

71 FLRA No. 143

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

and

NATIONAL BORDER PATROL COUNCIL
(Union)

0-AR-5435

DECISION

May 19, 2020

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

I. Statement of the Case

Arbitrator Jan Stiglitz issued an award finding that the Agency violated the parties’ ground-rules agreement (GRA) when it ceased paying travel and per diem expenses for the Union’s bargaining team during negotiations for a new collective-bargaining agreement. Because the Arbitrator’s interpretation of the GRA is contrary to its plain wording, we find that the award fails to draw its essence from the GRA. Accordingly, we set aside the award.

II. Background and Arbitrator’s Award

In 2012, the Union initiated bargaining for a new collective-bargaining agreement (CBA). To facilitate bargaining over the CBA, the parties began negotiating a GRA. One of the primary issues during GRA negotiations was who would pay the Union bargaining team’s travel and per diem expenses during CBA negotiations. Ultimately, the parties agreed to the following wording in Section 2 of the GRA (Section 2):

The Agency will reimburse travel and per diem costs for up to five . . . employee bargaining[-]team members for negotiations . . . for fiscal year 2013.

The [Union] will be responsible for its own travel and per diem costs for the first six . . . months of fiscal year 2014. During the second six . . . months of fiscal year 2014, the Agency will reimburse travel and per diem costs for up to five . . . employee bargaining[-]team members . . .

For fiscal year 2015, the Agency will reimburse travel and per diem costs for up to five . . . employee bargaining[-]team members . . .¹

The parties began CBA negotiations, but were unable to reach an agreement by the end of fiscal year (FY) 2015. Although the GRA did not require the Agency to pay the Union’s travel and per diem expenses after FY 2015, the Agency continued to do so for FY 2016 and FY 2017. However, in late 2017, the Agency informed the Union that it would no longer pay those expenses. As a result, the Union filed a grievance, and the matter proceeded to arbitration.

The Arbitrator framed the issues as: “Did the agency violate the . . . [GRA] between [the Union] and [the Agency] by ceasing to reimburse travel and per diem costs for the Union’s bargaining[-]team member[s],” and “[i]f so, what is the appropriate remedy?”²

Despite Section 2 plainly requiring the Agency to pay the travel and per diem expenses of the Union’s bargaining team only through FY 2015, the Arbitrator looked beyond Section 2’s terms in order to interpret the “meaning” of it.³ Specifically, the Arbitrator considered other provisions in the GRA, the parties’ bargaining history, subsequent discussions between Union and Agency representatives, and the Agency’s payment of the Union’s travel and per diem expenses in FY 2016 and FY 2017. Based on those considerations, the Arbitrator concluded that the GRA obligated the Agency to pay the Union’s travel and per diem expenses after FY 2015.

Accordingly, the Arbitrator sustained the grievance and directed the Agency to continue paying the Union’s travel and per diem expenses indefinitely, until the parties agreed to a new CBA or reached impasse.⁴

¹ Award at 5 (quoting GRA, § II.6).

² *Id.* at 2.

³ *Id.* at 25.

⁴ *Id.* at 31. The Arbitrator also directed the Agency to reimburse the Union for any outstanding travel and per diem expenses.

On November 14, 2018, the Agency filed exceptions to the award, and on December 12, 2018, the Union filed an opposition.

III. Analysis and Conclusion: The award fails to draw its essence from the GRA.

The Agency contends that the award, by directing the Agency to pay the Union's travel and per diem expenses beyond 2015, fails to draw its essence from the GRA.⁵ As relevant here, the Authority has found that an award fails to draw its essence from a collective-bargaining agreement where the award conflicts with the agreement's plain wording.⁶ And the Authority has stated that arbitrators may not look beyond a collective-bargaining agreement – to extraneous considerations – to modify an agreement's clear and unambiguous terms.⁷

Here, the plain wording of Section 2 describes each party's responsibility for Union travel and per diem expenses for the period from FY 2013 through FY 2015.⁸ In particular, Section 2 obligates the Agency to pay the Union bargaining team's expenses through FY 2015.⁹ However, nothing in Section 2 requires the Agency to pay those expenses after FY 2015. We agree with the Agency that, by interpreting that silence as requiring the Agency to continue paying those expenses beyond FY 2015, the Arbitrator impermissibly created a new contract term.¹⁰ When the parties asked the

