69 FLRA No. 84

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
CUSTOMS AND BORDER PROTECTION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL BORDER PATROL COUNCIL
(Union)

0-AR-5177

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DECISION

September 20, 2016

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

I. Statement of the Case

Arbitrator Michael Wolf found that the Agency violated the parties' collective-bargaining agreement by denying administratively uncontrollable overtime (AUO) pay to employees who spent all of their work hours on "official time" performing Union duties (100% official-time schedules).[1] The main question before us is whether it is contrary to government-wide regulations to approve AUO pay for employees who did not perform *any* overtime work for a year or more, and did not anticipate performing overtime work in the foreseeable future. Because the applicable government-wide regulations require an agency to have a definite basis to anticipate that an AUO-eligible employee will perform overtime work and that such overtime-work performance will continue over an appropriate period, the answer is yes.

II. Background and Arbitrator's Award

The parties' agreement provides that Union representatives "will not suffer any loss of pay, allowances, or other penalty for the use of official time."[2] Under this contract provision, for many years, the Agency paid AUO to border-patrol agents who worked on official time – including those who worked on 100% official-time schedules. But, after a review of its AUO-pay practices, the Agency decided to stop approving AUO pay for employees who worked on 100% official-time schedules (the grievants). The Agency based that decision on its findings that the grievants had not performed any overtime work for a year or more, and did not anticipate working overtime in the foreseeable future.

When the Agency informed the Union of this change to AUO-pay practices, the Union filed a grievance seeking continued AUO pay for the grievants, as well as backpay for the period during which the Agency had not approved AUO pay. The grievance went to arbitration, where the Arbitrator framed the following issues:

> Was the Agency obligated by the . . . agreement to pay . . . [AUO] to [employees] who performed Union representational duties on a full-time basis (i.e., on "official time")?
>
> If so, would those payments violate any . . . laws or regulations?
>
> If AUO pay in these circumstances was required by the . . . agreement and was lawful, what is an appropriate remedy?[3]

In addition, the parties stipulated that any AUO-pay remedy could not extend beyond May 16, 2015, because Congress reformed the Agency's compensation structure to eliminate AUO pay for the Agency's employees as of May 17, 2015.

In his award, the Arbitrator explained that AUO was premium pay that an Agency employee received based, in part, on the average number of "irregular or occasional" overtime hours that the employee worked.[4] The Arbitrator further explained that an individual's AUO-payment rate (AUO rate) could equal 10%, 15%, 20%, or 25% of that individual's basic pay, and that a greater average number of overtime hours entitled an employee to a greater AUO rate.

Further, the Arbitrator found that, in order to avoid disadvantaging Union representatives who received AUO pay and also worked on official time, the parties' practice under their agreement was to "exclude[]" an employee's official-time workdays from the calculation

[1] Award at 59 (citing 5 U.S.C. § 7131(d)).
[2] *Id.* at 10, 28 (quoting Collective-Bargaining Agreement (CBA), Art. 7, § D).
[3] *Id.* at 2-3 (footnote omitted).
[4] *Id.* at 5 (quoting 5 C.F.R. § 550.154 (2015)).

of that employee's average number of overtime hours.[5] The Arbitrator also found that, until the change in AUO-pay practices that prompted the grievance, the grievants continued to earn AUO at whatever rate they previously received before moving to 100% official-time schedules, even though their 100% official-time schedules did not include any overtime work.

At arbitration, the Agency did not deny its longstanding practice of paying AUO to employees on 100% official-time schedules. But the Agency asserted that it belatedly recognized that paying AUO to employees who had not performed any overtime work for years was contrary to federal statutes and government-wide regulations. In that regard, the Agency argued that the parties' agreement could not authorize AUO payments that were inconsistent with federal law.

In contrast, the Union argued that the parties' agreement unambiguously guaranteed the continuation of AUO pay to the grievants, if they had received AUO pay before moving to 100% official-time schedules. Moreover, the Union asserted that none of the statutes or regulations that the Agency cited addressed AUO-pay calculations for employees on 100% official-time schedules.

