68 FLRA No. 10

GENERAL SERVICES ADMINISTRATION
EASTERN DISTRIBUTION CENTER
BURLINGTON, NEW JERSEY
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF GSA LOCALS C-236
(Union)

0-AR-4953

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DECISION

October 30, 2014

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting)

I. Statement of the Case

Arbitrator Richard D. Zaiger found that the Agency violated the parties' agreement when it barred an employee (the grievant) from using an Agency scooter at work due to his Union activities. There are two main questions before us.

The first question is whether the Arbitrator exceeded his authority by failing to address an argument. As the parties did not include the disputed argument in their stipulated issues, and as arbitrators do not exceed their authority by failing to address arguments that the parties have not included in their stipulations, the answer is no.

The second question is whether the award is contrary to law because: (1) the Arbitrator determined that Article 4, Section 3 of the parties' agreement (Article 4) mirrors § 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (the Statute);[1] (2) the award is not supported by a preponderance of the evidence; and (3) the Arbitrator drew an adverse inference against the Agency for a supervisor's failure to comply with the Union's request to be available to testify at the hearing. The answer is no, because: (1) the Agency does not identify a law barring the Arbitrator's determination that Article 4 mirrors § 7116(a)(1) and (2); (2) a preponderance of the evidence supports the award; and (3) Authority precedent does not bar an arbitrator from drawing an adverse inference against an agency when a supervisor fails to testify at a hearing.

II. Background and Arbitrator's Award

The Agency barred the grievant, a Union vice president, from using an Agency scooter at work. Subsequently, the grievant's second-line supervisor (the second-line supervisor) questioned others as to the grievant's whereabouts while the grievant was on official time. The Union filed a grievance alleging, as relevant here, that these actions violated Article 4, which is set forth below. The grievance was unresolved and submitted to arbitration. At the arbitration hearing, the parties stipulated to three issues: (1) whether the Agency violated Article 4 by barring the grievant from using the scooter; (2) whether the Agency violated Article 4 by questioning the grievant's use of official time; and (3) if the Agency violated the parties' agreement, then "what is the appropriate remedy?"[2]

Turning to the first stipulated issue (the second issue is not in dispute), the Arbitrator stated that Article 4 is "statutory in intent and nature" and "mirrors" § 7116(a)(1) and (2) of the Statute,[3] which we discuss below. Accordingly, and even though the Union "did not allege a statutory violation,"[4] the Arbitrator stated that he would apply standards established by the Authority in unfair-labor-practice (ULP) proceedings and the "legal framework" for resolving allegations of discrimination[5] set forth in *Letterkenny Army Depot* (*Letterkenny*),[6] which we also discuss below.

In this regard, the Arbitrator made the following findings. The grievant "appropriate[d]" a spare Agency scooter when he was reassigned to the Agency's receiving department.[7] Although the grievant's job description did not require him to use a scooter to perform his duties, the grievant's first-line supervisor (the first-line supervisor) had the grievant use the scooter to deliver packages. In addition, the Arbitrator stated that the grievant was "entitled" to use official time to perform "representational duties."[8] With minor "deviations,"[9] the grievant "generally complied" with the parties' agreement when requesting official time, and the

[1] 5 U.S.C. § 7116(a)(1)-(2).

[2] Award at 9.
[3] *Id.* at 11.
[4] *Id.* at 16 n.13.
[5] *Id.* at 11.
[6] 35 FLRA 113 (1990).
[7] Award at 4.
[8] *Id.*
[9] *Id.* at 14.

first-line supervisor "routinely approved" those requests.[10]

But the Arbitrator found that once the second-line supervisor started indirectly supervising the grievant, "[i]ssues arose regarding the [g]rievant's use of official time and productivity."[11] Specifically, the second-line supervisor "expressed her displeasure" to the Union's chief steward (the chief steward) regarding the grievant's use of official time[12] and, in the same conversation, the second-line supervisor referred to the grievant as a "piece of shit."[13] These "issue[s] came to a head" when a section chief emailed the grievant about his request for official time, stating: "I understand the need for handling [U]nion business . . . [but] . . . I do not see [your productivity requirements] . . . being met."[14] Eight days later, a facility manager (the facility manager) emailed the first- and second-line supervisors and asked: "Why does [the [g]rievant] have a scooter?"[15]

The Arbitrator stated that "the Union" subsequently met with an Agency representative to resolve the "dispute" over the grievant's use of official time.[16] At the meeting, the Union raised the second-line supervisor's "piece of shit" comment.[17] Just two days later, and "in the midst of [this] dispute,"[18] the second-line supervisor recommended to the first-line supervisor that he take away the grievant's scooter,[19] and the first-line supervisor complied. As such, the second-line supervisor played a "central . . . role" in barring the grievant from using a scooter.[20] Further, the second-line supervisor "public[ly took] credit" for this result,[21] stating to a third supervisor (the third supervisor): "I told you I'd get that . . . fucker off the scooter."[22] With regard to that statement, the Arbitrator determined that the two witnesses (Witnesses A and B) who testified that they heard that statement were credible, whereas the second-line supervisor's denial that she made the statement was "unreliable" and "less than candid."[23] Moreover, the Arbitrator stated that, although the Union had requested that the third supervisor be available to testify, the third supervisor failed to appear at the hearing, and there was "no explanation" for his absence.[24] As such, the Arbitrator found it "appropriate" to draw an adverse inference against the Agency and find that the third supervisor's testimony would have supported the testimony of Witnesses A and B.[25]

The Arbitrator determined that because the grievant performed representational duties on official time, the grievant engaged in protected activity under Article 4. Additionally, he found that because the first-line supervisor and other managers had allowed the grievant to use a scooter for a "significant period of time," using a scooter had become a condition of the grievant's employment.[26] The Arbitrator found further, based on the timing of the Agency's actions – that it took away the scooter "in the midst" of the dispute over the grievant's use of official time and just two days after the meeting with the Union[27] – and the second-line supervisor's actions and derogatory comments regarding the grievant, that there was a "direct link" between the grievant's protected activity and the Agency's decision to bar the grievant from using a scooter.[28] Accordingly, the Arbitrator determined that the Union established a prima facie case of discrimination under § 7116(a)(2) of the Statute.

