71 FLRA No. 236

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
MIAMI, FLORIDA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS #33
LOCAL 3690
(Union)

0-AR-5561

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DECISION

December 29, 2020

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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, we reexamine Authority precedent related to the carve-out doctrine and find that § 7131(d) of the Federal Service Labor-Management Relations Statute (the Statute)[1] is not an exception to management rights under § 7106 of the Statute.[2]

Arbitrator Michael G. Whelan issued an award finding that the Union's grievance was arbitrable and that the Agency violated the parties' collective-bargaining agreement by denying a portion of an official-time request. The Agency filed exceptions to the award, arguing that it fails to draw its essence from the parties' agreement and that it is contrary to law because it excessively interferes with management's right to assign work under § 7106(a). For the reasons set forth below, we deny these exceptions.

II. Background and Arbitrator's Award

The Union president (the grievant) requested official time to prepare for upcoming arbitrations. Upon receipt of the request, the Agency sought additional information, which the grievant provided. After the Agency denied half of the requested time without explanation, the grievant renewed his request for the full amount with additional information as to why he needed that time. The Agency did not respond.

The Union filed a grievance alleging that the Agency violated the parties' agreement by partially denying the official-time request.[3] The Agency did not respond to the grievance, and the Union invoked arbitration. In the absence of a stipulated issue, the Arbitrator framed the issues to be resolved, in relevant part, as (1) whether the grievance was arbitrable, and (2) whether the Agency violated the parties' agreement by denying part of the grievant's official-time request.

At arbitration, the Agency argued that the grievance was not arbitrable because the Union did not meet the informal resolution requirements of Article 31, Section b of the parties' agreement (Article 31).[4] The Arbitrator found Article 31's requirement that the parties "always attempt informal resolution at the lowest appropriate level" was "ambiguous" and did not set forth a specific process for informal resolution.[5] He further found that the grievant's attempts at informal resolution – including a memorandum to, and an in-person meeting with, Agency officials – "met any requirement in Article 31."[6] Alternatively, the Arbitrator concluded that the Agency waived its arbitrability argument by failing to "respond to the grievance and put the Union on notice of its arbitrability defense."[7] Consequently, the Arbitrator held that the grievance was arbitrable.

On the merits of the grievance, the Arbitrator found that Article 11 of the parties' agreement (Article 11) allows the Union a "reasonable" amount of official time and that Article 7 of the parties agreement (Article 7) set out the "procedures for [its] approval."[8] However, because Article 11 did not specify who should determine what constitutes a reasonable amount of official time, the Arbitrator determined that the parties must attempt to agree on the amount. The Arbitrator noted that this process is not "formal," and that an "agreement is recognized when . . . the Union acquiesces to the Agency's decision."[9] Relying on recent Authority

[1] 5 U.S.C. § 7131(d).

[2] *Id.* § 7106(a)-(b).

[3] The Union filed its grievance on behalf of two Union officers, but the Arbitrator sustained the grievance only as it related to one official-time request by the Union president. Award at 45. The Agency challenges only that portion of the award.

[4] *Id.* at 20.

[5] *Id.* (citing Collective-Bargaining Agreement (CBA) Art. 31, § b); *id.* at 21.

[6] *Id.* at 21.

[7] *Id.* at 23 n.6.

[8] *Id.* at 12.

[9] *Id.* at 25.

guidance on the importance of informed decision-making in *U.S. DHS, U.S. CBP* (*DHS*),[10] the Arbitrator observed that official-time requests need to "provide sufficient information to educate the Agency as to [its] reasonableness."[11] He further found that the Agency could not "simply deny an official[-]time request without considering" its reasonableness[12] and, to "facilitate [an] agreement," an exchange of information was necessary.[13]

Weighing the information provided by the parties at the time of the request, the Arbitrator found that the grievant's official-time request was reasonable and that the Agency had not presented any evidence to the contrary. On this point, the Arbitrator found that the Agency had waived arguments in support of its denial by failing to provide them to the Union contemporaneously. Accordingly, because the Arbitrator found that the Agency had violated Articles 7 and 11, he sustained the grievance as it related to the grievant's official-time request and granted the grievant backpay of one hour and fifty minutes for the time he spent on representational activities.

The Agency filed exceptions to the award on October 31, 2019, and the Union filed an opposition to the exceptions on December 9, 2019.

III. Analysis and Conclusions

A. The award draws its essence from the parties' agreement.

The Agency argues that the Arbitrator's finding of arbitrability fails to draw its essence[14] from the parties' agreement in two respects.[15]

First, the Agency contends that the Arbitrator misinterpreted Article 31's informal-resolution requirement.[16] However, Article 31 does not set forth a specific procedure for informal resolution of grievances: it provides only that the parties "attempt informal resolution at the lowest appropriate level before filing a formal grievance."[17] Moreover, as the Arbitrator found, the grievant did attempt to resolve the grievance informally with a memorandum and an in-person meeting with Agency officials.[18] Therefore, the Arbitrator's finding – that the grievant's attempt at informal resolution "met any requirement in Article 31"[19] – is not irrational, unfounded, implausible or in manifest disregard of the parties' agreement.[20] Accordingly, we deny this essence exception.[21]

The Agency also argues that the Arbitrator's interpretation of Article 11 "creates a new process for the granting of official time that the parties never agreed to."[22] However, the award did not direct any prospective action by the Agency.[23] Relying on Authority precedent, the Arbitrator merely emphasized the importance of exchanging information to "facilitate [an] agreement" over the reasonableness of the grievant's official-time request.[24] In addition, as the Arbitrator noted, the parties' agreement does not explicitly grant either party sole authority to determine what constitutes a reasonable

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[10] 71 FLRA 119 (2019) (Member DuBester dissenting).

[11] Award at 25-26 (citing *DHS*, 71 FLRA at 119).

[12] *Id.* at 33.