Arbitrator to interpret the GRA, they did not authorize him to fabricate a new contractual obligation out of whole cloth.¹¹ As we recently clarified, an “erroneous arbitral award[] that run[s] counter to the plain language” of a contractual provision is not a carefully reasoned award that deserves, or will be accorded, deference.¹² Moreover, because Section 2 is unambiguous, and clearly does not require the Agency to pay the Union's travel and per diem expenses beyond FY 2015, the Arbitrator erred by considering extraneous evidence¹³ to find a meaning that is incompatible with the plain wording of that section.¹⁴

Based on the above, we find that the award fails to draw its essence from Section 2.¹⁵ Therefore, we set the award aside.¹⁶

⁵ Exceptions Br. at 14-22.

⁶ *U.S. Dep't of VA, Med. Ctr., Asheville, N.C.*, 70 FLRA 547, 548 (2018) (Member DuBester dissenting). The Authority will find that an award fails to draw its essence from the parties' agreement when the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected to the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *SSA*, 71 FLRA 355, 356 n.5 (2019) (*SSA*) (Member DuBester concurring).

⁷ *U.S. Dep't of the Army, 93rd Signal Brigade, Fort Eustis, Va.*, 70 FLRA 733, 734 (2018) (*Army*) (Member DuBester dissenting) (quoting *U.S. Small Bus. Admin.*, 70 FLRA 525, 528 (2018) (*SBA*) (Member DuBester concurring in part and dissenting in part)).

⁸ Award at 5.

⁹ *Id.*

¹⁰ See *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Miami, Fla.*, 71 FLRA 660, 664 (2020) (*FCI Miami*) (Member Abbott concurring; Member DuBester dissenting) (The Authority will not “ignore erroneous arbitral awards that run counter to the plain language . . . of contractual provisions.”); *U.S. Dep't of the Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, 70 FLRA 754, 755-56 (2018) (Member DuBester dissenting) (holding that an agreement's silence on a matter does not

authorize an arbitrator to modify, rather than interpret, the parties' agreement to create “a brand new contract provision”).

¹¹ *SSA*, 71 FLRA at 356; see also *FCI Miami*, 71 FLRA at 664.

¹² *FCI Miami*, 71 FLRA at 664.

¹³ Award at 3-5, 26 (considering bargaining history), 6-7, 25 (considering post-agreement discussions about Section 2), 7-8, 29-30 (considering Agency's payment of expenses in FY 2016 and FY 2017), 5, 25 (considering another provision in the GRA).

¹⁴ See *Army*, 70 FLRA at 734 (finding that an award failed to draw its essence from the parties' agreement where arbitrator considered parties' “normal course of business” to interpret unambiguous provision); *SBA*, 70 FLRA at 528-29 (finding award inconsistent with plain terms of agreement where arbitrator considered past practice to modify an unambiguous provision).

¹⁵ Nothing in the record indicates that either party sought or requested the Authority's Collaboration and Alternative Dispute Resolution (CADR) program. Nevertheless, we must briefly address the dissent's irrelevant statements regarding the alternative dispute resolution (ADR) options offered by the Authority. In 2019, the Federal Labor Relations Authority partnered with the Federal Mediation and Conciliation Service (FMCS) to offer ADR services. FLRA and FMCS Sign Memorandum of Understanding (June 27, 2019), <https://www.flra.gov/system/files/webfm/FLRA%20Agency-wide/Public%20Affairs/Press%20Releases/Press%20Release%20-%20FLRA-FMCS%20MOU%202019%20-%203update.pdf>. The FMCS is an independent agency whose mission is to “preserve and promote labor-management peace and cooperation” through the use of “mediation and conflict resolution services.” About Us, FMCS, <https://www.fmcs.gov/aboutus> (last visited May 14, 2020). We recognize the value that the FMCS and its trained mediators bring to both the Authority and the labor-management community, and we implore the dissent to stop discounting, and start advocating for, its services.

¹⁶ Because we set aside the award, we do not reach the Agency's remaining exception. See *AFGE, Local 2076*, 71 FLRA 221, 224 n.31 (2019) (Member DuBester concurring in part and dissenting in part).