Moreover, the Arbitrator found that the following showed that the Agency did not have a legitimate justification for barring the grievant from using a scooter: (1) the Agency benefited from the grievant using his scooter to deliver packages; (2) there was "no merit" to the second-line supervisor's contention that the grievant "was riding the scooter . . . when he should have been [working] in the receiving department";[29] (3) the grievant's minor "deviations" from the parties' agreement when requesting official time did not necessitate the Agency's action, especially because the first-line supervisor "never raised any issues" and "routinely approved" the requests;[30] and (4) there was "no evidence. . . that the [g]rievant ever left his work area without permission" to perform representational activities.[31] Moreover, the Arbitrator found that, given the length of time that the grievant had worked in the receiving department and the lack of evidence warranting the Agency's action, the Agency failed to demonstrate that it would have taken the same actions absent the grievant's protected activity. Accordingly, the Arbitrator determined that a preponderance of the evidence showed that the Agency barred the grievant from using a scooter because of his protected representational activity. Thus, the Arbitrator sustained the grievance as to that issue, and

[10] *Id.* at 4.
[11] *Id.*
[12] *Id.* at 13.
[13] *Id.* at 5-6 (internal quotation marks omitted).
[14] *Id.* at 5.
[15] *Id.* (first and fourth brackets in original).
[16] *Id.* at 12.
[17] *Id.* (internal quotation mark omitted).
[18] *Id.*
[19] *Id.* at 7 & n.7.
[20] *Id.* at 12.
[21] *Id.* at 12 n.11.
[22] *Id.* at 8 (internal quotation mark omitted).
[23] *Id.* at 8 n.8.
[24] *Id.* at 8.
[25] *Id.*
[26] *Id.* at 12.
[27] *Id.*
[28] *Id.* at 13.
[29] *Id.* at 14.
[30] *Id.*
[31] *Id.*

he directed the Agency to cease and desist discriminatory conduct.

The Agency filed exceptions to the award.

III. Analysis and Conclusions

A. One of the Agency's exceptions fails to raise a ground for reviewing the award under § 2425.6 of the Authority's Regulations.

Section 2425.6 of the Authority's Regulations enumerates the grounds that the Authority currently recognizes for reviewing arbitration awards.[32] In addition, the Regulations provide that if exceptions argue that an award is deficient based on private-sector grounds that are not currently recognized by the Authority, then the excepting party "must provide sufficient citation to legal authority that establishes the grounds upon which the party filed its exceptions."[33] Further, § 2425.6(e)(1) of the Regulations provides that an exception "may be subject to dismissal or denial if . . . [t]he excepting party fails to raise and support" the grounds listed in § 2425.6(a)-(c), or "otherwise fails to demonstrate a legally recognized basis for setting aside the award."[34]

The Agency argues that the award is deficient because the Arbitrator allowed testimony about the second-line supervisor's conversation with the chief steward that was "highly prejudicial," "misleading," and a "waste of time," under the Federal Rules of Evidence.[35] This argument does not raise a ground currently recognized by the Authority for reviewing awards.[36] And the Agency does not cite legal authority to support any ground not yet recognized by the Authority.[37] Accordingly, we dismiss this exception.[38]

B. The Arbitrator did not exceed his authority.

The Agency argues that the Arbitrator exceeded his authority by failing to resolve an argument pertaining to "retaliation."[39] As relevant here, an arbitrator exceeds his or her authority when he or she fails to resolve an issue submitted to arbitration.[40] In this regard, the Authority has held that an arbitrator does not exceed his or her authority by failing to address an argument that the parties did not include in their stipulation.[41]

As stated above, the parties submitted three issues to arbitration: (1) whether the Agency violated Article 4 by barring the grievant from using the scooter; (2) whether the Agency violated that provision by questioning the grievant's use of official time; and (3) if there was a violation, what would be the appropriate remedy.[42] There is no dispute[43] that the Arbitrator resolved all three issues.[44] Yet the Agency argues that the Arbitrator should have addressed a "retaliation" claim as well, because the Agency "urg[ed]" to the Arbitrator "that this grievance is a retaliation case,"[45] and because the Union alleged retaliation in its grievance.[46] But because the parties did not include a retaliation claim in their stipulated issues,[47] the Arbitrator did not exceed his authority by failing to address it.[48]

Additionally, the Agency cites *NTEU, Chapter 143*[49] to support the argument that, by alleging retaliation in its grievance, the Union submitted a retaliation issue to arbitration.[50] In *NTEU, Chapter 143*, the arbitrator effectively found that an argument raised in the grievance was an issue before him, and the arbitrator resolved that issue.[51] But the parties in *NTEU, Chapter 143* did not stipulate to the issues to be resolved,[52] and *NTEU, Chapter 143* did not hold that an arbitrator must resolve an argument that the parties failed to include in their stipulated issues.[53] Accordingly, the Agency's reliance on *NTEU, Chapter 143* is misplaced.

For these reasons, we deny the Agency's exceeded-authority exception.

C. The award is not contrary to law.

The Agency asserts that the award is contrary to law. When an exception involves an award's consistency with law, the Authority reviews any question of law

[32] *See* 5 C.F.R. § 2425.6(a)-(b).
[33] *Id.* § 2425.6(c).
[34] *Id.* § 2425.6(e).
[35] Exceptions at 7-8.
[36] *See* 5 C.F.R. § 2425.6(a)-(b).
[37] Exceptions at 7-8.
[38] *See, e.g., AFGE, Local 1858*, 66 FLRA 942, 943 (2012); *AFGE, Local 738*, 65 FLRA 931, 932 (2011).
[39] Exceptions at 3.
[40] *U.S. Dep't of the Treasury, IRS*, 66 FLRA 325, 331 (2011).
[41] *U.S. DHS, CBP Agency, N.Y.C., N.Y.*, 60 FLRA 813, 816 (2005) (*DHS*).
[42] Award at 9.
[43] Exceptions at 3-4, 17.
[44] Award at 15-16.
[45] Exceptions at 3.
[46] *Id.* at 4.
[47] Award at 9.
[48] *DHS*, 60 FLRA at 816.
[49] 60 FLRA 922, 930-31 (2005), *pet. for review denied sub nom. NTEU v. FLRA*, 453 F.3d 506 (D.C. Cir. 2006).
[50] Exceptions at 3-4.
[51] 60 FLRA at 930-31.
[52] *Id.* at 923.
[53] *Id.* at 930-31.

de novo.[54] In conducting de novo review, the Authority defers to the arbitrator's underlying factual findings unless a party demonstrates that the findings are nonfacts.[55] But disagreement with an arbitrator's evaluation of the evidence, including the credibility of witnesses and the weight given their testimony, provides no basis for finding an award deficient.[56] Additionally, exceptions that are based on misunderstandings of an arbitrator's award do not show that an award is contrary to law.[57]

As stated above, the Arbitrator found that Article 4 mirrors § 7116(a)(1) and (2) of the Statute. Article 4, titled "Protected Rights," states:

