70 FLRA No. 127

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. IMMIGRATION AND CUSTOMS
ENFORCEMENT
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL COUNCIL, 118-ICE
(Union)

0-AR-5229

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DECISION

June 15, 2018

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Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members
(Member DuBester dissenting)

I. Statement of the Case

In this case, the Agency sought to correct an unlawful practice under which nearly all law enforcement officers that it employed – approximately 5000 employees − were being paid excessive amounts of administratively uncontrollable overtime (AUO) on an ongoing basis to which they were not entitled. The Union grieved when the Agency did not bargain with the Union *before* it stopped the unlawful practice.

The Agency changed how it computed AUO after it was directed to bring its computation method into compliance with applicable government-wide regulations. Arbitrator Jeffrey J. Goodfriend found that the Agency violated the parties' collective-bargaining agreement and committed an unfair labor practice (ULP) under § 7116 of the Federal Service Labor-Management Relations Statute (the Statute)[1] by not bargaining with the Union before making the change.

The question before us is whether the Arbitrator's award is contrary to law. We find that the Agency's former method of computing AUO entitlements was contrary to government-wide regulations. Because the Agency was not required to bargain before changing that unlawful practice, the Agency did not commit a ULP. Therefore, the award is contrary to law.

II. Background and Arbitrator's Award

The Agency is a component of the U.S. Department of Homeland Security (the Department). The Union represents thousands of Agency law-enforcement employees. The Agency uses AUO to pay its law-enforcement employees for "substantial amounts of irregular, unscheduled overtime."[2] AUO is an Office of Personnel Management (OPM)-regulated, overtime-pay system in which agencies may compensate employees for overtime with a prorated annual premium based on a percentage of the employee's annual salary.[3]

The Agency calculates AUO entitlements by periodically reviewing an employee's time sheets to determine the average number of AUO hours worked. The Agency computes the average by dividing the number of AUO hours worked by the total number of hours worked in the applicable time period. The Arbitrator found that, in computing AUO, the Agency had a "longstanding practice" of excluding certain leave times, such as annual and sick leave, from the total number of hours worked (the practice).[4] The practice reduced an employee's total number of hours worked. Then, when the number of AUO hours worked was divided by the reduced number of total hours worked, the average number of AUO hours increased. By increasing the average number of AUO hours, the practice allowed an employee to meet the threshold-hour requirement for AUO eligibility more easily and to receive a higher AUO premium.

Allegations of AUO abuse prompted a January 2013 investigation by the Department into the Department's AUO practices. The Department's investigators found widespread AUO problems in all of the Department's components. Later that year, the U.S. Office of Special Counsel submitted the Department's report to Congress and the President. This triggered an investigation by the U.S. Government Accountability Office (GAO).[5]

Consequently, in May 2014, the Department issued a memorandum (May memo) that directed all components to review their excludable-days practices.

[1] 5 U.S.C. § 7116.

[2] Award at 4 (quoting 5 U.S.C. § 5545(c)(2)).

[3] 5 C.F.R. §§ 550.151-550.154, 550.161-550.164.

[4] Award at 6.

[5] In December 2014, GAO submitted its investigative report to Congress. In its report, GAO stated that the Department had not been calculating AUO in a manner consistent with law and regulation, and recommended changes to correct the deficiencies.

The May memo stated that the Agency's practice did not comport with OPM regulations, and directed the Agency to develop a plan to comply with the regulations.

Subsequently, the Agency sought the Department's guidance about how to change the practice. The Department directed the Agency to immediately stop treating any time periods as excludable under AUO except for the categories explicitly listed in the OPM regulations. The OPM regulations specifically permit[6] excluding time periods in which an employee is: (1) on a "temporary assignment to [non-AUO-eligible] duties,"[7] (2) in duty-related "advanced training,"[8] or (3) on a temporary assignment "directly related to a national emergency declared by the President."[9] The OPM regulations do *not* state that the time periods that the practice excluded – annual and sick leave – may be excluded from AUO computations.

Shortly thereafter, the Agency emailed all employees, stating that it was immediately ending the practice – i.e., the Agency would no longer exclude annual and sick leave from its AUO computations. The Agency separately notified the Union and offered post-implementation bargaining over the change.

The Union filed a grievance alleging that the Agency failed to notify or bargain with the Union *before* changing the practice, in violation of the Statute and Article 9A of the parties' agreement (Article 9A). Article 9A requires the Agency to provide pre-implementation notice of proposed changes in existing practices and the opportunity for the Union to request bargaining. The Union also asserted that no change in the law had occurred to justify the Agency's failure to bargain before changing the practice.

The Agency denied the grievance, and the parties submitted it to arbitration.

The stipulated issue before the Arbitrator was whether the Agency violated the parties' agreement or the Statute by changing the practice without bargaining with the Union.

As relevant here, the Arbitrator stated that the dispute centered on whether the Agency was required to bargain *before* or *after* changing the practice. The Agency argued that it had no control over changing the practice because the Department had directed it to end any unlawful AUO practices. Further, the Agency argued that, according to OPM's interpretation of its AUO regulations – as set forth in OPM Compensation Policy Memorandum, CPM 97-5 (the OPM guidance) – the practice was unlawful. Therefore, the Agency asserted that it was not required to bargain before changing the unlawful practice to conform to OPM regulations.