IV. Decision

We set aside the award.

Member Abbott, concurring:

I agree that the Arbitrator's award fails to draw its essence from the parties' ground-rules agreement (GRA). I write separately, however, to highlight the outrageous circumstances of this case which have led to a needless arbitration and a negotiation process that has gone on way too long. Unfortunately, the American taxpayer is left to pay for all of it.¹

There is just one question underlying this case – *how many years* (not days, weeks, or months) should taxpayers have to pay the travel and per diem costs of five Union (as well as an equal number of Agency) representatives negotiating a single collective-bargaining agreement, in addition to the countless hours, days, weeks, months and years of duty time spent away from critical, mission work. Our decision explains that the parties have been in the process of negotiating a collective-bargaining agreement for over seven years.² From the very beginning, the parties appeared more than happy to settle into a negotiation process that would span multiple years. In the ground rules, the Agency agreed to pay the travel and per diem costs for five Union negotiators for all of fiscal year (FY) 2013, for half of FY 2014, and all of FY 2015.³ And, yet, when they could not conclude negotiations by the end of FY 2015, the Agency inexplicably continued to pay the Union's costs through FY 2016 and FY 2017.⁴

Then, in FY 2018, the Agency apparently read the ground rules it had agreed to more than five years earlier and told the Union that, pursuant to Section II.6, it was not obligated to, and would no longer pay, the Union's travel and per diem costs. It is obvious to me that Congress never imagined that the negotiation of a collective-bargaining agreement could take over seven years or could justify taking at least ten Agency and Union employees away from their day-to-day jobs – that the American taxpayer pays them to perform – for the same period. Such a process does not “contribute[] to

¹ See *U.S. Army Corps of Eng'rs, Little Rock Dist.*, 71 FLRA 451, 457 (2019) (Member DuBester concurring; Member Abbott concurring; Chairman Kiko dissenting) (Dissenting Opinion of Chairman Kiko) (noting agreement with Member Abbott that while the Authority was “bound to preserve employees’ exercise of the rights provided for in the Statute, but that Congress, and taxpayers who foot the bill for all of these processes, expect those rights to be pursued in an effective and efficient manner”); *U.S. EPA*, 70 FLRA 715, 716 (2018) (Member DuBester concurring; Member Abbott concurring) (citing Exec. Order No. 13,837, 83 Fed. Reg. 25,335 (May 25, 2018)).

² Majority at 1-2 (citing Award at 5).

³ *Id.* at 2 (quoting GRA, § II.6).

⁴ *Id.*

the effective conduct of public business”⁵ or is “consistent with the requirement of an effective and efficient Government,”⁶ the premises upon which Congress established collective bargaining in the federal government.

Nonetheless, the dissent buys into the outrageous proposition that seven years – of which all but six months was paid entirely by American taxpayers – is reasonable and normal. It is indisputable to me that seven years to negotiate a new contract is neither reasonable nor normal, under any circumstance. Even in the private sector, where unions and employers have a far broader scope of matters that must be and may be negotiated, the National Labor Relations Board routinely finds ten to fourteen months to be an unreasonable length of time for parties to achieve consensus in negotiations of collective-bargaining agreements.⁷

The ongoing intransigence of both the Agency and the Union here is just the sort of needless delay that Executive Order 13,836 calls out and seeks to avoid in future negotiations – ground rules that “minimize delay, set reasonable limits for good-faith negotiations”; six weeks or less to achieve ground rules; no more than four to six months to complete negotiations.⁸

Undeterred, however, the dissent inexplicably harkens back to a recitation of executive orders issued in 1993 and 2009⁹ to lend support to the notion that the Arbitrator here is free to read an obligation into the parties’ GRA that simply is not there. This trip down memory lane, however, serves no useful purpose other than to highlight policy preferences that apparently are more to the liking of our dissenting colleague but have nothing to do with the case that is before us. And even though Executive Order 13,522 (issued in 2009) was in effect during the first three years of the parties’ seven years of negotiation, this case has nothing whatsoever to do with labor-management forums, the delivery of government services, or predecisional involvement matters that are addressed in its guidance.¹⁰