> Management shall not interfere with, restrain, coerce, defame[,] or discriminate against any employee or Union representative in the exercise of his/her statutory right or other conditions of employment. Management shall not encourage or discourage membership in the Union by discriminating in connection with hiring, tenure, promotion[,] or other conditions of employment.[58]

Section 7116(a)(1) and (2) of the Statute states:

> (a) For the purpose of [the Statute], it shall be [a ULP] for an agency–
>
> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under [the Statute]; [or]
>
> (2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment.[59]

When contract provisions mirror, or are intended to be interpreted in the same manner as, the Statute, the Authority has applied statutory standards in assessing the application of those contract provisions.[60] And when a grievance involves an alleged ULP, the arbitrator must apply the same standards and burdens that an administrative law judge would apply in a ULP proceeding under § 7118 of the Statute.[61] In a grievance alleging a ULP by an agency, the union bears the burden of proving the elements of the alleged ULP by a preponderance of the evidence.[62]

In cases alleging discrimination based on protected activity, the Authority applies the framework set forth in *Letterkenny*.[63] Under that framework, the complaining party (here, the Union) must establish that: (1) the affected employee was engaged in protected activity; and (2) such activity was a motivating factor in the agency's treatment of the employee in connection with hiring, tenure, promotion, or other conditions of employment.[64] If the complaining party makes this required prima facie showing, then an agency may seek to establish the affirmative defense that: (1) there was a legitimate justification for its action; and (2) the same action would have been taken in the absence of protected activity.[65] The Authority has held that the timing of a disputed action is significant in determining whether a party has established a prima facie case.[66]

1. The Arbitrator's determination that Article 4 mirrors § 7116(a)(1) and (2) of the Statute is not contrary to law.

The Agency argues that the award is contrary to law because the Arbitrator found that Article 4 mirrors § 7116(a)(1) and (2) of the Statute. As an initial matter, we note that the Agency does not allege that the Arbitrator's interpretation of Article 4 fails to draw its essence from the parties' agreement.[67] In addition, the plain wording of Article 4 is nearly identical to the wording in § 7116(a)(1) and (2),[68] which supports the Arbitrator's conclusion in this regard.[69] And the Agency does not cite a law barring the Arbitrator's determination in this respect. Instead, the Agency contends that because Article 4 refers to a "statutory right," rather than to "statutory rights," it is "more than plausible" that Article 4 refers to § 7102 of the Statute,[70] which states, as relevant here, that an employee shall have the right to

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[54] *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).
[55] *AFGE, Local 331*, 67 FLRA 295, 296 (2014).
[56] *U.S. Dep't of VA, VA Med. Ctr., Dayton, Ohio*, 65 FLRA 988, 993 (2011) (*VA*).
[57] *SPORT Air Traffic Controllers Org.*, 66 FLRA 552, 554 (2012) (*SATCO*).
[58] Award at 2 (quoting Art. 4).
[59] 5 U.S.C. § 7116(a)(1)-(2).
[60] *AFGE, Local 1164*, 64 FLRA 599, 600 (2010) (*Local 1164*).
[61] *NLRB*, 61 FLRA 197, 199 (2005).
[62] *Id.*
[63] *AFGE, Local 3506*, 65 FLRA 30, 32 (2010).
[64] *Pension Benefit Guar. Corp.*, 64 FLRA 692, 698 (2010).
[65] *Id.*
[66] *U.S. DOD, U.S. Air Force, 325th Fighter Wing, Tyndall Air Force Base, Fla.*, 66 FLRA 256, 261 (2011).
[67] *See* Exceptions at 17-18.
[68] *Compare* Award at 2 (quoting Art. 4), *with* 5 U.S.C. § 7116(a)(1)-(2).
[69] *See Local 1164*, 64 FLRA at 600-01.
[70] Exceptions at 9 (emphasis omitted) (internal quotation marks omitted).

"assist any labor organization . . . without fear of . . . reprisal."[71] Yet, as Article 4's title ("Protected Rights") indicates, Article 4 refers to more than just one right.[72] Moreover, Article 4's reference to a "statutory right"[73] parallels § 7116(a)(1)'s reference to "any right under [the Statute]."[74] For these reasons, the Agency has failed to demonstrate that the Arbitrator's finding that Article 4 mirrors § 7116(a)(1) and (2) of the Statute is contrary to law. Accordingly, we deny this exception.

2. A preponderance of the evidence supports the award.

The Agency asserts that the award is contrary to law because it is not supported by a preponderance of the evidence.[75] In this connection, the Agency asserts that there are "no facts . . . from which it can be concluded that the . . . [Agency] stopped [the grievant's] use of the scooter . . . because he was a Union representative."[76]

But the Arbitrator cited several facts supporting his finding of unlawful discrimination. Specifically, the Arbitrator determined that the Union established a prima facie case of discrimination because: (1) the Agency barred the grievant from using a scooter "in the midst of a dispute" over the grievant's use of official time and just two days after the Union met with an Agency representative to resolve the dispute;[77] and (2) the second-line supervisor had "expressed her displeasure with the [g]rievant's use of official time,"[78] directed the first-line supervisor to take away the scooter,[79] played a "central . . . role" in barring the grievant from using a scooter,[80] and "public[ly took] credit" for taking away the scooter.[81] Moreover, the Arbitrator found that the Agency did not have a legitimate justification for barring the grievant from using a scooter, because: (1) the Agency benefited from the grievant using his scooter to deliver packages;[82] (2) the grievant was not using his scooter to avoid doing work; and (3) the grievant's minor deviations from the parties' agreement when requesting official time did not necessitate the Agency's action, especially as the first-line supervisor "never raised any issues" and "routinely approved" the requests.[83] And the Arbitrator found that, given the length of time the grievant had worked in the receiving department and the lack of evidence warranting the Agency's action, the Agency failed to demonstrate that it would have taken the same actions absent the grievant's use of official time.[84] As a whole, these findings demonstrate that a preponderance of the evidence supports the Arbitrator's finding of unlawful discrimination.

The Agency raises several, related contrary-to-law arguments. First, the Agency challenges the Arbitrator's finding that the grievant engaged in protected activity by performing representational duties on official time. Specifically, the Agency asserts that the grievant was not exercising a right under § 7102 of the Statute.[85] Section 7102 provides, in pertinent part, that an employee shall be "protected in the exercise of"[86] the right to "act for a labor organization in the capacity of a representative."[87] Based on the Arbitrator's finding that the grievant performed representational duties on official time,[88] the grievant acted for a labor organization in the capacity of a representative under § 7102. (Contrary to the dissent's characterization of the award, the Arbitrator did not find that the grievant's protected activity was the "use of a scooter";[89] he found that the grievant's protected activity was performing representational duties on official time.) As such, and as the Agency does not cite any Authority precedent to support its assertion,[90] the Agency fails to demonstrate that the Arbitrator's finding is contrary to law.