The Arbitrator rejected the Agency's arguments. He stated that he did not need to defer to the Agency's interpretation of the OPM regulations. Instead, citing Authority decisions in a negotiability matter involving the same parties – decisions that the Authority has since vacated[10] – the Arbitrator found that the practice had not been contrary to OPM regulations. Consequently, the Arbitrator found that the Agency's failure to bargain with the Union before changing the practice violated Article 9A and § 7116(a)(5) of the Statute.

On October 3, 2016, the Agency filed exceptions to the award. On November 2, 2016, the Union filed an opposition to the Agency's exceptions.

III. Analysis and Conclusion: The Arbitrator's finding that the Agency was required to bargain before changing the practice is contrary to law.

According to the Agency, the Arbitrator erred by finding that it violated § 7116(a)(5) of the Statute by failing to notify and bargain with the Union before changing the practice. The Agency contends that because the practice was contrary to OPM regulations, it was required to bargain only *after* changing the practice.[11]

When an exception involves an award's consistency with regulations, the Authority reviews any question of law raised by the exception and the award de novo.[12] In applying the standard of de novo review, the Authority determines whether an arbitrator's legal conclusions are consistent with the applicable legal standard.[13]

The Agency argues that the practice is unlawful and that the Arbitrator erred by failing to defer to OPM's interpretation of its own regulations.[14] There is no dispute that the OPM AUO regulations are

[6] 5 C.F.R. § 550.154(c).
[7] *Id.* § 550.162(c)(1).
[8] *Id.* § 550.162(c)(2).
[9] *Id.* § 550.162(g).

[10] *See AFGE, ICE, Nat'l Council 118*, 70 FLRA 441 (2018) (*AFGE 2018*), *vacating AFGE, ICE, Nat'l Council 118*, 69 FLRA 248 (2016) (*AFGE 2016*) (Member Pizzella concurring), *and AFGE, ICE, Nat'l Council 118*, 68 FLRA 910 (2015) (*AFGE 2015*).
[11] Exceptions Br. at 21.
[12] *E.g.*, *U.S. DHS, CBP*, 69 FLRA 579, 581 (2016) (*CBP*); *U.S. DOJ, Fed. BOP, Wash., D.C.*, 64 FLRA 1148, 1150 (2010).
[13] *CBP*, 69 FLRA at 581.
[14] Exceptions Br. at 20-23.

government-wide regulations. The OPM regulations specify which time periods are "*not considered* in computing the average hours of irregular and occasional overtime work."[15] The specified permissible exclusions are time periods in which an employee is: (1) on "temporary assignment to [non-AUO-eligible] duties,"[16] (2) in duty-related "advanced training,"[17] or (3) on a temporary assignment "directly related to a national emergency declared by the President."[18] Thus, under the plain wording of the OPM regulations, the time periods that the practice excluded – annual and sick leave – are not permissible exclusions.

Moreover, OPM has interpreted its regulations as not permitting the exclusion of annual and sick leave from the AUO computation. The OPM guidance advises that "in determining the number of weeks in a review period, there is no authority to reduce the number of weeks by subtracting hours of paid leave (such as *annual leave or sick leave*)."[19] We defer to OPM's interpretation of its own regulations.[20] As the OPM guidance specifically states that agencies lack authority to exclude annual and sick leave from their AUO computations, we find that the practice is contrary to government-wide regulations.[21]

Our dissenting colleague advocates for an unprecedented bargaining obligation which is not found in our Statute and has never been suggested by the Authority. To the contrary, the Authority has long held that an agency may implement a change to correct an unlawful practice without first bargaining over the change.[22] In that circumstance, an agency is obligated to provide notice of the change and provide an opportunity to bargain only *after* implementation.[23] Consequently, the Arbitrator's finding that the Agency was required to bargain *before* changing the practice is contrary to law. Therefore, we set aside the Arbitrator's finding that the Agency violated the Statute. Additionally, because the Arbitrator based his contractual-violation finding on his erroneous determinations that (1) the practice was legal, and (2) the Agency was required to bargain before changing the practice, we find that the Arbitrator erred in finding a contractual violation. Accordingly, we set aside the award, and find it unnecessary to address the Agency's remaining exception.[24]

IV. Decision

We set aside the award.