[13] *Id.* at 27.

[14] The Authority will find that an arbitration award is deficient as failing to draw its essence from a collective-bargaining agreement when the appealing party establishes 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 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. *U.S. Dep't of the Treasury, IRS*, 70 FLRA 539, 542 n.24 (2018) (Member DuBester concurring) (citing *Bremerton Metal Trades Council*, 68 FLRA 154, 155 (2014)).

[15] Exceptions Br. at 11, 14.

[16] *Id.* at 11.

[17] Award at 20 (quoting CBA Art. 31, § b); *see also id.* at 21 (noting "ambiguous nature" of Art. 31, § b).

[18] *Id.* at 21.

[19] *Id.*

[20] *See IFPTE, Ass'n Admin. Law Judges*, 70 FLRA 316, 317 (2017) (*IFPTE*).

[21] In its essence exceptions, the Agency also argues that the Arbitrator erred by (1) improperly weighing the arbitrability evidence and (2) finding that the Agency waived its arbitrability challenge by failing to raise it prior to the arbitration. Exceptions Br. at 12-13. However, unlike the cases cited by the Agency, waiver was not the Arbitrator's sole basis for finding the grievance procedurally arbitrable here. *Compare U.S. DOD Educ. Activity*, 70 FLRA 937, 938 (2018) (Member DuBester Dissenting) (granting essence exception where arbitrability was based only on agency's waiver of procedural-arbitrability challenge), *with Fraternal Order of Police, Lodge No. 168*, 70 FLRA 788, 791 (2018) (denying essence exception where arbitrability was based on interpretation and application of grievance procedures). Here, as noted above, we have concluded that the Arbitrator's procedural-arbitrability determination – that the grievance met the procedural requirements of Article 31 – is not irrational, unfounded, implausible, or in manifest disregard of the parties' agreement. As this constitutes a separate and independent ground for the arbitrability finding, it is unnecessary to address the Agency's other essence exceptions related to that finding. *See Union of Pension Emps.*, 67 FLRA 63, 66 (2012) (denying exceptions to award based on "separate and independent grounds" where one ground was upheld).

[22] Exceptions Br. at 18.

[23] *See* Award at 45.

[24] *Id.* at 27.

amount of official time.[25] The Agency has failed to show how the Arbitrator's interpretation of Article 11 conflicts with the plain wording of the parties' agreement or is otherwise irrational, unfounded, implausible, or in manifest disregard of the agreement.[26] Therefore, we also deny this essence exception.

B. The award is not contrary to § 7106 of the Statute.

The Agency argues that the award is contrary to law[27] because it excessively interferes with the Agency's right to assign work under § 7106(a) of the Statute.[28] As relevant here, an agency's right to assign work under § 7106(a)(2)(B) includes the right to determine the particular duties to be assigned, when work assignments will occur, and to whom, or what positions, the duties will be assigned.[29]

In its exceptions, the Agency requests that the Authority reexamine the carve-out doctrine[30] – a statutory interpretation that carves out § 7131(d) as an exception to the management rights in § 7106.[31] Section 7131(d) of the Statute states that "any employee representing [a union] . . . shall be granted official time in any amount the agency and the [union] involved agree to be reasonable, necessary, and in the public interest."[32]

As the Authority's precedent concerning the carve-out doctrine has been inconsistent, and is contrary to the plain wording of the Statute, we agree that such a review is warranted.

The carve-out doctrine originated in *AFGE, AFL-CIO, Council of Locals No. 214 v. FLRA*[33] (*AFGE v. FLRA*), which considered whether a proposal concerning official time for representational activities impermissibly interfered with management's § 7106(b)(1) right to *elect* to negotiate over the "numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty."[34] Applying a "direct effects test,"[35] the Authority held that "where [an] agency can show . . . that the use of official time will interfere with the accomplishment of the agency's work, the exercise of management's rights will take precedence."[36] On appeal, the U.S. Court of Appeals for the D.C. Circuit rejected this holding. It noted that there were "ambiguities" between §§ 7106 and 7131, but found that the Authority's statutory interpretation would "effective[ly] repeal" § 7131(d) because it would "always make official[-]time proposals negotiable only at the agency's election" under § 7106(b)(1).[37] The court further stated that "[u]nless [§] 7131(d) carves out an exception . . . , [§] 7106(a) would [also] preclude any negotiation of official time provisions, since official time always affects an agency's ability to assign work."[38]

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[25] *Id.* at 24-25. In this regard, Chairman Kiko notes that she finds this case distinguishable from *U.S. Dep't of the Air Force, Davis-Monthan Air Force Base, Ariz.*, 71 FLRA 227 (2019) (*Davis-Monthan*) (Member DuBester concurring; Chairman Kiko dissenting). In *Davis-Monthan*, unlike here, the agreement expressly gave the agency the "responsibility to determine what constitutes a reasonable amount of [official] time." 71 FLRA at 230 (Dissenting Opinion of Chairman Kiko).

[26] *See IFPTE*, 70 FLRA at 317.

[27] When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception de novo. In conducting a de novo review, the Authority determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the appealing party establishes that they are nonfacts. *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014) (Member Pizzella concurring).

[28] Exceptions Br. at 26.

[29] *U.S. Dep't of Commerce, Patent & Trademark Office*, 65 FLRA 13, 15 (2010) (Member Beck dissenting).

[30] Exceptions Br. at 23. The Union argues that 5 C.F.R. §§ 2425.4 and 2429.5 bar these arguments because the Agency did not raise them before the Arbitrator. Opp'n at 9. However, the Agency did raise a management-rights argument below. *See* Exceptions, Attach. B, Agency's Post-Hr'g Br. at 13. We also note that a request to reconsider Authority precedent is not within an arbitrator's authority and, thus, would not have properly been before the Arbitrator here. *See* 5 U.S.C. § 7105(a)(1) (charging Authority with the responsibility to "establish[] policies and guidance" relating to the Statute); *U.S. Dep't of Energy v. FLRA*, 880 F.2d 1163, 1166 (10th Cir. 1989) (the Authority is charged with interpreting the Statute).