Second, the Agency argues that the grievant's protected activity was not a motivating factor in the Agency's decision to bar the grievant from using a scooter because the second-line supervisor used to be a Union member and can still participate in the Union's benefit plans.[91] For the reasons stated above, a preponderance of the evidence supports the Arbitrator's finding of unlawful discrimination, including his finding that the Union established a prima facie case by showing that the grievant's protected activity was a motivating factor for the Agency's decision to bar the grievant from using a scooter. That the second-line supervisor used to be a Union member and still can participate in the Union's benefit plans is immaterial to whether the grievant's protected activity was a motivating factor in the Agency's decision. Accordingly, the Agency's argument lacks merit.

[71] 5 U.S.C. § 7102.
[72] Award at 2 (quoting Art. 4).
[73] *Id.* (quoting Art. 4).
[74] 5 U.S.C. § 7116(a)(1).
[75] Exceptions at 11, 18.
[76] *Id.* at 11-12.
[77] Award at 12.
[78] *Id.* at 13.
[79] *Id.* at 12-13.
[80] *Id.* at 12.
[81] *Id.* at 12 n.11.
[82] *See id.* at 13.
[83] *Id.* at 14.
[84] *Id.* at 14-15.
[85] Exceptions at 11.
[86] 5 U.S.C. § 7102.
[87] *Id.* § 7102(1).
[88] Award at 12.
[89] Dissent at 17.
[90] Exceptions at 11.
[91] *See id.* at 5.

Third, the Agency claims that the grievant's protected activity was not a motivating factor in the Agency's decision to bar the grievant from using a scooter,[92] based on *U.S. DOL, Occupational Safety & Health Administration, Region 1, Boston, Massachusetts* (*OSHA*).[93] There, the Authority held that an employee's protected activity was not a motivating factor in a disputed agency action because the agency decided on that action *before* the employee engaged in protected activity.[94] Here, however, the Arbitrator found that the Agency decided to bar the grievant from using a scooter *after* the grievant had engaged in protected activity.[95] Accordingly, the Agency's reliance on *OSHA* is misplaced.

Fourth, the Agency argues that because using a scooter was not a condition of the grievant's employment when he was reassigned to the receiving department,[96] the grievant lost the scooter as a "consequence of" the reassignment,[97] and the Agency therefore did not change the grievant's condition of employment when it subsequently took away the scooter.[98] But the Agency ignores the Arbitrator's finding that using a scooter had become a condition of the grievant's employment by the time the Agency took away the scooter,[99] and the Agency cites no legal basis for overturning the Arbitrator's finding.[100]

Fifth, the Agency contends that the Arbitrator should not have relied on the testimony of Witnesses A and B,[101] and cites *Non-Appropriated Fund Instrumentality Billeting Office, Ellsworth Air Force Base, South Dakota* (*Ellsworth*)[102] for support. But disagreement with an arbitrator's evaluation of testimony, including the credibility of witnesses, provides no basis for finding an award deficient.[103] Further, because *Ellsworth* is a decision of an administrative law judge to which no exceptions were filed,[104] it is nonprecedential and therefore provides no support for the Agency's argument.[105]

Sixth, the Agency challenges several of the Arbitrators factual findings. Specifically, the Agency alleges that: (1) the second-line supervisor was not[106] "aware of and directly involved in the official[-]time controversy";[107] (2) the facility manager,[108] rather than the second-line supervisor,[109] played a central role in barring the grievant from using a scooter; and (3) the meeting between the Union and the Agency representative was "unrelated" to the Agency barring the grievant from using a scooter.[110] But because the Agency has not alleged that the award is based on nonfacts, we defer to the Arbitrator's factual findings, and the Agency's challenges to those findings are meritless.[111]

Seventh, the Agency asserts that: (1) there is "no evidence" that the second-line supervisor was "present" when the Union met with an Agency representative to resolve the dispute over the grievant's use of official time;[112] and (2) the meeting between the Union and the Agency representative was therefore "not the reason that the scooter-use was halted."[113] But the Arbitrator did not find that the second-line supervisor was present at the meeting,[114] or that the meeting was "the reason" that the Agency barred the grievant from using a scooter.[115] Therefore, these arguments are based on misunderstandings of the award. As a result, they provide no basis for finding the award deficient.[116]

Eighth, the Agency asserts that its action was a "change in a working condition, not a change in a condition of employment,"[117] and the dissent agrees with the Agency in this regard. According to the dissent, the distinction between "conditions of employment" and "working conditions" is a "significant" one.[118] But this contention cannot withstand scrutiny. The terms "working conditions" and "conditions of employment" also appeared in Executive Order 11,491, on which Congress modeled the Statute.[119] And in fulfilling his

[92] *See id.* at 6-7.
[93] 58 FLRA 213 (2002).
[94] *Id.* at 213, 227.
[95] Award at 12-13.
[96] Exceptions at 12 (citing *OSHA*, 58 FLRA at 213, 214 n.5, 216).
[97] *Id.* at 13.
[98] *Id.* at 12-13.
[99] Award at 12.
[100] Exceptions at 12-13.
[101] *Id.* at 13-15.
[102] Case Nos. 7-CA-533, 7-CA-733, 7-CA-878, ALJ Decision Reports, No. 10, 1982 FLRA LEXIS 387 (Apr. 13, 1982).
[103] *VA*, 65 FLRA at 993.
[104] 1982 FLRA LEXIS 387 at *1.
[105] *Prof'l Airways Sys. Specialists*, 56 FLRA 124, 125 n.1 (2000).
[106] Exceptions at 5.
[107] Award at 13.
[108] Exceptions at 6.
[109] Award at 12.
[110] Exceptions at 7.
[111] *AFGE, Local 331*, 67 FLRA at 296.
[112] Exceptions at 5.
[113] *Id.* at 6.
[114] Award at 5 n.4.
[115] *See id.* at 12-13.
[116] *SATCO*, 66 FLRA at 554.
[117] Exceptions at 13.
[118] Dissent at 18.
[119] *See* Exec. Order No. 11,491, *as amended by* Exec. Order Nos. 11,616, 11,636, and 11838, *reprinted in* Subcomm. on Postal Personnel & Modernization of the Comm. on Post Office & Civil Service, (Comm. Print 1979) 96th Cong., 1st Sess. (1979), Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, at 1342 (Sec. 2(e) (referring to

role under the Executive Order to "decide [ULP] complaints,"[120] the Assistant Secretary for Labor-Management Relations (Assistant Secretary) applied those terms in a manner that belies the dissent's understanding of them. The dissent asserts that rules and regulations that "define . . . employees['] . . . right[s] . . . constitute 'conditions of employment,'"[121] whereas the "effect" of such rules and regulations "on an employee . . . would be a 'working condition.'"[122] And yet, to take just two examples, the Assistant Secretary's decisions characterized a policy change regarding the civilian vehicle-registration program for an entire military installation as "a unilateral change in employee *working conditions*,"[123] and a dispute over the telephone-access privileges of a single employee as a "change" in an "established term and *condition of employment*."[124]