[15] 5 C.F.R. § 550.154(c) (emphasis added).
[16] *Id.* § 550.162(c)(1).
[17] *Id.* § 550.162(c)(2).
[18] *Id.* § 550.162(g).
[19] Exceptions, Ex. E, Agency Ex. 6 at 4 (emphasis added).
[20] *U.S. Dep't of VA, Med. Ctr., Wash., D.C.*, 67 FLRA 194, 197-98 (2014) (deferring to OPM's interpretation because the Authority defers to agency's interpretation of its own regulation unless that interpretation is "plainly erroneous or inconsistent with the regulation" (quoting *Cong. Research Emps. Ass'n, IFPTE, Local 75*, 59 FLRA 994, 1000 (2004))).
[21] We note the Union's argument that the Arbitrator properly relied upon *AFGE 2016*, 69 FLRA 248, and *AFGE 2015*, 68 FLRA 910, but – as stated above – the Authority has since vacated those decisions. *See AFGE 2018*, 70 FLRA 441. Therefore, those decisions have no legal effect and provide no basis for upholding the Arbitrator's award in this case. On May 14, 2018, based on the Authority's decision in *AFGE 2018*, the Agency filed with the Authority a request for leave to file a Request for Solicitation of Advisory Opinion with OPM regarding what types of time may properly be excluded from an AUO review period. On May 21, 2018, the Union filed an opposition to the Agency's request. However, because we find that the OPM regulations and existing OPM guidance – to which we defer – clearly bar the practice, we find it unnecessary to seek an advisory opinion from OPM. Consequently, we deny the Agency's request.
[22] *USDA, Food Safety & Inspection Serv., Boaz, Ala.*, 66 FLRA 720, 723 (2012); *U.S. INS, Wash., D.C.*, 55 FLRA 69, 73 n.8 (1999) (*INS*) (Member Wasserman dissenting); *see also Dep't of the Air Force, Air Force Logistics Command, Ogden Air Logistics Ctr., Hill Air Force Base, Utah*, 17 FLRA 394, 395-96 (1985) (citing *Dep't of the Interior, U.S. Geological Survey, Conservation Div., Gulf of Mex. Region, Metairie, La.*, 9 FLRA 543, 546 & n.9 (1982) (*Interior*)). The cases cited by the dissent do not support a contrary conclusion. *See* Dissent at 13 n.52 (citing *Interior*, 9 FLRA at 546 n.9; *U.S. Patent & Trademark Office*, 31 FLRA 952, 955 (1988) (*PTO*), *rev'd in part on other grounds sub. nom. POPA v. FLRA*, 872 F.2d 451 (1989)), 15 n.58 (citing *Interior*, 9 FLRA at 546 n.9). In both *Interior* and *PTO*, the Authority held that an agency has a statutory obligation to bargain over the impact and implementation of a change to correct an unlawful practice. However, the Authority did not hold in either case that this bargaining must take place *before* an agency may correct an illegal practice. In fact, in order to prevent any such misapprehension of its holding, the Authority in *Interior* provided the following qualification: "This is not to suggest that the obligation to bargain over the impact of a decision to discontinue an unlawful past practice could justify a delay in correcting the unlawful past practice." 9 FLRA at 546 n.9. Thus, *Interior* undercuts, rather than supports, the dissent.
[23] *AFGE, Local 1367*, 63 FLRA 655, 657 (2009) (citing *INS*, 55 FLRA at 73 n.8); *see also Portsmouth Naval Shipyard, Portsmouth, N.H.*, 49 FLRA 1522, 1532 (1994) (agency must provide notice and offer post-implementation bargaining).
[24] Exceptions Br. at 19-20 (arguing that the Arbitrator's finding that the grievance was arbitrable fails to draw its essence from the parties' agreement); *e.g., AFGE, Local 2145*, 69 FLRA 7, 9 (2015).

Member DuBester, dissenting:

In their summary decision in this case, the majority adopts a per se rule strictly limiting an agency's bargaining obligation where the agency is changing conditions of employment to comply with legal requirements. The majority's rule establishes only a post-implementation bargaining obligation in all such cases. This rule, adopted without a reasoned explanation or any meaningful consideration of the case's facts, lacks a foundation in the Federal Service Labor-Management Relations Statute (the Statute).[1] Because the majority's decision limiting collective bargaining in these circumstances is inconsistent with Congress's determination in the Statute that "collective bargaining [is] in the public interest,"[2] I dissent.

A complete understanding of the case's facts is key to determining how the case should be resolved.

I. Background and Arbitrator's Award

The Agency uses administratively uncontrollable overtime (AUO) to compensate its approximately 5000 law-enforcement officers for irregular and occasional overtime. Without notifying the Union or offering the Union an opportunity to bargain, the Agency unilaterally implemented a change in how it computes AUO entitlements. This change affected employees' eligibility for AUO and their amount of AUO pay. The Union filed a grievance alleging that the Agency violated the parties' agreement and committed an unfair labor practice (ULP) by changing this computation without notice to or bargaining with the Union.

Arbitrator Jeffrey Goodfriend found that the grievance was substantively arbitrable. The Arbitrator further found that the Agency violated the parties' agreement, and committed a ULP under § 7116 of the Statute,[3] when it failed to notify or engage in impact and implementation (I&I) bargaining with the Union before changing its AUO computation. He ordered a status quo ante (SQA) remedy, backpay, and other benefits.

The Arbitrator made detailed factual findings. As the Arbitrator found, the Agency is a component of the U.S. Department of Homeland Security (DHS or Department). The Union represents approximately 5800 Agency employees, of which 5000, in law enforcement, are affected here. The Agency uses AUO to pay employees for "irregular and occasional" overtime.[4] AUO is an alternate overtime-pay system, administered by the Office of Personnel Management (OPM), for compensating employees who work "substantial amounts of irregular unscheduled overtime duty."[5]

The Agency determines AUO eligibility (AUO certification) and AUO pay by periodically reviewing an employee's time sheets to determine the percentage of AUO hours worked. The Agency calculates the percentage by dividing AUO hours by the total number of hours worked in the applicable time period. The Arbitrator found that the Agency had a "longstanding practice" of excluding certain leave times, such as sick and annual leave, from the AUO computation (excludable-days practice).[6] This practice lowered an employee's total number of hours worked, resulting in an increase in the percentage of AUO hours, and made it easier for employees to meet the threshold-hour requirement for AUO certification and/or receive a higher AUO pay rate.