More confounding is the dissent’s unsupported implication that the parties to this negotiation were somehow denied, in general, the benefits of alternative dispute resolution or, specifically, the Authority’s Collaboration and Alternative Dispute Resolution (CADR) program.¹¹ Despite this implication, there is nothing in the record before us that indicates that either party sought or requested any form of alternative dispute resolution, including the Authority’s CADR program, although it was available throughout the seven years that spanned these negotiations and arbitration. Of particular note is the fact that both parties specifically declined CADR services when the Agency filed exceptions to this award.¹²

I am deeply troubled that our dissenting colleague portrays an unhelpful narrative that the Authority has devalued the need for alternative dispute resolution in federal labor-management relations. Nothing could be further from the truth. In fact, last year the Authority expanded the ADR capabilities and options that are available to parties in an initiative that was not supported by our dissenting colleague. On June 27, 2019, the Authority approved and Chairman Kiko signed a memorandum of understanding with the Federal Mediation and Conciliation Service (FMCS) whereby FMCS designated “a unique cadre of mediators . . . to assist the parties in the resolution of negotiability appeals through mediation.”¹³ In practical terms, this arrangement greatly expands the Authority’s ability to provide a broader scope of and more-timely array of capabilities than the Authority could with any program of its own.

Measured against any reasonable goals, the Agency and the Union both miss the mark entirely. It is unfortunate that the taxpayer has been left to pay all of the costs associated with this debacle disguised as good-faith bargaining.

⁵ 5 U.S.C. § 7101(a)(1)(B).

⁶ *Id.* § 7101(b).

⁷ See, e.g., *Latino Express, Inc.*, 360 NLRB 911, 914 (2014) (ten months); *Prentice-Hall, Inc.*, 290 NLRB 646, 669 (1988) (eleven months); *Houston Cnty. Elec. Coop., Inc.*, 285 NLRB 1213, 1301 (1987) (fourteen months); *Schuykill Metals Corp.*, 218 NLRB 317, 319-20 (1975) (twelve months).

⁸ Exec. Order No. 13,836, *Developing Efficient, Effective, & Cost-Reducing Approaches to Federal Sector Collective Bargaining*, 83 Fed. Reg. 25,329, 25,330, 25,331 (May 25, 2018).

⁹ Dissent at 12.

¹⁰ *Id.*

¹¹ *Id.* at 13-14.

¹² Exceptions at 4.

¹³ FLRA and FMCS Sign Memorandum of Understanding (June 27, 2019), <https://www.flra.gov/system/files/webfm/FLRA%20Agency-wide/Public%20Affairs/Press%20Releases/Press%20Release%20-%20FLRA-FMCS%20MOU%202019%20-%20203update.pdf>.

Member DuBester, dissenting:

I disagree with the majority's conclusion that the Arbitrator's award fails to draw its essence from the parties' ground-rules agreement (GRA). The majority's conclusory rejection of the Arbitrator's carefully reasoned award constitutes the latest example of its disregard for the established, deferential standard for analyzing essence challenges to awards.¹

The majority sets aside the award because, in the majority's view, it conflicts with the "plain wording" of the GRA.² On this point, the majority concludes that the award conflicts with Section 2 of the GRA, which pertains to the Agency's reimbursement of the travel and per diem costs of the Union's bargaining team, because "nothing in Section 2 requires the Agency to pay those expenses after [Fiscal Year (FY)] 2015."³

But this conclusion completely ignores the Arbitrator's contrary conclusion on this precise issue, namely that the provision does not contain a "plain and unambiguous" meaning.⁴ As the Arbitrator aptly recognized, Section 2 "does not expressly indicate what happens with regard to the payment of Union travel and per diem expenses after FY 2015."⁵

Consequently, and in accordance with well-established principles governing the interpretation of agreements, the Arbitrator examined additional factors to ascertain the parties' intent, including bargaining history, testimony regarding the meaning of the language, discussions regarding the Agency's payment obligations under Section 2, and conduct related to these obligations. Based on this examination, the Arbitrator concluded that the Agency was obligated to pay the Union's expenses after FY 2015.