Of course, in drafting the Statute, Congress could have endorsed a distinction between the terms "working conditions" and "conditions of employment" that resembles the distinction advocated in the dissent. But the Congressional Record indicates that Congress chose to do otherwise. In particular, Representative Ford explained that Congress was dissatisfied that the Federal Labor Relations Council had interpreted Executive Order 11,491 so as to "virtually eliminat[e] any obligation to bargain over 'working conditions.'"[125] So Congress largely replaced the term "working conditions" from the Executive Order with the term "conditions of employment" in the Statute to signify an "*expansion* of bargaining beyond the limited term 'working conditions.'"[126] Consequently, the dissent's reliance on a purported distinction between "conditions of employment" and "working conditions" to *narrow* the parties' bargaining obligations directly conflicts with congressional intent.

In addition, the dissent's distinction between "conditions of employment" and "working conditions" would seriously undermine the Statute's prohibition on "encourag[ing] or discourag[ing] membership in any labor organization by discrimination in connection with . . . conditions of employment."[127] As mentioned above, under the dissent's theory, the effects of applying a rule or regulation to a particular employee are merely changes to "working conditions," but not changes to "conditions of employment." Under that theory, an agency could "encourage or discourage membership in a[] labor organization by discrimination in connection with,"[128] for example, "when an employee starts and stops" working[129] without violating § 7116(a)(2). In such a case, the agency would merely be discriminating on the basis of "working conditions," but not "conditions of employment." Considering this troubling implication, in a case in which an agency asserted that it had not violated § 7116(a)(2) because, according to the agency, it had changed working conditions but not conditions of employment, the Authority unanimously rejected the agency's assertion.[130]

Although the dissent also asserts that its distinction finds support in the precedent of the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit), the D.C. Circuit's decisions do not bear out that assertion. In *NTEU v. FLRA*,[131] the D.C. Circuit held only that § 7116(a)(5) of the Statute does not require an agency to provide a union with notice and an opportunity to bargain over changes to conditions of employment unless the agency "made a change" in its policies, practices, or procedures affecting unit employees' conditions of employment. But *NTEU v. FLRA* did not recognize a substantive difference between changes in conditions of employment and changes in working conditions, as the dissent contends.[132] In fact, the D.C. Circuit's most relevant decision on the purported distinction between "working conditions" and "conditions of employment" stated that

"working conditions")), 1345 (Sec. 11(a)-(b) (referring to "working conditions")), 1348 (Sec. 19(a)(2) (referring to "conditions of employment")).

[120] *Id.* at 1344 (Sec. 6(a)(4)).

[121] Dissent at 19 (quoting *U.S. Dep't of VA, Med. Ctr. Sheridan, Wyo.*, 59 FLRA 93, 95 (2003) (Concurring Opinion of Chairman Cabaniss)).

[122] *Id.* (quoting *SSA*, 55 FLRA 978, 985 (1999) (Dissenting Opinion of then-Member Cabaniss)).

[123] *U.S. Army Elec. Command, Fort Monmouth, N.J.*, A/SLMR No. 653 (1976), 6 A/SLMR 228-29 (emphasis added).

[124] *VA, VA Regional Office, N.Y. Region*, A/SLMR No. 694 (1976), 6 A/SLMR 436, 437, 441 (emphasis added).

[125] 124 Cong. Rec. 38,715 (1978).

[126] *Id.* (emphasis added).

[127] 5 U.S.C. § 7116(a)(2).

[128] *Id.*

[129] Dissent at 20.

[130] *See U.S. Dep't of the Air Force, 60th Air Mobility Wing, Travis Air Force Base, Cal.*, 59 FLRA 632 (2004).

[131] Dissent at 20 (citing *NTEU v. FLRA*, 745 F.3d 1219, 1224 (D.C. Cir. 2014)).

[132] *NTEU v. FLRA*, 754 F.3d at 1224 (internal quotation mark omitted).

> the Authority has previously held that there is "no substantive difference between 'conditions of employment' and 'working conditions' as those terms are practically applied." *We think this conclusion is reasonable*, given that both courts and the Authority "have accorded [working conditions] a broad interpretation that encapsulates a wide range of subjects that is *effectively synonymous* with 'conditions of employment.'"[133]

For all the foregoing reasons, the Agency's and the dissent's contention that the Arbitrator erred in failing to recognize a distinction between "conditions of employment" and "working conditions" lacks merit.[134]

Because the award is based on a preponderance of the evidence, and because the Agency has not demonstrated that the award is otherwise contrary to law on the bases discussed above, we deny this contrary-to-law exception.

3. The Arbitrator's decision to draw an adverse inference against the Agency is not contrary to law.

The Agency argues that, because the Union was the party that would have called the third supervisor, the Arbitrator should have drawn an adverse inference against the Union for the third supervisor's failure to appear at the hearing.[135] The Authority considered a similar argument in *Broadcasting Board of Governors, Office of Cuba Broadcasting* (*Broadcasting*).[136] There, the Authority stated that if a potential witness is in management, then an arbitrator may reasonably assume that that individual is favorably disposed toward management, and the arbitrator can draw an adverse inference against the agency's failure to call that individual as a witness.[137]

Here, the Arbitrator found it appropriate to draw an adverse inference against the Agency for the third supervisor's unexplained failure to appear at the hearing.[138] Because the third supervisor is a management official, the Arbitrator could reasonably assume that the third supervisor would be favorably disposed to management, even though the Union was the party that would have called him as a witness. Accordingly, the Arbitrator's decision to draw an adverse inference against the Agency is consistent with *Broadcasting*.

The Agency argues that *Broadcasting* is distinguishable because it involved a "failure to call a witness" rather than a witness who did not appear.[139] But under either scenario, an arbitrator could reasonably assume that a witness in management would be favorably disposed to management. The Agency also argues that the Union could have had the third supervisor testify "telephonic[ally]," but the Agency does not explain how the Union's failure to do so makes the award contrary to law.[140]

For these reasons, we deny this contrary-to-law exception.