Responding to reports of AUO abuse, DHS distributed a memorandum in May 2014 (May 2014 memo) directing components to "develop a comprehensive [c]omponent-specific plan to achieve . . . compliance with [AUO] laws," including a review of excludable-days practices.[7] The May 2014 memo, which cited OPM regulations, stated that DHS would develop and issue a "Department-wide directive" to ensure "consistent . . . application" of rules on AUO pay.[8] The Arbitrator found that in response to the May 2014 memo, the Agency "put together an initial action plan . . . [and] began to address issues related to AUO" – but "did not provide specific guidance [on] . . . AUO" because of "confusion" about OPM's AUO regulations.[9]

Eight months later, in January 2015, DHS issued another memorandum (January 2015 memo) on AUO, directing the Agency to "provide feedback" concerning compliance with AUO law as directed in the May 2014 memo, to submit a "status report" concerning excludable days, and to "take immediate action to correct . . . unauthorized practices."[10] But the Arbitrator found that the Agency did not immediately change its excludable-days practice. Instead, the Agency responded

[1] 5 U.S.C. §§ 7101-7135.
[2] *Id.* at § 7101(a).
[3] 5 U.S.C. § 7116.
[4] Award at 4 (quoting 5 U.S.C. §5542(c)(2) amended by 5 U.S.C. § 5542(g)(4)(B) (2016)) (internal quotation marks omitted).
[5] *Id.*
[6] *Id.* at 6.
[7] *Id.* at 10.
[8] *Id.*
[9] *Id.* at 11.
[10] *Id.* at 13; *see also* Exceptions, Ex. E, Agency Ex. 7.

by submitting a status report and "not[ing] the need for department-wide guidance on AUO."[11]

Almost four months later, in April 2015, the Agency, while awaiting a Department-wide directive, contacted DHS for assistance in modifying its AUO practices. DHS responded by instructing the Agency to comply with the January 2015 memo. DHS also continued to work on a Department-wide AUO policy which, after distributing a draft to "national labor unions for review and comment," DHS issued on June 26, 2015 (DHS Directive).[12]

Also, in May 2015, the Agency – on a Saturday night, May 2, 2015 – sent an email to employees announcing issuance of a "new Premium Pay Guide" that included changes to the excludable-days practice.[13] These changes had a "significant effect" on bargaining unit employees' pay.[14] That same night, the Agency notified the Union for the first time that the Agency was changing its way of calculating AUO. Specifically, the Agency notified the Union that under "[Article] 9F of [the parties'] agreement," it was discontinuing the excludable-days practice "effective immediately" (9F notice).[15] Article 9F provides for "expedited implementation of new policies or practices affecting conditions of employment," without pre-implementation bargaining, on "certain occasions."[16] The effect of the unexpected change was "chaotic."[17] The Union was "swamped" with phone calls from employees who were upset and confused about the effect the change would have on their pay.[18]

The Union responded to the Agency's 9F notice by filing a grievance alleging that the Agency's failure "to notify the Union of [the] proposed changes ***before*** the Agency implemented the changes" violated Article 9A of the parties' agreement, and its failure to bargain was a ULP.[19] Article 9A of the agreement requires the Agency to provide pre-implementation notice of proposed changes in existing practices and the opportunity for the Union to request bargaining. The Union asserted that "no circumstances existed that would allow the Agency to avoid bargaining with the Union prior to implementing the policy."[20]

The Agency denied the grievance, asserting that it was required to immediately end the excludable-days practice and that it was not legally required to bargain over that decision.[21] The parties could not resolve the matter and took it to arbitration.

The stipulated issue before the Arbitrator was: "Did [the Agency] violate the [parties' agreement] and/or commit a [ULP] by unilaterally implementing a new [pay guide] in May 2015, which changed the [A]gency's policy on excludable days without engaging in *any* bargaining with [the Union]. If so, what is the remedy?"[22]

Before the Arbitrator, the Agency argued that the grievance was not arbitrable based on Article 47B of the parties' agreement. Article 47B "excludes matters from the grievance and arbitration procedures that are not subject to the control of management."[23] The Agency argued that DHS's instruction that the Agency change its excludable-days practice eliminated any control the Agency had over the change.

But the Arbitrator disagreed. He found that the Agency had four months after receiving the January 2015 memo, and before implementing the change in its May 2015, Saturday-night email, to "contact the Union and fulfill its obligation by engaging in pre-implementation bargaining."[24] He further found that the Agency had previously made the same argument in a negotiability matter involving the same parties, which the Authority also rejected.[25] Therefore, finding that the DHS instructions did not prevent the Agency from engaging in pre-implementation bargaining over the impact and implementation of the change to the excludable-days practice, the Arbitrator determined that Article 47B did not bar the grievance, and that the grievance was substantively arbitrable.