Contrary to the majority's assertion, the Arbitrator did not "fabricate" this obligation "out of whole cloth."⁶ Rather, as part of reviewing the parties' bargaining history, the Arbitrator credited the testimony of a Union representative that the Union "would not have signed the [GRA] had Agency representatives not assured him that the Agency would have to continue to pay the Union's travel and per diem

expenses if the bargaining extended beyond FY 2015."⁷ The Arbitrator also noted the testimony of an Agency representative that, when the Agency's bargaining team reviewed the ground rules in 2017, it concluded it was "unclear" how the rules applied to bargaining after 2015.⁸

The Arbitrator also noted that the parties began an extensive dialogue beginning in early 2016 regarding the continued application of Section 2 to the parties' ongoing negotiations.⁹ As part of this dialogue, the Union – in response to an email from an Agency representative asking the Union for its position on who would pay the expenses after FY 2015 – responded that "[w]e . . . negotiated to have the agency paying on the back end of the negotiations."¹⁰ In addition to finding that the Agency's query supported a conclusion that the agreement was ambiguous on this point, the Arbitrator credited the Agency representative's testimony that "he never told anyone in the Union that the continued funding was not required under the [GRA]."¹¹ And the Arbitrator found it significant that the Agency continued to pay the Union's expenses "for two years after it allegedly concluded that it had no obligation to do so."¹²

The Arbitrator also considered Section 3 of the GRA, which states that the ground rules would remain effective until "the effective date of the [bargaining agreement]."¹³ He interpreted this provision as "an agreement to maintain the status quo until completion of bargaining via a CBA or impasse."¹⁴ And he concluded that this "status quo" includes the Agency's obligation to pay the Union's travel and per diem expenses.¹⁵ Upon reviewing the evidence, the Arbitrator found that the Union's interpretation of Section 2 was correct based on the "language in the [GRA], the purpose behind the agreement, and the reason for the Union's

¹ 5 U.S.C. § 7122(a)(2); *U.S. Small Bus. Admin.*, 70 FLRA 525, 532 (2018) (*SBA*) (Separate Opinion of Member DuBester); *see also U.S. Dep't of the Treasury, Office of the Comptroller of the Currency*, 71 FLRA 387, 392 (2019) (Separate Opinion of Member DuBester).

² Majority at 3.

³ *Id.*

⁴ Award at 24.

⁵ *Id.* at 25.

⁶ Majority at 3.

⁷ Award at 27.

⁸ *Id.* at 16, 25.

⁹ *Id.* at 6-8.

¹⁰ *Id.* at 28.

¹¹ *Id.* at 10. The Arbitrator acknowledged the Agency representative's testimony that "he thought he had drafted a response [to the email] but later learned that his response had gotten 'stuck' in his 'drafts' folder." *Id.* The Arbitrator later concluded that "[o]ne would expect that if the Agency disagreed, [the Agency representative] would have responded with the Agency's position." *Id.* at 28.

¹² *Id.* at 29-30 ("While it is possible to credit the testimony that the Agency did not want to start a fight at that point in time and hoped that continuing to pay the disputed expenses might result in a [collective-bargaining agreement], one would have expected the Agency to have notified the Union that it was doing this despite the ambiguity in the [GRA] and only for a limited time.").

¹³ *Id.* at 5.

¹⁴ *Id.* at 31.

¹⁵ *Id.*

consistent position that it needed the Agency to be on the hook for bargaining costs to ensure that the Agency has an incentive to complete negotiations[.]”¹⁶

Against this background, the majority’s decision to vacate the award reflects nothing more than its “continue[d] . . . assault on arbitrators’ reasonable interpretations of contractual language”¹⁷ by substituting its judgment for that of the arbitrator.¹⁸ The GRA’s silence regarding payment of the Union’s travel and per diem expenses after FY 2015 “does not demonstrate that the award fails to draw its essence from the agreement.”¹⁹ Rather, as the Arbitrator correctly recognized, the meaning of the agreement regarding this point “must ‘ultimately depend[] on the intent of the contracting parties.’”²⁰ Applying the deferential standard of review governing essence exceptions,²¹ I would find that the award constitutes a plausible interpretation of the GRA. Accordingly, I dissent from the majority’s conclusion to the contrary, and would address the Agency’s remaining exception.

