 494, 499 (D.C. Cir. 2003)); see also *Cnty. Heating & Plumbing Co., Inc. v. Kelso*, 987 F.2d 1575, 1578-79 (Fed. Cir. 1993) (*Kelso*) (citations omitted).

<sup>32</sup> *Kelso*, 987 F.2d at 1578-79 (citations omitted); see also *Local 2924*, 470 F.3d at 381, 383 (citations omitted).

<sup>33</sup> Remand Decision at 23.

<sup>34</sup> *SBA*, 70 FLRA at 528-29; see also *Local 2924*, 470 F.3d at 383 (citing *NTEU v. FLRA*, 466 F.3d 1079, 1081 (D.C. Cir. 2006)) (finding the Authority erred by considering extrinsic evidence when plain terms of collective-bargaining agreement were unambiguous).

<sup>35</sup> Because we set aside the remand decision on the basis that it fails to draw its essence from the agreement, we find it unnecessary to address the Agency’s nonfact exception. Exceptions at 12-14. *E.g.*, *AFGE, Local 2145*, 69 FLRA 7, 9 (2015).

**Member Cohen, dissenting:**

I hereby dissent from the majority decision in this case. The following are my reasons:

Foreign Service promotion boards are instructed to review all personnel files in a given class of F.S. employees, and to rate them in order of performance during the rating year. The boards are also instructed to recommend those worthy of promotion to the next highest grade. Normally, less than half of the employees in a class are recommended for promotion. (A certain percentage of F.S. employees in each class are not eligible for promotion because they have not had sufficient time in class.)

After the final list of employees recommended for promotion is produced, management decides how many on that list can be promoted based on vacancies in the next highest grade. When the actual promotion list is finalized, those recommended for promotion, who were not high enough on the list to be promoted, are automatically eligible for meritorious step increases (MSI).

It is important to emphasize that not everyone in the class who is not promoted is eligible for MSI. Only those recommended for promotion are eligible for MSI. In other words, only those in the annual elite category are eligible.

For five years prior to 2014, the year covered by this case, the promotion precepts, negotiated between management and the union, were always the same: MSIs will be awarded to those recommended for promotion at a maximum of ten percent of those on the list, in rank order. With this practice having been followed year after year, it is quite normal that the union had the right to believe that the number would never be less than ten percent pursuant to the negotiated precepts. Ten percent was not part of a sliding scale. It was an agreed amount.

If management had changed that number from year to year, the situation for 2014 would have been totally different. The union would have demanded the right to negotiate that number. For this reason, management's decision to unilaterally change the number of MSIs was contrary to the precepts, despite the ambiguous language. Historical practice said that ten percent of those recommended, but not promoted, would receive MSIs.

Secondly, management gave a reason for awarding only five percent MSIs in 2014. Management said it was "exercising its budgetary authority" to make the reduction. In other words, the funds were needed elsewhere.

Management's decision, made on the basis of budgetary requirements, was violating the traditional rule that employee salaries are the last to be cut for budgetary requirements. Certainly, if there is a general government-wide reduction in budget of enormous proportions, salaries may have to be reduced. But this has never happened. Salaries are sacred, and are not reduced during periods of budgetary austerity.

Where management's reasoning is faulty is that it fails to recognize that in the Foreign Service, annual promotions and MSIs are part of salary that can be reduced only in the event of agency-wide reductions. And even in such situations, savings are normally realized by reductions in personnel, and never reductions in salaries. In the Foreign Service, annual promotions and MSIs are part of the salary envelope.

In the specific year 2014, it appears that the need to save money by reducing MSIs had no relationship to overall budgetary needs. In short, management was saving money on MSIs, and using that "salary money" to pay for 35 sets of ambassadorial furniture, as one possible example. In 2014, management provided no reason to justify this reduction in this highest priority "salary" by higher priority needs elsewhere. Neither, to my knowledge, was there an overall government-wide freeze in MSIs that year.

For the reasons mentioned above, I dissent from the majority decision in this case.