On the merits, the Agency argued that because the excludable-days practice was inconsistent with law; that is, OPM's AUO regulations, the Agency was entitled to "expedited implementation" of its new practice under Article 9F.[26] The Arbitrator rejected this argument as well, finding that the Agency's asserted need to comply with DHS's new interpretation of OPM's AUO regulations did not preclude the Agency from pre-implementation I&I bargaining. Therefore, the Arbitrator found that the Agency's failure to engage in

[11] Award at 12-13; *see also* Opp'n, Ex. C, Agency Ex. 10A.
[12] Award at 12; *see also id.* at 12 n.21.
[13] *Id.* at 14.
[14] *Id.* at 15.
[15] *Id.* at 18; Opp'n, Ex. C, Joint Ex. 3.
[16] Award at 24.
[17] *Id.* at 17 (internal quotation marks omitted).
[18] *Id.* at 16 (internal quotation marks omitted).
[19] Exceptions, Ex. E, Joint Ex. 4 at 3.
[20] *Id.*
[21] Award at 20-21.
[22] *Id.* at 22 (emphasis added).
[23] *Id.*
[24] *Id.* at 36; *see also id.* at 13.
[25] *Id.* at 25, 27.
[26] *Id.* at 30.

pre-implementation I&I bargaining with the Union over the change violated Article 9A of the parties' agreement.

Additionally and independently, the Arbitrator found that the Agency committed a ULP under the Statute because it failed "to engage in pre-implementation bargaining"[27] over a change in employees' conditions of employment that was more than de minimis. He ordered an SQA remedy and related remedies under the Back Pay Act.[28]

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

II. Analysis

A. The Arbitrator's substantive-arbitrability determination draws its essence from the parties' agreement.

The majority's summary decision does not discuss the Agency's threshold claim that the Arbitrator erred in determining that the grievance was arbitrable under the parties' agreement.[29] However, resolving that threshold claim is instructive.

When reviewing exceptions involving matters of contract interpretation, like the Agency's arbitrability claim here, the Authority defers to an arbitrator's interpretation of a collective-bargaining agreement.[30] This deference, and the private-sector cases from which it is derived, make clear that an award will not be found to fail to draw its essence from the parties' agreement merely because a party believes the arbitrator misinterpreted the agreement.[31] The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained."[32]

To show that an award fails to draw its essence from the collective-bargaining agreement, the appealing party must establish that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective-bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement.[33]

The Agency argues that the grievance is not arbitrable under the "plain language" of Article 47B of the parties' agreement because this provision excludes matters from the contractual grievance procedure "which are not subject to the control by Management."[34] As noted previously, Article 47B "excludes matters from [the] grievance and arbitration procedures that are not subject to the control of management."[35] The Agency contends that DHS instructed it "to cease" its excludable-days practice, and because it was "obliged" to follow DHS's direction, the matter was beyond its control and excluded from arbitration by Article 47B.[36] In support, the Agency contends that the Arbitrator improperly relied on Authority case law addressing the negotiability of the Agency's excludable-hours practice, and disregarded DHS directives issued in January and April 2015, which the Agency claims obliged the Agency to cease that practice.[37]

The Agency's arguments do not demonstrate that the Arbitrator's interpretation of Article 47B fails to draw its essence from the parties' agreement. The grievance alleges that the Agency violated the parties' agreement by failing to engage in pre-implementation bargaining over changing its excludable-days practice. In determining whether the Agency had control over the matter, the Arbitrator found that the Agency waited four months after DHS issued the January 2015 memo before implementing the change. Making a determination that has significance for other aspects of this case as well, the Arbitrator concluded that during this time, the Agency had ample opportunity to "contact the Union and fulfill its obligation by engaging in pre-implementation bargaining."[38] And the Agency does not dispute this finding. Therefore, because the issue the Agency raises – whether the Agency was obliged to cease its excludable-hours practice – standing alone, is not dispositive of the Arbitrator's conclusion that the grievance is arbitrable, the Agency fails to show that the Arbitrator's reading of Article 47B is irrational, unfounded, implausible, or in manifest disregard of the parties' agreement.[39] Accordingly, I would deny the Agency's threshold arbitrability exception.

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[27] *Id.* at 34.
[28] *Id.* at 42 (citing 5 C.F.R. § 550.805).
[29] *See* Exceptions Br. at 17.
[30] *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Forrest City, Ark.*, 68 FLRA 672, 674 (*Forrest City*).
[31] *Id.*
[32] *Id.* (internal quotation marks omitted).
[33] *U.S. DOD, Def. Contract Audit Agency, Cent. Region, Irving, Tex.*, 60 FLRA 28, 30 (2004) (*DOD*) (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).
[34] Exceptions Br. at 19; *see also* Exceptions, Ex. E, Joint Ex. 1 at 90.
[35] Award at 22.
[36] Exceptions Br. at 17.
[37] *Id.* at 17-18.
[38] Award at 36; *see also id.* at 13, 22.
[39] *DOD*, 60 FLRA at 30.

B. The Arbitrator's finding that the Agency committed a ULP is not contrary to law.

The heart of the majority's summary decision is the conclusion that the Arbitrator's ULP finding is contrary to law. For reasons similar to those cited by the Arbitrator when he found the grievance arbitrable, I disagree with the majority regarding the Arbitrator's ULP finding.