[31] *See Military Entrance Processing Station, L.A., Cal.*, 25 FLRA 685, 688 (1987) (*MEPS*).

[32] 5 U.S.C. § 7131(d).

[33] 798 F.2d 1525 (D.C. Cir. 1986).

[34] *Id.* at 1528.

[35] *Id.* at 1528-29 (test which provides that a proposal that is "directly or integrally related to the numbers, types and grades of employees or positions assigned to a work project, organizational entity or tour of duty, so as to be determinative of such numbers, types and grades, is negotiable [only] at the election of the agency" (alteration in the original)).

[36] *Id.* at 1528 (citing *AFGE, AFL-CIO, Council of Locals No. 214*, 19 FLRA 215, 219 (1985) (*Local 214*), *rev'd AFGE v. FLRA*, 798 F.2d 1525 (D.C. Cir. 1986)).

[37] *Id.* at 1529; *see also id.* ("Any bargaining proposal concerning official time for representational activities necessarily reduces the number of person-hours available for performing the work of the agency, and therefore has a direct effect on agency staffing patterns.").

[38] *Id.* at 1530 n.8. *AFGE v. FLRA*, and the Authority decision it reviewed, involved only whether an official-time proposal "directly affected" management's right to "determine staffing

The Authority adopted this statutory interpretation in *Military Entrance Processing Station, Los Angeles, California*, finding that an agency committed an unfair labor practice by failing to negotiate before changing the official-time schedule.[39] In rejecting an argument "based on management's right to assign work under § 7106(a)," the Authority held that § 7131(d) "'carves out an exception'" to management's right to assign work because, "otherwise, that right 'would preclude any negotiation of official[-]time provisions.'"[40] The Authority went on to announce that "the use of official time under § 7131(d) – that is, its amount, allocation and scheduling – is negotiable absent an emergency or other special circumstances."[41]

This reasoning was called into question, although indirectly, by the Supreme Court in *Department of the Treasury, IRS v. FLRA* (*IRS v. FLRA*).[42] In that case, the Court examined the Authority's conclusion that the management rights contained in § 7106 *did not* supersede § 7121, which entitles unions to negotiate and enforce grievance procedures.[43] The Court found that such a reading of the Statute was "flatly contradicted by the language of § 7106(a)'s command that . . . nothing in the entire [Statute] . . . shall affect the authority of agency officials to make . . . determinations" based on its listed management rights.[44] Accordingly, the Court found that § 7121 was not an exception to § 7106.[45]

In response to the Court's decision, the Authority revisited the carve-out doctrine in *NTEU* (*BATF*).[46] There, the Authority acknowledged that a "strict reading of . . . *IRS v. FLRA* leads to a conclusion that . . . any proposals concerning official time that are negotiated under [§] 7131(d) are subject to [§] 7106(a)."[47] The Authority held that application of the Court's reasoning to the carve-out doctrine would be contrary to rules of statutory construction because it "would effectively void § 7131(d)" by eviscerating the negotiation of official-time provisions.[48] Accordingly, the Authority announced that it would "continue to carve out an exception to [§] 7106 in order to maintain the negotiability . . . of matters involving official time."[49]

Nevertheless, the Authority noted that "the effect, if any, of *IRS v. FLRA* on the carve-out theory [wa]s one of first impression" and that the union had alternatively argued that the provisions at issue were appropriate arrangements.[50] Therefore, the Authority stated that, until the courts provided "further guidance" on the issue, it would also analyze whether official-time provisions "interfere[d] with management's rights under [§] 7106 and whether [they] constitute[d] . . . appropriate arrangement[s] that [are] negotiable pursuant to [§] 7106(b)(3)."[51] Following a thorough analysis, the Authority found that the provisions at issue in *BATF* were negotiable under the carve-out doctrine and as appropriate arrangements under § 7106(b)(3).[52]

For several years, the Authority continued to both apply the carve-out doctrine *and* consider whether provisions concerning official time impermissibly interfered with § 7106 – in one case, going so far as to conclude, incongruously, that two such provisions did not constitute appropriate arrangements under § 7106(b)(3) but were negotiable under carve-out doctrine.[53] Then,

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patterns" and thus was negotiable only at the election of the agency under 5 U.S.C. § 7106(b)(1). The Authority's underlying decision held that any time an official-time proposal has a "direct effect" on staffing patterns, it falls within § 7106(b)(1) and the agency has no duty to bargain over it if it does not wish to do so. *Local 214*, 19 FLRA at 222-223. The D.C. Circuit held that this interpretation would effectively read 5 U.S.C. § 7131(d) out of the Statute, because "[a]ny bargaining proposal concerning official time for representational activities necessarily reduces the number of person-hours available for performing the work of the agency, and therefore has a direct effect on agency staffing patterns." *AFGE v. FLRA*, 798 F.2d at 1529. *AFGE v. FLRA* did not consider, however, whether official-time proposals are negotiable under § 7106(b)(3) as "appropriate arrangements," and the Authority has subsequently answered this question in the affirmative. Nor did *AFGE v. FLRA* consider whether application of an "excessive interference" test, the test we adopt today, is consistent with § 7131(d). It is important to note that an "appropriate arrangement" under § 7106(b)(3) is a mandatory subject of bargaining, notwithstanding § 7106(b)(1). *See Ass'n of Civilian Technicians, Ky. Long Rifle Chapter & Bluegrass Chapter*, 70 FLRA 968, 969 (2018) (Member DuBester concurring, in part, and dissenting, in part) ("A proposal that interferes with management's rights under § 7106(b)(1) may nevertheless be a mandatory subject of negotiation if the proposal is an appropriate arrangement under § 7106(b)(3) of the Statute."). Thus, contrary to the dissent's contentions, our decision today does not effectively "void" § 7131(d), nor does our decision contravene the reasoning of *AFGE v. FLRA*.