My concurring colleague – not content merely to vacate the Arbitrator’s well-reasoned award – chastises the parties for “appear[ing] more than happy to settle into a negotiation process that would span multiple years”²² without regard for the attendant burden on taxpayers. And, my colleague criticizes my dissenting opinion for “buy[ing] into the outrageous proposition” that the extended length of time spent by the parties on their

negotiations “is reasonable and normal.”²³ Neither assertion withstands professional scrutiny.

As an initial matter, my colleague’s indictment of the parties’ supposed mutual disregard for the length of their negotiations ignores the Arbitrator’s finding that the Union bargained for Section 2 in the parties’ GRA *precisely because* it was “concerned about delay by the Agency” and wanted an “incentive to the Agency” to timely complete the negotiations.²⁴ According to the Arbitrator, the Union’s concerns were well-founded.²⁵ It is therefore inexplicable that my colleague would bemoan the enforcement of a provision in the GRA that was designed to address the *very problem* he identifies.

On a broader level, I certainly take no issue with the proposition that participants in federal sector bargaining should be responsible stewards of taxpayer funds. As I noted in my dissent in *U.S. DOJ, Federal BOP, Federal Correctional Institution, Miami, Florida (FCI Miami)*,²⁶

federal sector bargaining affects at least three constituencies not directly affected by private sector bargaining: citizens who use the services provided by the agencies governed by our Statute; taxpayers who provide funding for these agencies; and, perhaps most significantly, the public officials whose responsibilities have some bearing on these agencies’ operations, particularly those officials whose actions will affect or determine the agencies’ budgets.²⁷

As I further explained in *FCI Miami*, Congress addressed these constituencies by placing significant limitations on federal sector bargaining that are not found in the private sector. This includes the Statute’s exclusion of a number of matters from the “conditions of employment” over which the parties must bargain; its prohibition of strikes, work stoppages, and slowdowns in labor-management disputes; and its inclusion of a strong management-rights provision. By limiting both the scope of bargaining and the ability of exclusive representatives to exert economic pressure on their agencies, these provisions are directly responsive to

¹⁶ *Id.* at 30.

¹⁷ *U.S. Dep’t of the Army, Aberdeen Proving Ground Research, Dev. & Admin., Aberdeen Proving Ground, Md.*, 71 FLRA 54, 56 (2019) (Dissenting Opinion of Member DuBester) (citations omitted).

¹⁸ *See, e.g., U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Phx., Ariz.*, 70 FLRA 1028, 1031 (2018) (Dissenting Opinion of Member DuBester) (noting that “the majority’s non-deferential treatment of the arbitrator’s award . . . ignores the Supreme Court’s declaration that . . . a reviewing body has ‘no business overruling’ an arbitrator simply because ‘[its] interpretation of the contract is different.’”) (quoting *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960)).

¹⁹ *U.S. DOD Educ. Activity*, 70 FLRA 937, 939-40 (2018) (Dissenting Opinion of Member DuBester) (quoting *Bremerton Metal Trades Council*, 68 FLRA 154, 155 (2014)).

²⁰ *U.S. Dep’t of the Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, 70 FLRA 754, 757 (2018) (Dissenting Opinion of Member DuBester) (quoting *IRS, Wash., D.C.*, 47 FLRA 1091, 1110 (1993)).

²¹ *SBA*, 70 FLRA at 532 (Separate Opinion of Member DuBester); *see also AFGE, Local 3354*, 64 FLRA 330, 333 (2009) (“a disagreement with an arbitrator’s factual finding[s] does not provide a basis for concluding that an award fails to draw its essence from an agreement”).

²² Concurrence at 5.

²³ *Id.* at 5-6.

²⁴ Award at 27.

²⁵ *Id.* at 30 (“By intent or by circumstance, the Agency did not act in a way that suggested that it wanted to reach a new CBA as soon as possible.”).

²⁶ 71 FLRA 660, 669-76 (2020) (Dissenting Opinion of Member DuBester).

²⁷ *Id.* at 673.

Congress' concern for taxpayers and the agencies they support.²⁸

This is not to suggest, of course, that agency bargaining representatives do not share their private sector counterparts' interest in achieving greater productivity at the lowest possible cost. In my view, federal sector bargaining representatives on both sides of the table share a common objective of creating a high-performance workplace that advances their agency's mission in the public interest.