After considering the parties' positions, the Arbitrator agreed with the Union that none of the Agency's citations to the *United States Code* or the *Code of Federal Regulations* (C.F.R.) directly addressed how to calculate AUO pay for employees on 100% official-time schedules. But, to the extent that the C.F.R.'s AUO requirements provided some guidance on resolving the grievance, the Arbitrator noted that the C.F.R. expressly required continuing otherwise-eligible employees' AUO pay during certain periods when they did not perform any work at all – such as "a period of paid leave . . . following a job-related injury."[6] The Arbitrator found that these C.F.R. provisions undermined the Agency's argument that an employee could not lawfully receive AUO pay without actually working overtime hours.

Moreover, as relevant here, the Arbitrator found that prior Authority decisions supported finding that the parties' contractual AUO-pay protections were fully enforceable in the cases of employees on 100% official time. Specifically, the Arbitrator found that Authority case law sanctioned negotiated agreements for "the exclusion of official time for . . . computing AUO" as lawful.[7] Thus, the Arbitrator found that Authority precedent supported enforcing the parties' agreement to "mak[e] all official time excludable for purposes of computing AUO" pay.[8]

As relevant here, for the reasons stated above, the Arbitrator found that the Agency violated the parties' agreement, without legal justification, by discontinuing AUO pay for the grievants. To remedy the contract violation, the Arbitrator directed the Agency to make the grievants whole for any AUO pay that they lost due to the Agency's violation.

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

III. Preliminary Matters

A. We assume that the Union has established extraordinary circumstances to excuse the untimely filing of its opposition.

The filing deadline for the Union's opposition was "no later than midnight Eastern Time" on March 4, 2016,[9] but the Union eFiled its opposition at 12:21 a.m. on March 5, 2016. Consequently, the Authority's Office of Case Intake and Publication directed the Union to show cause why the opposition should not be dismissed as untimely filed.[10] The Union responded that, when its counsel attempted to upload its opposition brief on March 4 – less than an hour before the filing deadline expired[11] – counsel experienced technical difficulties with the Authority's eFiling system that delayed the Union's submission until March 5.[12]

The Union asks that the Authority exercise discretion under its Regulations to waive the expired deadline for the opposition, based on allegedly "extraordinary circumstances" in this case.[13] In support, the Union states that: (1) it completed all of the question fields on the eFiling opposition form two days before the filing deadline, and needed only to upload attachments on March 4, but could not submit those attachments as planned;[14] (2) the Union did not make substantive changes to the opposition between the unsuccessful

[5] *Id.* at 7.
[6] *Id.* at 39 (quoting 5 C.F.R. § 550.162(f)(1) (2015)).
[7] *Id.* at 49 (citing *Nat'l Border Patrol Council, AFGE, AFL-CIO*, 23 FLRA 106 (1986) (*AFGE*)).
[8] *Id.* at 10, 28 (quoting CBA, Art. 7, § D).
[9] Order to Show Cause (Apr. 7, 2016) at 2 (quoting 5 C.F.R. § 2429.24(a)).
[10] *See id.*
[11] Resp. to Order to Show Cause (Union's Resp.) (Apr. 21, 2016) at 5 (indicating that Union uploaded its brief to the eFiling system "about half an hour before the time limit expired").
[12] *See id.* at 2-3.
[13] *See* 5 C.F.R. § 2429.23(b) ("[T]he Authority . . . , or [its] designated representatives, as appropriate, may waive an[] expired time limit . . . in extraordinary circumstances."); Union's Resp. at 5 (requesting waiver of expired time limit).
[14] Union's Resp. at 1-2.