IV. Decision

We dismiss, in part, and deny, in part, the Agency's exceptions.

[133] *U.S. DHS, CBP v. FLRA*, 647 F.3d 359, 365 (D.C. Cir. 2011) (alteration in original) (emphasis added) (citations omitted).
[134] *See U.S. Dep't of the Air Force, 355th MSG/CC, Davis-Monthan Air Force Base, Ariz.*, 64 FLRA 85, 90 (2009).
[135] Exceptions at 15-17.
[136] 66 FLRA 1012, 1017-18 (2012).
[137] *See id.* at 1018.
[138] Award at 8 n.8.
[139] Exceptions at 17.
[140] *Id.*

Member Pizzella, dissenting:

I would conclude that the Arbitrator's award is contrary to law.

Not since watching Gregory Peck and Audrey Hepburn buzz around Rome in the 1953 film classic, "Roman Holiday," has a scooter so totally grabbed my attention.

Keith Miller is a shop steward for the Council of GSA Locals, C-236 of the American Federation of Government Employees (Council C-236). His job is to "repack[] damaged cartons and mak[e] boxes[,]"[1] that is, when he is not helping out Council C-236 with union business. At some point, Miller decided that he needed a "stand-up" scooter so he started using one after he determined it was not being used by anyone else.[2] The Agency never issued him the scooter. Even the Union concedes that he did not need one to perform his job duties, but when Miller was transferred to a new department, he took the scooter along. Just one problem, though – he didn't need one there either.

After Miller was transferred, the new supervisor, who was apparently more observant than the prior supervisor, noticed that Miller "frequently" disappeared on the scooter.[3] When Miller requested permission to perform "official time" for the Union, Miller "frequently" waited until "[five] or [ten] minutes after his official time had [already] started" to email his supervisor to request permission and, just as "frequently[,] fail[ed] to identify . . . the nature of the [official duties] he was engaging in."[4] Finally, on July 9, 2012, after Miller's supervisor noticed that Miller was not "even close to" meeting his production goals, the supervisor questioned Miller about the timing of *one* request for official time.[5] Two weeks later, after consulting with the assistant foreman, the supervisor told Miller that "he would no longer be permitted to use a scooter" because "he d[id]n't need one."[6]

Council C-236 filed this grievance and argued to the Arbitrator that the only reason the Agency would want to take away Miller's scooter and "question[] [his] use of official time"[7] was to "interfere[], restrain[], and coerc[e]" Miller from "engag[ing] in union activity."[8] (As I stated in *U.S. Department of VA Medical Center, Kansas City, Missouri*., "[you] cannot just make this stuff up."[9]) At arbitration, the Union made the issue sound even more impressive – "whether the Agency violated Article 4, Section 3" of the parties'. . . agreement,[10] a provision that "refers to the statutory [5 U.S.C. § 7116(a)(1) and (2)] rights of" bargaining unit employees."[11]

On the question of official time (the one that presumably would be of most significance to everyone involved), Arbitrator Richard Zaiger concluded that the Agency did not violate the Federal Service Labor-Management Relations Statute (the Statute) or Article 4, Section 3 when the supervisor questioned Miller about his official time usage. The Arbitrator acknowledged that a supervisor always "has the right to inquire regarding the whereabouts of a union officer or official."[12] On this point, I applaud Arbitrator Zaiger for recognizing the legitimate responsibility and prerogative of supervisors to ensure that official time is requested in accordance with all relevant laws and agreements and that a supervisor does not violate the Statute[13] when he questions the timing of an official-time request to ensure that it comports with the parties' agreement and will not interfere with the demands of the workplace.

As I noted in my concurring opinion in *U.S. DHS, CBP* (*CBP*), it is incumbent upon union officials to "distinguish legitimate, good-faith disputes from everyday workplace annoyances" in conducting their important representational role.[14] The most recent government data available demonstrates that in a recent year, federal employees, acting as union representatives, were paid more than $155 million taxpayer dollars to perform more than 3.4 million hours of union representational activities.[15]

But, on the trivial issue of the scooter, the Arbitrator came up with a plot twist that is more surprising than the conclusion of any episode of "Law and Order." He determined that the Agency *had no right to take back* its own scooter even though Miller "d[id]n't need"[16] one to do his job and had improperly "appropriated" the one he was using.[17]

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[1] Award at 4.
[2] *Id*.
[3] *Id*. at 4-5, 7.
[4] *Id*. at 4.
[5] *Id*.
[6] *Id*. at 7.
[7] *Id*. at 9.
[8] *Id*. at 9-10.
[9] 67 FLRA 627, 629 (2014) (Dissenting Opinion of Member Pizzella).
[10] Award at 9.
[11] *Id.* at 11.
[12] *Id*. at 15.
[13] 5 U.S.C. §§ 7101-7135.
[14] 67 FLRA 107, 113 (2013) (*CBP*) (Concurring Opinion of Member Pizzella).
[15] *Id*. at 112.
[16] Award at 7.
[17] *Id.* at 4.

The Statute guarantees unions and employees a panoply of rights. Of particular importance are those provisions that protect unions and employees from restraint, coercion, or any form of discrimination when they exercise their rights under the Statute.[18] When these rights are used properly, they "create positive working relationships and [contribute to the resolution of] good-faith disputes."[19] As such, they should be guarded judiciously. But, on the other hand, I doubt that Congress ever "envisioned"[20] that a union would oppropriate these important rights by filing a grievance on behalf of an employee who gets mad because his supervisor takes away a scooter to which he was never entitled, and did not need, to perform his job.

The allegations raised by Council C-236 in this case can only be described as "futile,"[21] and they certainly do not "'contribute[] to the effective conduct of [the government's] business' or facilitate the 'amicable settlement of disputes.'"[22]

I agree with my colleagues, insofar as they find, that the Union must prove that Miller was "engaged in *protected activity[,]*" and that "such activity was a motivating factor in the agency's treatment of the employee in connection with . . . *other conditions of employment[,]*"[23] in order to prove that the Agency violated 5 U.S.C. § 7116(a)(1) and (2) or Article 4, Section 3. Applying the framework that was established by the Authority in *Letterkenny Army Depot* (*Letterkenny*),[24] the Arbitrator found that Council C-236 established a prima facie case of discrimination when the Agency took away the scooter that Miller had misappropriated for his own use.