In reality, however, agreements over how to achieve this objective are not always easily reached. Indeed, party representatives are *expected* to advocate for their constituents' interests during the bargaining process as part of a good-faith effort to resolve their differences.²⁹ And sometimes, as demonstrated by the case before us, this process can take longer than what might seem appropriate to an outside party.³⁰

But rather than condemning the parties before us for having endured what were obviously protracted and frustrating negotiations, I would ask my colleague to join me in advocating for the use of alternative dispute resolution (ADR) procedures to assist agencies and unions with their labor-management relations. Until recently, such a request would not have raised an eyebrow.

²⁸ *Id.*

²⁹ See, e.g., 5 U.S.C. § 7114(a)(4) ("Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement.").

³⁰ Contrary to my colleague's suggestion, enforcing the cost-shifting provisions in the parties' bargaining agreement is not based upon any finding that the length of the parties' negotiations was either "reasonable" or "normal." Concurrence at 6. Indeed, in reaching his decision, the Arbitrator noted that the Union's representatives "testified that the Union was concerned about delay by the Agency and believed it might take years to complete bargaining." Award at 27. And as I previously noted, the Arbitrator found that "[b]y intent or by circumstance, the Agency did not act in a way that suggested that it wanted to reach a new CBA as soon as possible." *Id.* at 30.

Regardless, while my colleague summarily concludes that the parties' negotiations constituted a "debacle disguised as good-faith bargaining," the question of whether either party engaged in bad-faith bargaining – which would constitute an unfair labor practice (ULP) under our Statute – is not presented to us for resolution in this case. Concurrence at 7. On this point, however, it is worth noting that the FLRA has been without a General Counsel – the official who is statutorily authorized to prosecute ULPs – since November 2017.

For instance, in 1990, Congress enacted the Administrative Dispute Resolution Act, which required executive agencies to adopt policies addressing and promoting the use of ADR.³¹ Eight years later, Congress enacted similar legislation to require each federal district court to devise and implement its own ADR program, and to encourage and promote the use of ADR.³²

And over the last thirty years, two United States Presidents have issued Executive Orders designed to facilitate federal sector labor-management relations through the use of collaborative methods. In 1993, President Clinton issued Executive Order 12,871,³³ which directed federal agencies to create labor-management partnerships consisting of union and management representatives "to identify problems and craft solutions to better serve the agency's customers and mission."³⁴ Executive Order 12,871 also directed agencies to provide training in "consensual methods of dispute resolution," including ADR techniques and interest-based bargaining approaches.³⁵

And in 2009, President Obama issued Executive Order 13,522,³⁶ which created labor-management forums "to help identify problems and propose solutions to better serve the public and agency missions."³⁷ Based upon the President's finding that federal employees and their union representatives "are an essential source of front-line ideas and information about the realities of delivering Government services to the American people,"³⁸ Executive Order 13,522 also directed agencies to allow employees and their exclusive representatives "to have pre-decisional involvement in all workplace matters to the fullest extent practicable."³⁹

The collaborative processes established by these Executive Orders encouraged federal agencies to save time and expense by working with unions to resolve labor-management disputes without having to resort to statutory enforcement mechanisms. And the record is replete with examples of how agencies and unions – by discussing ideas for improving agency operations in a

³¹ Administrative Dispute Resolution Act of 1990, Pub. L. No. 101-552, 104 Stat. 2736.

³² Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993.

³³ Exec. Order No. 12,871, *Labor-Management Partnerships*, 58 Fed. Reg. 52,201 (Oct. 6, 1993).

³⁴ *Id.* at § 2(b).

³⁵ *Id.* at § 2(c).

³⁶ Exec. Order No. 13,522, *Creating Labor-Management Forums to Improve Delivery of Government Services*, 74 Fed. Reg. 66,203 (Dec. 14, 2009).

³⁷ *Id.* at § 3(a)(i).

³⁸ *Id.* at § 1.

³⁹ *Id.* at § 3(a)(ii).

non-adversarial fashion – improved their agencies’ productivity and efficiency, to the direct benefit of the citizens using their services and the taxpayers funding their budgets.⁴⁰

Despite these benefits, both Executive Orders were revoked by succeeding Presidential administrations.⁴¹ And – regrettably – the Federal Labor Relations Authority’s (FLRA’s) own efforts to promote collaborative approaches for resolving labor-management disputes have fared no better.