The Agency argues that the Arbitrator improperly found that the Agency violated § 7116(a)(5) of the Statute by failing to notify and bargain with the Union before changing the Agency's excludable-days practice. Specifically, the Agency contends that the award is contrary to law because the change "was necessary to end a practice contrary to government-wide regulation[s]."[40] Therefore, the Agency argues, it was only required to notify the Union and bargain *after* implementing the change to its excludable-days practice.[41]

When an exception involves an award's consistency with regulations, the Authority reviews any question of law raised by the exception and the award de novo.[42] In applying the standard of de novo review, the Authority determines whether an arbitrator's legal conclusions, not his or her underlying reasoning, are consistent with the applicable legal standard.[43] In making that determination, we defer to the arbitrator's underlying findings of fact.[44]

Under the Statute, an agency ordinarily may not change terms and conditions of employment without giving the collective-bargaining representative of the affected employees prior notice and an opportunity to bargain concerning the change.[45] Parties "may establish terms and conditions of employment by practice, or other form of tacit or informal agreement, and this, like other established terms and conditions of employment, may not be altered by either party in the absence of agreement or impasse following good faith bargaining."[46] It is well settled, in the area of federal-service labor-relations law, that the right to engage in a collective-bargaining dialogue with respect to matters for which there is an obligation to meet and confer ordinarily becomes meaningful only when agency management has afforded the exclusive representative reasonable notification and an ample opportunity to explore fully the matters involved "*prior to* the implementation date."[47]

If an existing practice is contrary to a government-wide regulation, an agency may take legitimate steps to conform to lawful requirements.[48] When an agency changes a past practice because it is unlawful, it has no duty to bargain over the substance of the change.[49] However, even if the subject matter of a change in conditions of employment is outside the duty to bargain, an agency must still bargain over the impact and implementation of the change if the change has more than a de minimis impact on employees.[50]

Even the majority concedes that the Agency has a duty to bargain in this case. The issue that separates us, therefore, is when – not whether – the Agency had an obligation to notify, and engage in I&I bargaining with the Union over the change to the Agency's excludable-days practice.[51] The Agency contends that it fulfilled its bargaining obligation by offering post-implementation bargaining over, what it asserts, is an illegal practice. But the Authority has found, in certain circumstances, that even when an agency must correct an unlawful practice, there may also remain an obligation to give prior notice of the change and bargain,

[40] Exceptions Br. at 20.
[41] *Id.* at 21.
[42] *U.S. DHS, CBP*, 69 FLRA 579, 581 (2016); *U.S. DOJ, Fed. BOP, Wash., D.C.*, 64 FLRA 1148, 1150 (2010) (*BOP*).
[43] *U.S. DHS, U.S. CBP*, 68 FLRA 276, 277 (2015); *SSA*, 67 FLRA 534, 538 (2014); *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 64 FLRA 426, 432-33 (2010); *see e.g., NTEU, Chapter 137*, 60 FLRA 483, 488 (2004) (error in arbitrator's reasoning does not provide basis for setting aside award where arbitrator's legal conclusion is correct); *see also U.S. Dep't of VA, Denver Reg'l Office, Denver, Colo.*, 60 FLRA 235, 237 (2004) (arbitrator's misinterpretation of Authority precedent does not alter arbitrator's ultimate, correct conclusion); *U.S. Dep't of the Navy, Naval Training Ctr., Great Lakes, Ill.*, 51 FLRA 198, 201 (1995) (arbitrator's erroneous statement of law does not alter arbitrator's ultimate, correct conclusion); *U.S. Dep't of the Navy, Mare Island Naval Shipyard, Vallejo, Cal.*, 49 FLRA 802, 812 (1994).
[44] *BOP*, 64 FLRA at 1150.
[45] *See* 5 U.S.C. § 7116(a)(5); *U.S. Dep't of the Treasury, Customs Serv., Wash. D.C.*, 38 FLRA 875, 880 (1990) (finding agency violated 5 U.S.C. § 7116(a)(5) by failing to provide union with prior notice and opportunity to bargain over impact and implementation of directive that changed conditions of employment).
[46] *Dep't of the Navy, Naval Underwater Sys. Ctr., Newport Naval Base*, 3 FLRA 413, 414 (1980) (citing "well established" precedent under Executive Order 11491).
[47] *Veterans Admin., Hines Hospital, Hines, Ill.*, 16 FLRA 3, 4 (1984) (emphasis added); *see also id.* at 21 (citations omitted).
[48] *U.S. Dep't of the Treasury, Customs Serv. New Orleans, La.* 38 FLRA 163, 174 (1990).
[49] *Portsmouth Naval Shipyard, Portsmouth N.H.*, 49 FLRA 1522, 1527-28 (1994) (*Portsmouth*).
[50] *U.S. Army Adjutant General, Publ'n Ctr., St. Louis, Mo.*, 35 FLRA 631, 634 (1990) (*Army*).
[51] *See* Award at 18, 22, 29.

to the extent consistent with law and regulation, concerning the impact of the required change and, where possible, its implementation.[52] Specifically, the Authority has held that an agency must notify a union before changing an unlawful practice, when this will not delay discontinuation of the practice and would not be otherwise contrary to law.[53]

Contrary to the majority, the Authority has not held that an agency has an unrestricted right to unilaterally implement a change to correct an unlawful practice, without giving the exclusive representative notice and an opportunity to bargain. The cases on which the majority relies do not support such an expansive exception to the requirement that notice and the opportunity to bargain must ordinarily occur before a change is made.[54]

Here, the Arbitrator's factual findings, to which we defer, show that the Agency had ample opportunity to, at a minimum, provide the notice to the Union required under 5 U.S.C. § 7116(a)(5).[55] This is not a case where the Agency needed to act abruptly, precluding adequate notice to, and bargaining with, the Union. The Agency's unilateral change was not premised on exigent circumstances such as an emergency or newly discovered information. And the Agency does not dispute the Arbitrator's finding that it waited four months after DHS issued the January 2015 memo before it unilaterally changed its longstanding practice. Nor does the Agency dispute that it was aware that it would need to make changes to the excludable-days practice at least since DHS issued the May 2014 memo – a year before it sent the 9F Notice.