[39] *See MEPS*, 25 FLRA at 688-89.

[40] *Id.* (citing *AFGE v. FLRA*, 798 F.2d at 1530 n.8).

[41] *Id.* at 689; *see also id.* at 689 n.* (stating that the direct-effects test would no longer be applied to official-time cases).

[42] 494 U.S. 922 (1990) (*IRS v. FLRA*).

[43] *Id.* at 927.

[44] *Id.* at 928.

[45] *Id.* at 928-29.

[46] 45 FLRA 339, 347 (1992) (Member Armendariz concurring in part and dissenting in part).

[47] *Id.* at 348.

[48] *Id.*

[49] *Id.*

[50] *Id.* at 348-49.

[51] *Id.* at 349 (applying test from *NAGE, Local R14-87*, 21 FLRA 24, 31 (1986) (*KANG*)).

[52] *Id.* at 355.

[53] *See NTEU, Chapter 243*, 49 FLRA 176, 206-07 (1994) (Member Armendariz concurring in part and dissenting in part) (concluding, inconsistently, that two provisions were negotiable

without directly overturning *BATF* or providing an explanation, the Authority changed course and stopped considering whether a proposal, provision, or award impermissibly interfered with management rights when official time was involved.[54] In negotiability cases, the Authority considered only whether "emergency or other special circumstances" intervened to render an official time proposal nonnegotiable.[55] Similarly, in the arbitration context, the Authority found that awards upholding official time negotiated under § 7131(d) were not subject to exceptions concerning management's right to assign work.[56] Throughout this time, some Authority members questioned the viability and necessity of the carve-out exception.[57]

In light of the foregoing inconsistencies, we believe it is necessary to bring clarity to Authority precedent by giving meaning to the plain wording of the Statute. As interpreted by the Court in *IRS v. FLRA*, "nothing in the entire [Statute]," beyond the exceptions in § 7106(b), "shall affect" the rights in § 7106(a).[58] That includes § 7131(d). Contrary to the fear expressed in *BATF*, giving proper effect to § 7106(a) does not "effectively void" § 7131(d) any more than it does other statutory union rights that potentially impact management rights.[59] This is because of the balance that the courts and the Authority have established between the exercise of management rights under § 7106(a) and appropriate arrangements protecting union rights under § 7106(b)(3).[60] Reading the Statute in this way "effectuates rather than frustrates the major purpose of the legislative draft[ers],"[61] by accommodating *both* the agency and union interests concerning the use of official time.[62] As it is not necessary to carve § 7131(d) out of § 7106(a) to give it effect, the Authority will no longer apply the carve-out doctrine. Where it is asserted that matters concerning the amount, allocation, or scheduling of official time under § 7131(d) affect a management right under § 7106(a), we will consider whether the proposal, provision, or award excessively interferes with that right.[63]

In so finding, we are not ignoring the congressional mandate that "official time for representational activities [sh]ould be negotiable"[64] Rather we are mediating between the competing rights outlined in §§ 7131(d) and 7106(a), while giving effect to the plain wording of both sections.[65]

In reaching this decision, we note that the carve-out doctrine arose from the concern that, if § 7131(d) is subject to § 7106, the availability of official time would be greatly reduced or eliminated.[66] We

under carve-out doctrine after finding that they excessively interfered with § 7106 rights).

[54] *See NTEU*, 52 FLRA 1265, 1287 (1997) (Chair Segal concurring) (applying the carve-out doctrine and finding "no need to address . . . [whether] the provision is negotiable as an appropriate arrangement"); *see also U.S. DOD, Army & Air Force Exch. Serv.*, 51 FLRA 1371, 1374-75 (1996) (*AAFES*) (Chair Segal concurring in part and dissenting in part) (applying carve-out doctrine to deny management-rights exception to award).

[55] *See, e.g.*, *AFGE, Local 1770*, 64 FLRA 953, 957 (2010) (finding provisions did not "impermissibly interfere" with management rights where emergency or special circumstances were not asserted).

[56] *See, e.g.*, *U.S. Dep't of the Treasury, IRS*, 59 FLRA 34, 36 (2003) (finding award was not contrary to § 7106(a) because the carve-out doctrine applied).

[57] *See AFGE, Council 224*, 60 FLRA 278, 280 (2004) (*Council 224*) (Concurring Opinion of Chairman Cabaniss) (arguing that "the 'carve[-]out' doctrine . . . does not withstand scrutiny" and that resolving official-time negotiability disputes "pursuant to § 7106(b)(3) . . . eviscerates neither § 7131(d) nor § 7106(a)"); *NTEU,* 52 FLRA at 1302 (Concurring Opinion of Chair Segal) (arguing that "the majority reads too much into [§] 7131(d) and, in so doing, potentially invalidates legitimate agency management rights set out in [§] 7106(a)); *AAFES*, 51 FLRA at 1383-84 (Dissenting Opinion of Chair Segal) (arguing that the award is contrary to *IRS v. FLRA*).

[58] *IRS v. FLRA*, 494 U.S. at 928.

[59] *See, e.g.*, *U.S. INS v. FLRA*, 4 F.3d 268, 272 n.7 (4th Cir. 1993) (*INS*) (rejecting argument that § 7106(a) "proscribes granting 'official time' generally")

[60] *See AFGE, AFL-CIO, Local 2782 v. FLRA*, 702 F.2d 1183, 1188 (D.C. Cir. 1983) (*Local 2782*) (noting that, under § 7106(b)(3), "provisions for employees adversely affected can contravene what would in other circumstances be management prerogatives").