March 4 submission attempts, and the ultimately successful submission on March 5;[15] and (3) as documented in a printout attached to its response,[16] the Union emailed the webmaster of the Authority's website immediately after successfully eFiling the opposition, in order to alert the Authority to the Union's difficulties with the eFiling system.[17]

We take this opportunity to caution all parties once again that they "must accept responsibility for the increased potential that a minor, ordinary obstacle could prove fatal to their ability to file a timely" document, particularly if they "wait[to file] until . . . after the Authority's close of business . . . on the last day of the filing period."[18] However, here, the contentions in the opposition largely track the Arbitrator's reasoning in the award. And, regardless of whether the Union filed an opposition, we must address the Arbitrator's reasoning to resolve the Agency's exceptions. In other words, considering the Union's opposition will not materially affect our analysis in this case. For that reason, we assume, without deciding, that the Union has established extraordinary circumstances to justify waiving the expired deadline, and that the opposition is properly before us.[19]

B. We find it unnecessary to resolve the Agency's request for judicial notice or the Union's motions to strike.

As part of its exceptions, the Agency requests that the Authority take "judicial notice" of certain "Congressional hearings for background purposes."[20] But, for the reasons explained in Part IV. below, we resolve one of the Agency's exceptions in its favor without relying on any information from Congressional hearings. Because granting the Agency's judicial-notice request would not affect that outcome, we find it unnecessary to resolve the request.[21]

As part of its opposition, the Union moves that the Authority strike several paragraphs from the Agency's exceptions brief[22] – as well as one attachment to the exceptions[23] – for reasons not relevant here. But, because we do not need to consider the contested portions of the exceptions to resolve this case, we find it unnecessary to determine whether the Union's motions are properly before us, or to resolve those motions on the merits.[24]

IV. Analysis and Conclusion: The award is contrary to government-wide regulations.

The Agency asserts that the Arbitrator legally erred in several respects.[25] Of particular relevance here, the Agency contends that the Arbitrator's direction to pay AUO to employees working on 100% official-time schedules is contrary to government-wide regulations in the C.F.R.,[26] for reasons discussed in more detail below. When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo.[27] In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[28] Under this standard, the Authority defers to the arbitrator's underlying factual findings, unless the excepting party establishes that they are nonfacts.[29]

As the parties and Arbitrator recognized, the Authority has addressed the legality of "excludable days" for purposes of calculating AUO rates on several

[15] *See id.* at 3.
[16] *Id.*, Attach. at 2.
[17] Union's Resp. at 3.
[18] *AFGE, Local 3961*, 68 FLRA 443, 445 (2015) (Member DuBester dissenting).
[19] *Cf. NATCA, AFL-CIO*, 66 FLRA 467, 472 (2012) (considering party's supplemental submission, where it "merely reiterate[d] arguments" that were already before the Authority as part of other filings).
[20] Exceptions at 9 n.1.
[21] *See, e.g., U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Sheridan, Or.*, 65 FLRA 157, 157 n.1 (2010) (finding it unnecessary to resolve official-notice request because recognized filings provided the Authority with all of the information needed to resolve the dispute).
[22] Opp'n at 3 (moving to strike a paragraph from the exceptions that discusses a Government Accountability Office report about AUO at the Department of Homeland Security), 4 (moving to strike discussion of an agency instruction that postdates the arbitration hearing).
[23] *Id.* at 4 (moving to strike Exhibit G from the exceptions because it did not exist at the time of the arbitration hearing).
[24] *See, e.g., U.S. DOD, Ala. Air Nat'l Guard, Montgomery, Ala.*, 58 FLRA 411, 413 n.4 (2003) (finding it unnecessary to address whether an argument was raised below because the argument was not relevant to resolving exceptions).
[25] *E.g.*, Exceptions at 4, 14-15 (citing 5 U.S.C. § 5545(c)), 20-22 (citing judicial precedent), 30-42 (citing guidance from the Office of Personnel Management).
[26] *E.g., id.* at 17 (citing 5 C.F.R. § 550.153 (2015)), 23 (same), 25 (citing 5 C.F.R. § 550.161(f) (2015)), 42 (same).
[27] *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)); *see U.S. DOJ, Fed. BOP, Wash., D.C.*, 64 FLRA 1148, 1150 (2010) (Authority performs de novo legal review to resolve arguments that an award is inconsistent with government-wide regulations).
[28] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[29] *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014) (citing *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 104 (2012)).

previous occasions.[30] In one such recent decision, the Authority described the analytical steps for "determining the eligibility for, and the amount of, AUO pay," consistent with the C.F.R.[31] In the first step of the analysis, under 5 C.F.R. § 550.153(a), an agency must determine whether the nature of a "position in general" is suitable for AUO pay.[32] Here, the parties have not disputed the first step, so we need not discuss it further.