In short, the Arbitrator found that the Agency engaged in a protracted process to revise its AUO calculation. And the Agency's review process continued for months even after DHS instructed the Agency to take "immediate action."[56] The Arbitrator further found that DHS itself distributed a draft of its department-wide directive to "national labor unions for review and comment" before it became final – making no claim that doing so would delay correction of illegal practices.[57] The Agency does not explain why DHS was able to provide this notice when responding to a presumed illegal practice, but the Agency could not satisfy its own obligation to notify and bargain with the Union before changing that practice. Indeed, when considered in the context of the large number of employees involved, and their demanding function as law-enforcement officers, it would have made more sense for the Agency to notify the Union *before* creating the chaotic situation caused by the Agency's surprise Saturday announcement that it was changing its excludable-days practice.

Accordingly, based on the facts and circumstances of this case, I would find that even if the change to the excludable-days practice was necessary to conform to requirements of a government-wide regulation, the Agency was obligated to provide the Union with notice and an opportunity to bargain before

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[52] *Dep't of the Interior, U.S. Geological Survey Conservation Div. Gulf of Mexico Region, Metairie, La.*, 9 FLRA 543, 546 n.9 (1982) (*Interior*) (finding agency committed ULP by failing to first notify and give union opportunity to bargain over change in an overtime pay practice that was contrary to statute); *see also U.S. Patent & Trademark Office*, 31 FLRA 952, 955-56, 981-82, 984 (1988) (ordering agency to cease and desist from changing certain law-school-tuition-payment practices, to conform to legal requirements, without first notifying and bargaining with union), *rev'd in part as to other matters sub nom POPA v. FLRA*, 872 F.2d 451 (D.C. Cir. 1989).

[53] *Interior*, 9 FLRA at 546 n.9.

[54] The majority relies on a number of inapposite cases, including: *USDA, Food Safety & Inspection Serv., Boaz, Ala.*, 66 FLRA 720, 723 (2012) (*USDA*) (noting, in dicta, that Authority has held that agency may implement change to correct unlawful practice without prior notice and bargaining, but finding practice not illegal and therefore agency committed ULP when it unilaterally implemented change without prior notice and bargaining); *AFGE, Local 1367*, 63 FLRA 655, 656-57 (2009) (noting, in dicta, that agency may implement change when necessary to correct unlawful practice and only obligated to bargain after implementation, but finding no evidence that agency failed to bargain prior to terminating practice because agency provided notice and opportunity to bargain over the impact and implementation *prior* to terminating unlawful practice, and union waived opportunity to bargain by failing to submit proposals); *U.S. INS, Wash., D.C.*, 55 FLRA 69, 73 n.8 (1999) (Member Wasserman dissenting) (noting, in dicta, that agency may implement changes to correct an unlawful practice and only obligated to engage in I&I bargaining after implementation, but addressing agency's obligations at impasse and Statute's requirement that agency complete negotiations and impasse procedures prior to making changes in working conditions, with exceptions); *Portsmouth*, 49 FLRA at 1532 (agreeing with Judge that agency not obligated agency to bargain over decision to terminate unlawful past practice, but finding no exceptions filed to Judge's determination that agency unlawfully failed to provide union notice and opportunity for I&I bargaining, therefore directed agency to bargain with union); *Dep't of the Air Force, Air Force Logistics Command, Ogden Air Logistics Ctr., Hill Air Force Base, Utah*, 17 FLRA 394, 395-96 (1985) (agreeing with Judge that agency had no duty to bargain over decision to change unlawful practice, and adopting Judge's findings that agency had duty to bargain over the impact and implementation as long as bargaining does not delay correcting the unlawful practice (quoting *Interior*, 9 FLRA at 546 n.9)).

[55] 5 U.S.C. § 7116(a)(5) ("it shall be and unfair labor practice for an agency . . . to refuse to consult *or* negotiate in good faith") (emphasis added).

[56] Award at 13-14.

[57] *Id.* at 12-14; *see also* 5 U.S.C. § 7113 (National consultation rights).

instituting this change.[58] As there is no evidence that this would have delayed the Agency's conforming to regulatory requirements, I would deny the Agency's exception to the Arbitrator's finding that the Agency committed a ULP in violation of 5 U.S.C. § 7116(a)(5).[59]

Further, although the Arbitrator also based his award on a contract-violation finding,[60] I would find that the Arbitrator's ULP determination is a separate and independent ground for the award. When an arbitrator's remedy is based on separate and independent grounds, the Authority has held that the excepting party must establish that all of the grounds for the award are deficient in order for the Authority to find the award deficient.[61] And when an excepting party has not demonstrated that the award is deficient on one of the grounds relied on by the arbitrator, and the award would stand on that ground alone, then it is unnecessary to address exceptions to the other grounds.[62] As the Agency fails to establish that the Arbitrator's finding that it committed a ULP is contrary to law, it is unnecessary to address the Agency's contrary-to-law exception as it relates to the contract violation.