[61] *See DOD, Army-Air Force Exch. Serv. v. FLRA*., 659 F.2d 1140, 1160 (D.C. Cir. 1981) (quoting *Shultz v. Louisiana Trailer Sales, Inc.*, 428 F.2d 61, 65 (5th Cir. 1970)) (noting balance between management rights under § 7106(a) and negotiable procedures under § 7106(b)(2)).

[62] *INS*, 4 F.3d at 272 n.7 (noting applicability of "excessive interference" test in negotiability dispute concerning official time).

[63] *E.g.*, *BATF*, 45 FLRA at 349-55 (finding official-time provisions negotiable as appropriate arrangements); *see also NTEU*, 52 FLRA at 1311-12 (Concurring Opinion of Chair Segal) (same).

[64] *AFGE v FLRA*, 798 F.2d at 1530 n.5; *see Council 224*, 60 FLRA at 280 (Concurring Opinion of Chairman Cabaniss) ("Official time under § 7131(d) is clearly bargainable.").

[65] *See NTEU*, 52 FLRA at 1301 (Concurring Opinion of Chair Segal) (arguing that, just as the "language of [§] 7106(a) [does not] trump[] the right to negotiate for, and use, official time . . . , [§] 7131(d)'s vitality does not depend on the nullification of [§] 7106(a)).

[66] *See, e.g.*, *MEPS*, 25 FLRA at 688 (asserting that an agency's "generalized concern to carry out its mission . . . 'cannot displace a specific congressional provision providing for the negotiability of official[-]time proposals'"); *see also BATF*,

believe that these concerns are unfounded.[67] Arbitrators' awards that find violations of official-time provisions are not contrary to law simply because they "affect" a § 7106 management right.[68] Such an award is contrary to law only if, as relevant here, it "excessively interferes" with the purported management right.[69] Similarly, in the context of a negotiability case, an official-time proposal or provision that affects a § 7106 right would still be negotiable if it were found to be a procedure or an appropriate arrangement under § 7106(b)(2) or (3), respectively.[70] Many official-time awards, proposals, and provisions will continue to be lawful. Even in *BATF*, where the Authority asserted that the carve-out doctrine was *required* to protect official time under § 7131(d), the official-time provisions at issue were found negotiable as "appropriate arrangements" under § 7106(b)(3).[71]

Turning to the case at hand, the Agency argues that the award excessively interferes with the management right to assign work by requiring it to engage in an "interactive process" when responding to official-time requests.[72] Therefore, it contends that the award should be vacated under the *U.S. DOJ, Federal BOP* (*DOJ*) three-part framework for analyzing whether an award excessively interferes with a management right.[73]

Under *DOJ*, the first question is whether the Arbitrator found a violation of a contract provision.[74] Here, the Arbitrator found that the Agency violated Articles 7 and 11 by partially denying the grievant's official-time request.[75] Therefore, the answer to this question is yes.

The second question is whether the Arbitrator's remedy reasonably and proportionally relates to the violation.[76] As conceded by the Agency,[77] the Arbitrator's remedy – backpay of one hour and fifty minutes for the off-duty time spent to perform representational tasks[78] – does "reasonably and proportionally" relate to the violation.[79]

The final question is whether the Arbitrator's interpretation of the parties' agreement excessively interferes with the § 7106(a) right to assign work.[80] We find that answer to this question is no. We note, initially, that the award does not direct any prospective action by the Agency when dealing with official-time requests.[81] Further, the Arbitrator's interpretation of the parties'

45 FLRA at 348 (finding that applying *IRS v. FLRA* to § 7131 would "render [it] inoperative").

[67] *See Council 224*, 60 FLRA at 280 (Concurring Opinion of Chairman Cabaniss) (arguing that § 7131(d) official time would not be "eviscerate[d]" if proposals were "analyzed under the § 7106(b)(3) 'appropriate arrangement' framework").

[68] *See U.S. Dep't of the Treasury, Office of the Comptroller of the Currency*, 71 FLRA 387, 390 (2019) (Member DuBester dissenting) (noting that the test announced in *U.S. DOJ, Federal BOP*, 70 FLRA 398 (2018) (*DOJ*) (Member DuBester dissenting), "only applies in cases where the awards or remedies affect a management right," and that the test "measure[s] . . . the impact of the arbitration award or remedy on [the] management rights" to determine whether the effect is excessive).

[69] *DOJ*, 70 FLRA at 405-06 ("[T]he final question is whether the arbitrator's interpretation of the [contract] provision excessively interferes with a § 7106(a) management right. If the answer to this question is yes, then the arbitrator's award is contrary to law and must be vacated.").

[70] *See Local 2782*, 702 F.2d at 1188 (holding that appropriate arrangements under § 7106(b) are an exception to management rights under § 7106(a)); *see also NFFE, Local 1450, IAMAW*, 70 FLRA 975, 976 (2018) (setting out appropriate arrangement analysis).

[71] *BATF*, 45 FLRA at 349-55 (applying *KANG* analysis).

[72] Exceptions Br. at 26.

[73] *DOJ*, 70 FLRA at 405-06. As we have previously noted, "*DOJ* only applies in cases where the award[] or remed[y] affect[s] a management right." *U.S. DOD, Def. Logistics Agency*, 70 FLRA 932, 933 (2018) (Member DuBester dissenting). Here, the Arbitrator found that the Agency had improperly denied the grievant a particular amount of official time. Award at 33. Whenever a proposal, provision, or award concerns the amount, allocation, or scheduling of official time for representational duties, it affects the right to assign work because it "necessarily reduces the number of person-hours available for performing the work of the agency." *AFGE v. FLRA*, 798 F.2d at 1529; *see also id.* at 1530 n.8 (finding that "official time always affects an agency's ability to assign work."). Therefore, *DOJ* applies in this case.

[74] *DOJ*, 70 FLRA at 405.