At the second step of the analysis (second step), under 5 C.F.R. § 550.153(b), "an agency determines whether an *individual employee performs* the requisite amount of AUO – at least an average of three hours a week."[33] Further, 5 C.F.R. § 550.161(f) requires that an agency review its second-step determination "at appropriate intervals."[34] Thus, as relevant here, to be consistent with government-wide regulations, the Arbitrator's award must permit the Agency to verify, at appropriate intervals, that the grievants performed the required average number of AUO hours to maintain their AUO-pay eligibility.[35]

In its exceptions, the Agency argues that the award fails to satisfy those requirements.[36] Regarding the second step, the Agency contends that the grievants – who did not perform any overtime work for periods of a year or more – necessarily failed to perform at least an average of three hours of AUO per week, as § 550.153(b) requires.[37] And the Agency contends that the award contravenes § 550.161(f) by effectively precluding the Agency from reviewing its second-step determinations for the grievants.[38]

As mentioned earlier, the Arbitrator found that the Agency could have lawfully excluded the grievants' official-time workdays from its AUO calculations and that, after doing so, the Agency could have properly certified the grievants as eligible for AUO pay.[39] In that regard, the award essentially holds that the Agency should have excluded all of the grievants' workdays from its AUO calculations. Further, the parties stipulated before the Arbitrator[40] – and it remains undisputed[41] – that the grievants did not perform any "irregular or occasional overtime work"[42] for a year or more, and they did not plan to perform overtime work for as long as they maintained their 100% official-time schedules. As a result, the grievants did not have any non-excluded workdays, or any AUO-work performance, that would have supported re-affirming the Agency's prior AUO-rate calculations for them "at appropriate intervals," under § 550.161(f).[43]

In addition, in order for the Agency to have properly certified the grievants as AUO-eligible under § 550.153(b),[44] "[t]here must [have been] a *definite basis for anticipating* that the [grievants'] irregular or occasional overtime work [would] *continue over an appropriate period* with a duration and frequency sufficient to meet the minimum requirements,"[45] including "at least an average of three hours of AUO per week."[46] But because the grievants did not perform overtime work for a year or more, the Agency had no basis – let alone a "definite basis," as § 550.153(b)(3) requires[47] – to anticipate that the grievants would perform the minimum average overtime work necessary to maintain AUO eligibility.

For the foregoing reasons, we find that the Arbitrator's enforcement of the parties' agreement in this case – where the grievants had not performed overtime work for years, and had no plans to return to performing overtime work – is inconsistent with §§ 550.153(b) and

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[30] *E.g.*, *AFGE, ICE, Nat'l Council 118*, 68 FLRA 910, 912 (2015) (*Council 118*), *recons. denied*, 69 FLRA 248 (2016); *AFGE*, 23 FLRA at 106, 109.

[31] *Council 118*, 68 FLRA at 912.

[32] *Id.* (citing 5 C.F.R. § 550.153(a) (2015)).

[33] *Id.* at 912-13 (emphasis added) (citing 5 C.F.R. § 550.153(b) (2015)).

[34] *Id.* at 913 (quoting 5 C.F.R. § 550.161(f) (2015)).

[35] 5 C.F.R. §§ 550.153(b), 550.161(f) (2015).

[36] *See, e.g.*, Exceptions at 23, 25, 44, 47.

[37] *See id.* at 23 (citing 5 C.F.R. § 550.153 (2015)).

[38] *See id.* at 25 (citing 5 C.F.R. § 550.161(f) (2015)); *id.* at 44 ("None of the[Authority's prior] decisions . . . contemplated awarding AUO to full-time union officials who were not performing overtime work."), 45 (complaining that employees on 100% official-time schedules were receiving at least a 10% AUO rate, despite "not performing *any* overtime work"), 47 ("At no point has the Authority stated that employees may *continue to be paid* AUO premium pay *ad infinitum* when there is no overtime work being performed." (emphases added)).

[39] Award at 59.