Unlike the majority, however, I do not agree that the Arbitrator properly applied the *Letterkenny* framework, and I would conclude that Council C-236 failed to establish either part of its "burden."[25]

The fact that Miller had been engaged in union activities is not sufficient to establish that he was engaged in "*protected activity*" for purposes of establishing discrimination under 5 U.S.C. § 7116(a)(1) and (2).[26] To the contrary, activities that occur while "performing [one's] job" do not constitute "protected activit[ies]."[27] Even though Miller occasionally performed representational duties for C-236, the Arbitrator recognized that the scooter contributed to his frequent absences from the job site[28] and to his failure to meet his production quotas.[29] Accordingly, the Arbitrator found that the supervisor did not violate the Statute or the parties' agreement when the supervisor questioned Miller about his whereabouts and denied him official time.[30]

The Arbitrator was wrong, however, when he concluded that Miller's use of the scooter became a "protected activity"[31] and that there was a "direct link" between Miller's "use of official time" and the Agency's decision to take away the scooter.[32] Miller was never given the scooter; he simply took one and claimed it as his own.[33] Unlike some employees, who actually *need* a scooter to perform their duties, he did not. As noted above, his job was limited to "repacking damaged cartons and making boxes."[34] And, he did not need a scooter to carry out his union responsibilities.[35]

Therefore, the Agency did not violate the Statute or the parties' agreement when it took the scooter away.

I also do not agree that Miller's use of the scooter constituted a *condition of employment*. The Agency argues, in this respect, that even if Miller's unauthorized use of the scooter constituted a "*working condition*," it most certainly was not a "*condition of employment*."[36]

The majority dismisses this argument. In their view, "there is no substantive difference between '*conditions of employment*' and '*working conditions*.'"[37]

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[18] *See Pension Benefit Guar. Corp.*, 64 FLRA 692, 693 (2010) (*PBGC*).

[19] *CBP*, 67 FLRA at 113 (Concurring Opinion of Member Pizzella).

[20] *AFGE, Local 3571*, 67 FLRA 218, 220 (2014) (Concurring Opinion of Member Pizzella).

[21] *Id.*

[22] *Id.* (quoting 5 U.S.C. § 7101(a)(1)(B) - (C)); *see also CBP*, 67 FLRA at 112 (Concurring Opinion of Member Pizzella).

[23] Majority at 7 (citing *PBGC*, 64 FLRA at 698) (emphasis added).

[24] 35 FLRA 113 (1990) (*Letterkenny*).

[25] *U.S. Air Force Academy, Colo. Springs, Colo.*, 52 FLRA 874, 878 (1997) (*Air Force Academy*).

[26] *Id.* at 876 (emphasis added).

[27] *Id.* at 875; *see also NTEU, Chapter 284*, 60 FLRA 230, 233 (2004) (Dissenting Opinion of Chairman Cabaniss) (conduct that could be subject to discipline should not constitute "protected activity" to take into consideration in determining whether the same action would have been taken 'even in the absence of protected activity'") (quoting *Letterkenny*, 35 FLRA at 118)).

[28] Award at 7.

[29] *Id.* at 5.

[30] *Id.* at 15.

[31] *Id.* at 13, 15.

[32] *Id.* at 13.

[33] *Id.* at 4.

[34] *Id.*

[35] *Id.* at 5.

[36] Exceptions at 12-13 (emphasis added).

[37] Majority at 13 (emphasis added).

Much like the occasional sightings of Elvis Presley – such as those that are reported with interesting and eye-catching headlines in the National Enquirer – the notion that *conditions of employment* and *working conditions* mean the same thing has been repeated so often by various majorities of the Authority, it is presumed to be a correct interpretation of the Statute.

There is, however, little precedent to support that notion other than the Authority's own repetition of it.

Executive Orders 10988 and 11491 (that served as precursors to our Statute) use both terms but do not indicate that they were ever intended to, or could in fact, mean the same thing. One need look no further than the definition of "*conditions of employment*,"[38] as that term is defined in our Statute, to see that the two terms have to mean something different. In 5 U.S.C. § 7103(a)(14), "conditions of employment" is defined as "*personnel policies, practices, and matters*, whether established by rule, regulation, or otherwise, *affecting working conditions*."[39]

In a unanimous decision of the U.S. Supreme Court in 1990, the Justices applied the deferential standard set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (*Chevron*)[40] and deferred to the *Authority's "reading"* that, under the unique circumstances of that case, teacher pay and benefits constituted "*conditions of employment*."[41] But, the Court rejected the agency's attempt to conflate The Court explained, in exhaustive dicta, that the term, "*working conditions*," as used in 5 U.S.C. § 7103(a)(14), "more naturally refers, in isolation, *only* to the 'circumstances' or 'state of affairs' attendant to one's performance of a job . . . [i.e.] the day-to-day circumstances under which an employee performs his or her job"[42] and that the term, "*conditions of employment*," refers to the "qualifications demanded of, or obligations imposed upon, employees."[43]

Until 2011, various majorities of the Authority went far beyond that clear distinction and repeatedly cited *Ft. Stewart* incorrectly to support the notion that there is "no *substantive* difference between '*conditions of employment*' and '*working conditions*' as those terms are *practically applied*."[44]

Chairman Cabaniss, however, repeatedly challenged the Authority's unwarranted evolution on this point. In a series of dissenting and concurring opinions, she pointed out that there is a clear distinction between the two terms and that the distinction is significant in the federal workplace. In *Social Security Administration*,[45] then-Member Cabaniss explained, by way of example, that a policy to establish disciplinary procedure would constitute a "condition of employment," whereas the effect of the disciplinary procedure (i.e. the taking of a disciplinary action) on an employee would be a "working condition[.]"

In subsequent cases, Chairman Cabaniss provided additional examples to clarify the practical distinction between the two terms. She noted, in *U.S. Department of VA Medical Center, Sheridan, Wyoming*, that the "rules [and] regulations" that "define . . . [which] employees have the right to take [a government-owned vehicle] (GOV) home" constitute "conditions of employment[,]" whereas the "ability to take home a GOV" is a "working condition[]."[46] Similarly, in *U.S. DOL, Occupational Safety & Health Admin., Region 1, Boston, Massachusetts* (*OSHA Region 1*), Chairman Cabaniss explained that "rules [and] regulations . . . that define the hours of work for [a] bargaining unit" would constitute a "condition of employment," whereas, when an employee starts and stops work is a "working condition[]."[47]

These distinctions are consistent with the Supreme Court's decision in *Ft. Stewart* and the plain language that is used in 5 U.S.C. § 7103(a)(14). They are also consistent with more recent decisions of the Supreme Court and the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit).