[75] Award at 33.

[76] *DOJ*, 70 FLRA at 405.

[77] Exceptions Br. at 27.

[78] Award at 44.

[79] *See U.S. Dep't of the Treasury, IRS*, 63 FLRA 157, 159 (2009) ("The Authority has held that, when official time is wrongfully denied and representational activities are performed on nonduty time, § 7131(d) of the Statute "entitles the aggrieved employee to be paid at the appropriate straight-time rate." (quoting *U.S. Dep't of Transp., FAA, Sw. Region, Fort Worth, Tex.*, 59 FLRA 530, 532 (2003))).

[80] *DOJ*, 70 FLRA at 405.

[81] *See* Award at 44-45; s*ee also AFGE, Local 1101*, 70 FLRA 644, 648 (2018) (Member DuBester concurring) (party's misunderstanding of award provides no basis for finding award contrary to law (citing *AFGE, Nat'l Joint Council of Food Inspection Locals*, 64 FLRA 1116, 1118 (2010))).

agreement, as involving the exchange of information to determine whether an official-time request is "reasonable," is consistent with *DHS*, which emphasizes the necessity of sharing information to "make a reasoned determination" about such requests.[82] Moreover, the award does not explicitly impose conditions on the Agency's ability to make work assignments.[83] For these reasons, we find that the award does not excessively interfere with the right to assign work, and we deny this contrary-to-law exception.

IV. Conclusion

We deny the Agency's exceptions.

[82] *DHS*, 71 FLRA at 120.
[83] *See IAMAW, Local Lodge 2424*, 32 FLRA 200, 203 (1988) (finding proposal did not interfere with right to assign work where there was "no express requirement . . . that specific assignments be made or be discontinued").

Member DuBester, dissenting:

I agree that the Agency's exceptions should be denied. It is there, however, that I part company with my colleagues.

Section 7131(d) of the Federal Service Labor-Management Relations Statute (the Statute) states the following:

> Except as provided in the preceding subsections of this section – (1) any employee representing an exclusive representative, or (2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative, *shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest*.[1]

In previous decisions, my colleagues have divested unions and agencies of their right to determine, through § 7131(d) collective bargaining, the official time arrangements that best suit their particular needs. Not coincidentally, these decisions have also significantly eroded unions' ability to utilize negotiated official time to fulfill their statutory obligations.[2]

In today's decision, the majority escalates its assault on § 7131(d) by subjecting negotiated official time arrangements to collateral attack by means of a management rights analysis. Because the majority's decision contradicts both the language and purpose of this fundamentally important statutory provision, I strongly dissent.

The Authority has long recognized the principle that Congress expressly delegated to the parties the role of determining, through collective bargaining, "all matters concerning the use of official time under § 7131(d)."[3] This is reinforced by the Statute's legislative history, which confirms that § 7131(d) "makes all . . . matters concerning official time for unit employees engaged in labor-management relations activity," other than the official time specifically provided by § 7131(a) and (c), "subject to negotiation."[4]

The Authority's "carve out" doctrine flows directly from this principle. As the majority acknowledges, the doctrine originated in the U.S. Court of Appeals for the District of Columbia's (D.C. Circuit's) decision in *AFGE, AFL-CIO, Council of Locals No. 214 v. FLRA* (*AFGE*).[5] In *AFGE*, the agency challenged the negotiability of a union proposal that would allow certain employees to spend 100 percent of their time handling union representational functions. While acknowledging that the proposal was a proper subject of bargaining under § 7131(d), the Authority concluded it was negotiable only at the election of the agency – pursuant to § 7106(b)(1) of the Statute – because "the direct effect of [the union's] proposal would be to require a reallocation of positions and employees and force changes in [the agency's] staffing patterns."[6] In other words, as summarized by the court, the Authority "ruled that section 7131(d) must be subordinated to section 7106(b)(1) of the Statute."[7]

On appeal from the Authority's decision, the D.C. Circuit squarely rejected this premise. It began by noting that "[*a*]*ny* bargaining proposal concerning official time for representational activities necessarily reduces the number of person-hours available for performing the work of the agency, and therefore has a direct effect on agency staffing patterns."[8] And the court found that, by specifically providing for negotiated official time under § 7131(d), "Congress must have envisioned either some reallocation of positions or some additional hiring and hence some limitation in management's right to

[1] 5 U.S.C. § 7131(d) (emphasis added).

[2] *See*, *e.g.*, *POPA*, 71 FLRA 1223 (2020) (Member DuBester dissenting) (concluding that union's proposals regarding amount and use of official time are outside the duty to bargain because they conflict with Executive Order 13,837); *U.S. DHS, U.S. CBP*, 71 FLRA 119, 120 (2019) (Member DuBester dissenting) (setting aside award enforcing parties' official time agreement on grounds that it is "unenforceable" under § 7131(d)); *Nat'l Right to Work Legal Def. Found.*, 71 FLRA 923, 926 (2020) (Member DuBester dissenting) (concluding that unions may not use official time negotiated under § 7131(d) for "indirect" or "grass roots" lobbying).

[3] *United Power Trades Org.*, 64 FLRA 440, 442 (2010); *see also U.S. Dep't of the Air Force, HQ Air Force Materiel Command*, 49 FLRA 1111, 1119 (1994) (*Air Force*).

[4] *Air Force*, 49 FLRA at 1119 (quoting H.R. Rep. No. 1403, 95th Cong., 2d Sess. 59 (1978), reprinted in Comm. on Post Office & Civil Serv., House of Representatives, 96th Cong., 1st Sess., Legislative History of the Fed. Serv. Labor-Mgmt. Relations Statute, Title VII of the Civil Serv. Reform Act of 1978, (Comm. Print No. 96-7), at 705 (1979)).

[5] 798 F.2d 1525 (D.C. Cir. 1986).