[40] Exceptions, Attach., Ex. F (Arbitration-Hr'g Joint Ex. J-1), Stipulations of Fact at 3 no. 12 ("Full-time [U]nion representatives spend 100% of duty time performing [U]nion representational functions and are not assigned[,] and *do not perform*[,] Border Patrol Agent duties, except for mandatory trainings." (emphasis added)); *see also* Exceptions, Attach., Ex. E, Arbitration-Hr'g Tr. at 69 (testimony of first Union witness that "I don't work AUO"), 108 (testimony of second Union witness that the "last time that I worked AUO . . . was when the government shut down" in 2013).

[41] Exceptions at 17 ("[Grievants] do not actually perform any . . . work on an overtime basis."); Opp'n at 12 (asserting that the grievants "were . . . working AUO . . . *prior to assuming their union duties*," but not asserting that they performed any overtime work while on 100% official time (emphasis added)).

[42] 5 C.F.R. § 550.153(b)(3) (2015).

[43] *Id.* § 550.161(f) (2015).

[44] *See* Exceptions at 7, 23 (quoting 5 C.F.R. § 550.153(b)(3) (2015)).

[45] 5 C.F.R. § 550.153(b)(3) (2015) (emphases added).

[46] *Id.* § 550.153(b)(1) (2015).

[47] *Id.* § 550.153(b)(3) (2015).

550.161(f). Thus, we set aside the award as contrary to government-wide regulations.

Nevertheless, we wish to emphasize the narrow scope of our decision. The Authority has previously recognized that unions may negotiate to exclude certain time periods – for example, "negotiations time"[48] – from an agency's AUO-rate calculations, and we are not rejecting that principle. Unlike this case, however, those prior decisions involved employees who still performed *some* AUO work during the work year so that, even after excluding official-time work, an agency could base its AUO certifications on AUO-eligible work that the agency had "a definite basis for anticipating"[49] the employees would continue performing.[50] The problems in this case arose from the grievants' desires to exclude *all* of their workdays from their AUO calculations, and also to receive an overtime premium without performing any overtime work. We emphasize the narrow scope of our decision not, as our concurring colleague inaccurately claims, to "give [an] advisory opinion[]."[51] Rather, consistent with judicial practice in similar situations, we discuss how this decision relates to Authority precedent in order to maintain the clarity of our case law, and to help parties avoid misinterpreting this decision in future cases.[52]

Finally, we note that the Agency has made numerous additional arguments in its exceptions, including nonfact arguments[53] and other contrary-to-law arguments.[54] Because we are setting aside the award as contrary to §§ 550.153(b) and 550.161(f), we find it unnecessary to resolve the Agency's additional arguments.[55]

V. Decision

We set aside the award.

[48] *AFGE*, 23 FLRA at 106.
[49] 5 C.F.R. § 550.153(b)(3) (2015).
[50] *See Council 118*, 68 FLRA at 912 (rejecting agency argument that it was unlawful to negotiate excludable days, where "[a]gency ignore[d] the fact that AUO-eligible employees return to AUO-qualifying duties when not involved in negotiations").
[51] Concurrence at 11.
[52] *See, e.g.*, *Riley v. Kennedy*, 553 U.S. 406, 428 (2008) ("Although our reasoning and the particular facts of this case should make the narrow scope of our holding apparent, we conclude with some cautionary observations."); *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71, 75 (1953) ("The parties here see the case as requiring decision of sweeping abstract principles . . . . *But this decision does not, and should not be read to, declare any such principles.* The actual controversy here is within a very narrow scope . . . ." (emphasis added)).
[53] *E.g.*, Exceptions at 14, 16, 19, 20, 23-24, 30, 39-40, 53-57.
[54] *E.g.*, *id.* at 4, 13 (citing other provisions of the C.F.R.), 14-15 (citing 5 U.S.C. § 5545(c) and the U.S. Constitution), 20-22 (citing judicial precedent), 26-28 (making arguments about 5 C.F.R. § 550.162 that the Authority has rejected in several prior decisions), 30-42 (citing guidance from the Office of Personnel Management), 50 (relying on Antideficiency Act and U.S. Constitution).
[55] *See, e.g.*, *AFGE, Local 1034*, 68 FLRA 718, 720 (2015) (finding it unnecessary to address excepting party's additional arguments, where Authority granted a contrary-to-law argument and set aside award on that basis).