Over twenty-four years ago, the FLRA, the Federal Service Impasses Panel (FSIP), and the FLRA’s Office of General Counsel jointly established the Collaboration and Alternative Dispute Resolution (CADR) program to encourage constructive methods of resolving federal sector workplace disputes, reduce transaction costs associated with dispute resolution, and improve labor-management relationships.⁴² For more than two decades, CADR staff delivered voluntary ADR services in some of the most complex, sensitive, and difficult matters, including post-complaint unfair labor practice (ULP) cases, negotiability disputes, and exceptions to arbitration awards. In the overwhelming majority of cases in which the parties used CADR’s services, legal disputes were fully resolved in a timely manner without the need for a decision by the Authority. More importantly, CADR helped the parties successfully address underlying problems so that similar matters would not erupt into new cases before third parties. CADR staff also taught parties effective techniques for addressing labor-management disputes without the need for third-party assistance.

FLRA’s CADR professional staff earned a well-deserved reputation based on their expert ADR skills combined with a unique set of federal sector experience and expertise. As a result, they were uniquely equipped to help FLRA parties make well-informed choices about whether to accept our offer of voluntary

ADR services. And, as a result, CADR staff was uniquely able to deliver superior ADR services in cases pending before the FLRA. Contrary to my colleagues’ suggestions, this in no way reflects an intention to deprecate the excellent work performed by the Federal Mediation and Conciliation Service (FMCS) in other realms.

Moreover, my colleagues miss my point entirely – namely, that the FLRA should not abandon its role in this crucial area. It is noteworthy that the memorandum of understanding (MOU) recently signed with FMCS is narrowly focused on one case type, negotiability disputes. While this is a significant area, the MOU leaves unaddressed the many other types of cases previously handled by CADR. It also does not replace the extensive training formerly provided by CADR staff. Nor does it replace the direct assistance formerly provided to parties by CADR, upon request, with their labor-management disputes.

Since its inception, the FLRA’s CADR program thrived in one form or another through every change of administration and every change in leadership of the FLRA and FSIP. That is, until now. Notwithstanding its proven record, my colleagues recently decided to effectively disband the CADR program. Nothing about these actions reflect a genuine interest in providing FLRA parties broader or more timely access to ADR services.

I recognize that not all disputes can be resolved through collaboration and cooperation. And the ADR intervention and prevention mechanisms I have described are designed to complement, rather than replace, the procedures provided by our Statute for enforcing the rights and obligations of agencies and unions in their labor-management relationships.

But in light of our mandate to exercise leadership⁴³ and interpret the Statute “in a manner consistent with the requirement of an effective and efficient Government,”⁴⁴ we have an affirmative obligation to provide parties with resources that enable them to effectively and efficiently resolve differences through ADR methods rather than costly, time-consuming, and sometimes unnecessary litigation or protracted bargaining. I look forward to a day when we once again recognize the value of this common-sense approach.

⁴⁰ Among the many resources that illustrate these successes, see, for example: National Council on Federal Labor-Management Relations, *Labor-Management Forum Success Story Presentations*,

<https://web.archive.org/web/20170202041622/https://www.lmrcouncil.gov/PDI/Success-Stories.pdf> (last visited May 13, 2020).

⁴¹ See Exec. Order No. 13,203, *Revocation of Executive Order and Presidential Memorandum Concerning Labor-Management Partnerships*, 66 Fed. Reg. 11,227 (Feb. 17, 2001); Exec. Order No. 13,812, *Revocation of Executive Order Creating Labor-Management Forums*, 82 Fed. Reg. 46,367 (Sept. 29, 2017).

⁴² In a memorandum dated October 5, 1995, FLRA Chairman Phyllis Segal, General Counsel Joe Swerdzewski, and FSIP Chair Betty Bolden announced the establishment of CADR as a cross-component ADR program of the FLRA. CADR began operating in early 1996.

⁴³ 5 U.S.C. § 7105(a)(1).

⁴⁴ *Id.* § 7101(b).