[6] *Id.* at 1528. Section 7106(b)(1), in relevant part, reserves to the agency the choice of whether to negotiate on "the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty." 5 U.S.C. § 7106(b)(1).

[7] *AFGE*, 798 F.2d at 1526.

[8] *Id.* at 1529 (emphasis added).

determine the number of employees assigned to a work project or organizational subdivision."[9]

Based on these findings, the court concluded that the Authority's subordination of § 7131(d) "drain[ed] the official time provision of any reasonable meaning" and thus "frustrate[d] the intent of Congress."[10] It also rejected the Authority's "suggestion" that its interpretation was necessary "to protect the ability of agencies to function effectively," because this ignored § 7131(d)'s plain language, in which Congress provided that "the agency and the union together should determine the amount of official time" that is "'reasonable, necessary, and *in the public interest*.'"[11]

And noting that the Statute's legislative history "fails to indicate that Congress intended any such perverse effect," the court held that the Authority "cannot assume that Congress' explicit provision for official time was not meant to be a meaningful guarantee."[12] Indeed, the court cautioned that "'[i]t would require legislative history of exceptional clarity to induce us to adopt an interpretation which . . . would deprive [a provision of the Statute] of virtually all effect.'"[13]

Having dispensed with the Authority's flawed analysis, the court then clarified the Authority's path going forward. Specifically, the court explained that its "examination of section 7106 as a whole reinforce[d] [its] conclusion that section 7131(d) takes priority over section 7106(b)(1)."[14] And, more generally, it concluded that "[u]nless section 7131(d) *carves out an exception to section 7106(a)*, section 7106(a) would preclude any negotiation of official time provisions, since official time always affects an agency's ability to assign work."[15]

The Authority has subsequently applied the court's "carve out" doctrine to decisions involving the negotiability of official time proposals and provisions, as well as to arbitration awards enforcing official time provisions in negotiated agreements. But contrary to the majority's assertions, while the Authority has occasionally applied the "carve out" doctrine in conjunction with an appropriate arrangement analysis, its application of this doctrine has been neither unclear nor "inconsistent."[16]

For instance, in *Military Entrance Processing Station, Los Angeles, California*,[17] the Authority applied the "carve out" doctrine to reject the agency's argument that it was not required to bargain over a change to official time arrangements based upon its right to assign work under § 7106(a)(1) of the Statute. Adopting the D.C. Circuit's reasoning in *AFGE*, the Authority succinctly explained that the agency's objection "'cannot displace a specific congressional provision providing for the negotiability of official time proposals.'"[18]

The Authority elaborated on this rationale in *NTEU*,[19] a decision *barely mentioned* by the majority. Specifically, in *NTEU*, the Authority applied the "carve out" doctrine to reject the agency's argument that a union provision concerning the approval of official time offended its management right to direct employees and assign work.

In reaching this conclusion, the Authority found that, by employing the term "shall" in § 7131(d), Congress "intended for representatives of labor organizations to be able to use and schedule [official] time in a meaningful way."[20] And the Authority explained that this conclusion was consistent with the Statute's legislative history, which, it found, reflects Congress' concern with two paramount and pragmatic principles in section 7131(d):

> (1) ensuring that representatives of labor organizations would have sufficient opportunity to perform the representational activities that were being provided by the proposed legislation; and (2) equalizing the resources and ability of labor organization representatives to pursue these activities on official time in the same manner as management.[21]

Applying these principles, the Authority then concluded that "interpreting section 7106(a)(2) to permit management to control when union representatives can schedule or use official time would *undercut the purpose of § 7131(d)*."[22] And it reiterated that applying the

[9] *Id.*
[10] *Id.* at 1528.
[11] *Id.* at 1530 (quoting § 7131(d)).
[12] *Id.*
[13] *Id.* at 1529 (quoting *AFGE, Local 2782 v. FLRA*, 702 F.2d 1183, 1187 (D.C. Cir. 1983)).
[14] *Id.* at 1530 n.8.
[15] *Id.* (emphasis added).
[16] Majority at 5.

[17] 25 FLRA 685 (1987) (*MEPS*).
[18] *Id.* at 688 (quoting *AFGE*, 798 F.2d at 1530).
[19] 52 FLRA 1265 (1997) (*NTEU*) (Chair Segal concurring).
[20] *Id.* at 1284.
[21] *Id.*
[22] *Id.* at 1285 (emphasis added); *see also id.* at 1284 ("The clear import of the [a]gency's argument is that it does not wish to bargain over the allocation or scheduling of official time by [u]nion representatives. However, we interpret section 7131(d)

"carve out" doctrine to the union's proposal was necessary to preserve "the balance of official time usage that Congress intended to create."[23]

This thorough and reasoned articulation of the "carve out" doctrine belies the majority's purported need to bring either "clarity"[24] or consistency to our precedent.

But more importantly, the majority is simply wrong in concluding that the Supreme Court's decision in *Department of the Treasury, IRS v. FLRA* (*IRS*)[25] requires us to "reexamine" – much less repeal – the "carve out" doctrine.[26] In reality, the Authority has *already* "reexamined" the "carve out" doctrine in response to *IRS*. And it found that the doctrine is wholly compatible with the Court's decision.