Member Pizzella, concurring:

I agree that the Arbitrator's award is contrary to government-wide regulations.

However, I cannot join the majority insofar as they excuse the Union's late filing of its opposition. The Union's opposition was filed late and should not be considered.

In *AFGE, Local 3961*, the Authority dismissed a union's exceptions which were filed six minutes after the filing deadline.[1] In that case, we cautioned parties, who wait until the last minute to attempt to process and file documents electronically, that a "minor, ordinary obstacle could prove fatal to their ability to file a timely exception."[2]

Here, the Union's opposition to the Agency's exceptions were filed twenty-one minutes late even though, according to the Union's own admission, it had completed the eFiling opposition form *two days* before the filing deadline. During those two days, the Union made no substantive changes to the form and does not explain why it waited until the last minute to send the opposition.

The majority concludes that the Union's negligence should be ignored and "assume[s], without deciding, that the Union has established extraordinary circumstances to justify waiving the expired deadline, and that the opposition is properly before us."[3] And in a tact that has never been taken by the Authority (and arguably creates a proverbial-legal slope more slippery than a frozen hillside) or any court or quasi-judicial review agency justifies its inconsistent approach by reasoning that the Union's untimely-filed opposition "largely track[s] the Arbitrator's reasoning in the award."[4]

Huh?? I would dare say that most, if not all, oppositions to any exception filed from an arbitral award will "largely track" the arbitrator's reasoning. Otherwise, there would be no dispute as to whether the arbitrator erred. In other words, if the circumstances of this case "establish extraordinary circumstances" to accept the late filing, I find it difficult to conceive of a situation that would not.

I also disagree with the majority's decision insofar as they unnecessarily address a question that was not raised by the parties and is unnecessary to resolve the issue that is properly before us.

Here, the question before the Authority is "whether it is contrary to government-wide regulations to approve [administratively uncontrollable overtime (AUO)] pay for employees who did not perform *any* overtime work for a year or more, and did not anticipate performing overtime work in the foreseeable future."[5] My colleagues and I agree that, under these circumstances, AUO pay is unlawful and that the Arbitrator's award is contrary to government-wide regulations.[6]

Obviously then, this case has nothing whatsoever to do with what a union may or may not negotiate,[7] a question that my colleagues inexplicably throw in to ask and answer even though neither party raised the question and even though the question has nothing to do with the dispute we are supposed to answer.

But in its answer to and discussion of its own hypothetical question − whether a union "may negotiate to exclude certain time periods"[8] – the majority suggests the exact proposal that this, or any other, union should propose in any future negotiation in order to circumvent the very government-wide restrictions which we enforce in the decision to which we all agreed today.

Creating its own idiomatic "tempest in a teapot,"[9] the majority claims that *its discussion* of *its own question* is not advisory in nature but "clari[fies]" Authority precedent.[10] There are a couple of problems with the majority's defensive response.

First, it seems to me that if there was any lack of clarity in Authority precedent, which required clarification, it is more than likely that some party in the Federal government would have raised that question in the past thirty years. The purported "previously recognized" precedent,[11] which the majority proclaims requires "clari[fication]," is not similar to the

[1] 68 FLRA 443, 445 (2015) (Member DuBester dissenting).
[2] *Id.*; *see also U.S. DHS, U.S. CBP*, 68 FLRA 1015, 1017-18 (2015) (Member Pizzella dissenting); *U.S. DHS, U.S. Border Patrol, Yuma Sector*, 68 FLRA 189, 191 (2015) (Authority may waive late opposition filing).
[3] Majority at 5.
[4] *Id.* at 4.
[5] *Id.* at 1.
[6] *Id.* at 1, 7-8.
[7] *Id.* at 8.
[8] *Id.*
[9] http://idioms.thefreedictionary.com/Tempest+in+a+teapot.
[10] Majority at 8.
[11] *Id.*

circumstances of this case and it is a question that has not been raised by any party in the thirty years since.[12]