In 2013, the D.C. Circuit, rejected its earlier deference to the Authority in *U.S. DHS, CBP v. FLRA*,[48] and held that while an agency must bargain over

[38] 5 U.S.C. § 7103(a)(14).
[39] *Id.* (emphasis added).
[40] *Ft. Stewart Sch. v. FLRA*, 495 U.S. 641, 645 (1999) (citing *Chevron*, 467 U.S. 837 (1984).
[41] *Id.* at 645-46 (citing *Ft. Stewart (Ga.) Ass'n of Educators*, 28 FLRA 547, 550-51 (1987)) (emphasis added).
[42] *Id*. at 645-46 (quoting *DOD Dependents Sch. v. FLRA*, 863 F.2d 988, 990 (D.C. Cir. 1988) (emphasis added).
[43] *Id*. (emphasis added)
[44] *U.S. DHS, CBP v. FLRA*, 647 F.3d 359, 365 (D.C. Cir. 2011) (internal citations omitted) (emphasis added).
[45] 55 FLRA 978, 985 (1999) (internal citations omitted) (Dissenting Opinion of then-Member Cabaniss).
[46] 59 FLRA 93, 96 (2003) (Concurring Opinion of Chairman Cabaniss).
[47] 67 FLRA 442, 446 (2014) (Concurring Opinion of Chairman Cabaniss) (*OSHA Region 1*) ("'*every word* of a statute must be presumed to have been used *for a purpose*,' so as not to 'construe different terms within a statute to embody the same meaning'") (internal citation omitted).
[48] 647 F.3d 359, 365 (D.C. Cir. 2011)

"conditions of employment,"[49] no condition of employment was implicated when the agency "initiated *no change* . . . to its *policies, practices, or procedures*."[50] Nearly echoing the distinctions drawn by Chairman Cabaniss, the court further held that a "*condition of employment*" refers to "change[s] in a *policy, practice, or procedure*" but that "*working conditions*" refer to matters such as an "increase[]" in an employee's "'volume' of work or 'number' of assignments *not attributable to* any change in the agency's *policies, practices or procedures.*"[51]

Around the same time as the D.C. Circuit's decision in *NTEU*, the Supreme Court reaffirmed that "a phrase is not superfluous if [it is] used to '*remove* . . . *doubt*' about an issue."[52] In 5 U.S.C. § 7103(a)(14), "conditions of employment" are defined as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, *affecting working conditions* . . ." It stands to reason, then, that the phrase, "affecting *working conditions*," although apparently "related"[53] to *conditions of employment*, has to mean something different. Otherwise, the term, *working conditions*, in the definition of *conditions of employment* would be "superfluous"[54] and would *raise*, rather than "*remove*," doubt[55] about why it is there.

Just four months ago, in *U.S. DOJ, Federal BOP, Metropolitan Correctional Center, New York, New York*. (*Metropolitan Correctional Ctr.*), my colleagues asserted that the Authority must "refrain from concluding" that *different terms* in a *single statutory provision* could have the "*same meaning*."[56] In that decision, the majority affirmed that the Authority "recognize[s] the 'well-established canon of statutory interpretation' that '*every word* of a statute must be presumed to have been used *for a purpose*,' so as *not to 'construe different terms* within a statute to *embody the same meaning*.'"[57] My colleagues went on to explain that "[s]uch a presumption has even greater force where, as here, *distinct terms are used within the very same sentence*."[58]

Following that rationale, the terms *conditions of employment* and *working conditions* could not mean the same thing. They not only appear in the "same sentence," but, as held by the majority in *Metropolitan Correctional Center*, "every word . . .[is presumed to be] used for a purpose."[59]

In practice, then, the distinction between a *working condition* and a *condition of employment* is significant. For example, many federal agencies have established a wide array of variable work arrangements – alternative work schedules, flexible time bands, etc. – through regulation and policy. These arrangements, and their concomitant prerequisites, constitute *conditions of employment*. But, the choices that an employee makes, pursuant to those regulations and policies (i.e. choosing a 4-10 workweek versus a 5-8 workweek or choosing a start time between 6 a.m. and 10 a.m. under a flexible time band), would constitute a *working condition*.

Therefore, an agency may well have to notify and negotiate with an exclusive representative before it eliminates a 4-10 workweek as an optional work schedule (*condition of employment*) from its regulation. But, the agency would not be obligated to notify and negotiate with the union before an individual supervisor changes the work schedule of an employee (who is suspected of abusing the agency's leave policy) from a previously elected 4-10 alternative work schedule to a standard 5-8 workweek or before another supervisor changes the start time of an excessively tardy employee (whose tardiness is negatively impacting the employee's performance) from a previously elected 10:00 a.m. start time to 8:30 a.m.

The distinction between *conditions of employment* and *working conditions* is just as clear in this case. Miller's access to, and unauthorized use of, the scooter was never a *condition of his employment*. I am even reluctant to categorize Miller's unauthorized "appropriate[ion]"[60] of the scooter as a *working condition*. But, in order to assume all of the facts in the best possible light to Council C-236, the Agency's decision to take away the scooter impacted nothing more than a *working condition*.

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[49] *NTEU v. FLRA*, 745 F.3d 1219, 1224 (D.C. Cir. 2014) (*NTEU*)(citing 5 U.S.C. §§ 7102(2), 7103(a)(12), 7114(a)(4), 7114(b)(2).

[50] *Id*. at 1225 (emphasis added).

[51] *Id*. at 1224 (emphasis added).

[52] *Marx v. General Revenue Corp*., 133 S. Ct. 1166, 1176 (2013) (*Marx*) (citing *Ft. Stewart*, 495 U.S. at 646) (emphasis added)).

[53] *OSHA Region 1*, 58 FLRA at 216 (Dissenting Opinion of then-Member Cabaniss)..

[54] *Marx*, 133 S. Ct. at 1176 (citing *Ft. Stewart*, 495 U.S. at 464).

[55] *Id*. (emphasis added).

[56] 67 FLRA 442, 446 (2014) (*Metropolitan Corr. Ctr.*) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983) (emphasis added) (internal quotation marks omitted).

[57] *Id*. (emphasis added) (internal citations omitted).

[58] *Id*. (citing *United States v. Williams*, 340 F.3d 1231, 1236 (11th Cir. 2003) ("[D]eliberate variation in terminology within the same sentence of a statute suggests that Congress did not interpret the two terms as being equivalent.") (emphasis added)).

[59] *Id*.

[60] Award at 4.

Thus, applying the Authority's *Letterkenny* framework, the Agency could not have violated 5 U.S.C. § 7116(a)(1) and (2). Council C-236 never demonstrated a change to any *condition of employment*.[61]

Vroooooom!!

Thank you.

[61] *Air Force Academy*, 52 FLRA at 878 (internal citations omitted).