C. An SQA remedy is not appropriate in this case.

Although I would uphold the Arbitrator's finding that the Agency committed a ULP, not all of the remedies the Arbitrator ordered are appropriate. The Arbitrator ordered an SQA remedy to correct the Agency's violation of 5 U.S.C. § 7116(a)(5), in part, because he concluded that the agency was not compelled by regulation to change the excludable-days practice. The parties have not specifically addressed the appropriateness of the SQA remedy. But the Agency's exceptions implicitly challenge the SQA remedy by arguing that the award is contrary to regulation by finding that "the Agency was required to engage in pre-implementation bargaining over the change to its excludable[-]day[s] practice."[63] Moreover, before the Arbitrator, the Agency argued that an SQA remedy was not appropriate because it would return the parties to an unlawful practice.[64]

The Authority has held that it will not order an SQA remedy that would result in the reinstitution of an illegal practice.[65] I would find, contrary to the Arbitrator, that to the extent the Agency was determining AUO eligibility and calculating AUO pay by excluding annual and sick leave, its practice is contrary to OPM's regulations.

The Authority defers to OPM's interpretation of its own regulations.[66] In 1997, OPM issued OPM Compensation Policy Memorandum (CPM) 97-5 (guidance)[67] interpreting its AUO regulations.[68] The guidance advises that "in determining the number of weeks in a review period, there is no authority to reduce the number of weeks by subtracting hours of paid leave (such as *annual leave or sick leave*)."[69] As the guidance specifically states that agencies lack authority to exclude sick and annual leave from their AUO calculations, I would find that the Agency's excludable-days practice is contrary to regulation. Consequently, an SQA remedy would result in the restitution of an illegal practice.

I think it is important to point out that I disagree with the Arbitrator that two previous Authority decisions are applicable here.[70] In those decisions, the Authority found negotiable a union ground-rules proposal concerning the treatment of *official time* in calculating bargaining-unit employees' AUO eligibility and pay. The Authority concluded that neither the applicable regulations nor OPM guidance "address the subject of the proposal, the exclusion of *official time*" from AUO calculations."[71] Those decisions did not consider the principal change made here, ending the Agency's longstanding practice of excluding sick and annual leave from its AUO calculation. And as OPM's guidance

[58] *See Interior*, 9 FLRA at 546 n.9 (finding where agency makes change to unlawful past practice, agency has duty to engage in pre-impact and implementation bargaining if bargaining would not delay correcting unlawful practice); *cf. U.S. Customs Serv., Wash., D.C.*, 29 FLRA 307, 308, 324-25 (1987) (finding under 5 U.S.C. § 7106(a)(1)(D) agency may unilaterally implement change in conditions of employment and bargain post-implementation when responding to emergency).

[59] *Army*, 35 FLRA at 634; *see also Interior*, 9 FLRA at 546 n.9.

[60] Award at 32.

[61] *Forrest City*, 68 FLRA at 674-75 (citations omitted); *U.S. Dep't of the Treasury, IRS*, 66 FLRA 325, 332 (2011).

[62] *Forrest City*, 68 FLRA at 675; *see also U.S. DHS, U.S. ICE*, 67 FLRA 501, 504 (2014) (where agency allowed violations of a policy for years no basis for finding agency attempting to expedite change or bargaining would delay implementation).

[63] Exceptions Br. at 4.

[64] Exceptions, Ex. B, Agency's Post-Hr'g Br. at 32.

[65] *USDA*, 66 FLRA at 723; *GSA, Nat'l Capital Region, Fed. Protective Serv. Div., Wash., D.C.*, 52 FLRA 563, 568 (1996).

[66] *U.S. Dep't of Transp. FAA*, 55 FLRA 797, 802 (1999) (Authority generally affords deference to agency's interpretation of its own regulations).

[67] OPM Compensation Policy Memorandum 97-5, *Attachment to Guidance on Administratively Uncontrollable Overtime* (June 13, 1997).

[68] 5 C.F.R. § 550.162 et al.

[69] CPM 97-5 at 8.

[70] *See* Award at 25-28, 32 (citing *AFGE, ICE, Nat'l Council 118*, 68 FLRA 910 (2015) (*AFGE 2015*); *AFGE, ICE, Nat'l Council 118*, 69 FLRA 248 (2016)).

[71] *See AFGE 2015*, 68 FLRA at 914 (emphasis added).

makes clear, this practice is not permitted under the regulations.

Therefore, I would conclude that the Agency's past practice of excluding sick and annual leave from AUO eligibility and pay obligations is contrary to government-wide regulation, and consequently, that an SQA remedy would reinstitute an unlawful practice. Accordingly, I would modify the award and set aside the SQA remedy.

III. Conclusion

The majority's summary analysis does not include any meaningful consideration of any of the facts, and most of the issues, discussed in this separate opinion. Because considering and discussing these matters is essential to resolving this case in a manner that is not arbitrary, I have included those details in this opinion. As it stands, the majority's summary decision is little more than a brief statement unduly restricting bargaining. The majority's decision is consequently inconsistent with the Statute's policy promoting collective bargaining, and with general principles of administrative law requiring a decision maker to make clear the reasonable basis for a decision. Accordingly, I dissent.