Second, my colleagues may have forgotten, but the Authority does not give advisory opinions.[13] On numerous occasions, the Authority, and this majority, has recognized that an "advisory opinion" is one which "resolve[s] an issue [that will] *not affect the results*" of the case before the Authority[14] or one that addresses an issue that just "*might* occur *in the future*"[15] or, in other words, is entirely "hypothetical."[16]

By any plausible definition, the majority's discussion of its own question constitutes an advisory opinion. I have previously reminded my colleagues that over twenty-five centuries ago, Confucius observed that "the beginning of wisdom is to call things by their proper names."[17] It is obvious that the majority's extraneous sua sponte discussion is intended to signal to every federal union *how to circumvent* the regulatory restrictions that we enforced in this decision. More troubling is that the majority indicates that it will be willing to create new law, which would require federal agencies to negotiate to exclude "negotiations time" from those restrictions, as soon as a union makes the proposal.

Therefore, let's at least call this what it really is – an advisory opinion.

Thank you.

[12] The majority erroneously implies that the Authority has held "that unions *may negotiate* to exclude certain time periods – for example, 'negotiations time'" – citing, as support, a single, two-member thirty-year-old case (Majority at 8 (citing *Nat'l Border Patrol Council, AFGE, AFL-CIO*, 23 FLRA 106, 106 (1986) (*AFGE*))) – which addressed an entirely different scenario than the case before us. As the majority acknowledges, *AFGE* involved employees who performed "*some* AUO" during the work year and the proposal was intended to "minimiz[e] or eliminate[e] the future adverse economic impact [resulting from] the difference between [] *AUO* and . . . *regular overtime*." In other words, in *AFGE*, the employees actually spent some time performing work at their work site. In this case, however, the employees are Union officers who are on 100% official time and spend all of their time away from their worksite performing work for only the Union. Accordingly, these employees are not otherwise eligible for overtime and are trying to force the Agency to negotiate a provision which would benefit only them (in other words to earn overtime for work performed entirely for the Union). Before the two-member decision in *AFGE* from 1986, the Authority had never held, as the majority suggests in its advisory discourse, that such a proposal *is negotiable*. *See AFGE, Nat'l Border Patrol Council, Local 2455*, 23 FLRA 90, 94 (1986); *U.S. Dep't of the Treasury, IRS, Phila. Serv. Ctr.*, 16 FLRA 749, 751 (1984).

[13] 5 C.F.R. § 2429.10 ("The Authority . . . will not issue advisory opinions."); *see NASA, Goddard Space Flight Ctr., Wallops Island, Va.*, 67 FLRA 258, 258 (2014); *Overseas Private Investment Corp.*, 64 FLRA 827, 827 (2010).

[14] *U.S. Dep't of the Air Force Space and Missile Systems Ctr., L.A. AFB El Segundo, Cal.*, 67 FLRA 566, 568 (2014) (Member Pizzella dissenting) (emphasis added) (citing *USDA, Rural Hous. Serv., Centralized Servicing Ctr.*, 67 FLRA 207, 208 (2014)); *NASA, Goddard Space Flight Ctr., Wallops Island, Va.*, 67 FLRA 258, 259 (2014) (Member DuBester concurring) (defining "advisory opinion" as answering a question that "would not change the [Regional Director's] determination") (citing *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 61 FLRA 352, 354 (2005)); *AFSCME, Local 1418*, 53 FLRA 1191, 1194 (1998).

[15] *SSA, Office of Disability Adjudication & Review, Region 1*, 65 FLRA 334, 336 (2010) (emphasis added) (citing *AFGE, Local 1864*, 45 FLRA 691, 694-95 (1992)).

[16] *NASA, Goddard Space Flight Ctr., Greenbelt, Md.*, 62 FLRA 348, 349 (2008) (declining to address an exception that challenges a "hypothetical future event" because addressing that exception would constitute an "advisory opinion").

[17] *U.S. Dep't of VA, Med. Ctr., Dayton, Ohio*, 68 FLRA 360, 363 (2015) (Dissenting Opinion of Member Pizzella) (citation omitted).