Specifically, in *NTEU* (*BATF*),[27] the Authority *explicitly acknowledged* that the "breadth and effect" that the *IRS* decision "ascribed to the phrase 'nothing in this chapter,' which appears in section 7106(a)(1) of the Statute, requires us to reconsider our previous conclusion that section 7131(d) carves out an exception to section 7106(a)(1)."[28] In undertaking that analysis, however, the Authority correctly recognized that "an elementary rule of statutory construction is that effect must be given to every word, clause, and sentence of a statute so that no part is rendered inoperative or insignificant."[29] And applying this rule, it concluded that

> as the agency charged with the duty of enforcing the Statute, *and of harmonizing its provisions*, we read [*IRS*] to apply to situations where according predominance to the rights established by section 7106 can be achieved without eviscerating another provision of the Statute. Such was the case in [*IRS*], which narrowed the scope of negotiation involving the grievance procedure but did not render section 7121 of the Statute inoperative.[30]

Significantly, the Authority then determined that "[s]ections 7106 and 7131(d) *cannot be reconciled in such a manner*" because, as the D.C. Circuit "recognized" in *AFGE*, "subordinating section 7131(d) to section 7106(a) of the Statute would effectively void section 7131(d)."[31] And on this basis, the Authority determined that it "will continue to carve out an exception to section 7106 in order to maintain the negotiability, when otherwise warranted, of matters involving official time."[32]

While *BATF* also addressed the union's "alternative" argument that its official time proposals should be found negotiable as appropriate arrangements under § 7106(b)(3) of the Statute,[33] it simply does not follow – as the majority suggests – that its thorough analysis of *IRS'* effect on the "carve out" doctrine lacked sufficient "clarity."[34]

But more importantly, the majority has failed to set forth a rational basis for concluding that *BATF* was incorrectly decided. The majority appears to reject *BATF*'s analysis because "giving proper effect to § 7106(a) does not 'effectively void' § 7131(d) any more than it does other statutory union rights that potentially impact management rights."[35]

But this rationale ignores the unique nature of § 7131(d), in which Congress *specifically delegated* to agencies and unions the responsibility for negotiating official time arrangements that are "reasonable, necessary and in the public interest."[36] Thus, to the extent that the majority concludes that subjecting these arrangements to a management-rights analysis is necessary to "accommodat[e] both the agency and union interests concerning the use of official time,"[37] this ignores the plain language of § 7131(d), in which Congress directed that these interests should be addressed, and reconciled,

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to mean that management cannot unilaterally determine the allocation or scheduling of official time. Rather it must be determined bilaterally. We believe that reading the Statute in this manner gives full effect to a provision that was of obvious significance to its drafters.") (citing *AFGE*, 798 F.2d at 1530)).

[23] *Id.* at 1287. *NTEU* also recognized that "the negotiability of official time under § 7131(d) is not without some limitation." *NTEU*, 52 FLRA at 1286. For instance, such restrictions are, "first and foremost, imposed by the parties themselves." *Id.* It also noted that, under existing precedent, official time under § 7131(d) is negotiable "'absent an emergency or other special circumstances.'" *Id.* (quoting *MEPS*, 25 FLRA at 689).

[24] Majority at 8.

[25] 494 U.S. 922 (1990).

[26] Majority at 5.

[27] 45 FLRA 339 (1992) (Member Armendariz concurring in part and dissenting in part).

[28] *Id.* at 347-48.

[29] *Id.* at 348.

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

[31] *Id.*

[32] *Id.* The Authority subsequently relied upon this same rationale in *NTEU*. 52 FLRA at 1286-87.

[33] *BATF*, 45 FLRA at 348-49.

[34] Majority at 8.

[35] *Id.*

[36] 5 U.S.C. § 7131(d).

[37] Majority at 8.

by the *parties themselves* through the bargaining process.[38]

The Authority has been cautioned that it "must either follow its own precedent or 'provide a reasoned explanation for' its decision to depart from that precedent."[39] Indeed, in *AFGE*, the court specifically cautioned that its judicial deference "'cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of *major policy decisions* properly made by Congress.'"[40] And the court found that, even under the deferential standard applied to agency decisions, the Authority's decision was "impermissible" because it "ignore[d] the familiar canon that statutes should be construed 'to give effect, if possible, to every word Congress used.'"[41] Regrettably, in its haste to undermine negotiated official time arrangements, the majority has failed to heed these warnings.

And even looking beyond the infirmity of the majority's analysis, our parties should take little solace in the majority's assurance that the availability of official time will not be "greatly reduced or eliminated" by today's decision.[42] This follows because, as a consequence of the majority's ruling, arbitrators' awards enforcing collectively bargained official time provisions will now be subject to the three-part test created by the majority in *U.S. DOJ, Federal BOP* (*DOJ*).[43]

As I have previously cautioned, the outcome of this test "'invite[s] the exercise of arbitrary power'" because it "lack[s] discernible principles."[44] And because *DOJ*'s "excessive-interference" test "eliminates consideration of the benefits" of a provision to bargaining unit employees,[45] it is particularly ill-equipped to assess awards enforcing provisions negotiated under § 7131(d), given the "obvious significance" that Congress afforded to official time in the Statute.[46] Nevertheless, because the "carve out" doctrine will no longer apply to exceptions from such awards, the ability of unions to utilize negotiated official time will now be entirely dependent upon the whimsical outcomes of this arbitrary test.

And because today's decision also eliminates application of the "carve out" doctrine to negotiability determinations, agencies are now absolved from bargaining over official time proposals that – in the *Authority's* view – do not constitute procedures or appropriate arrangements under § 7106(b)(2) and (3). This outcome simply cannot be squared with the plain language of § 7131(d), which – as noted – specifically delegates to agencies and unions the responsibility for negotiating official time arrangements that are "reasonable, necessary and in the public interest."[47]

In sum, the majority fails to demonstrate any plausible reason why we should abandon our long-standing and well-reasoned precedent applying the "carve out" doctrine. And its decision to do so is squarely inconsistent with the language and purpose of § 7131(d). Given the fundamental role played by negotiated official time in enabling unions to fulfill their representational responsibilities under our Statute, I can only conclude, once again, that the majority's "true objective" is to "undermin[e] the ability of unions to carry out their

[38] And as part of the process for resolving any impasses that may arise regarding official time matters, agencies can assert that a particular official time proposal should not be adopted because it is not reasonable, necessary, and in the public interest. *See* 5 U.S.C. § 7119.

[39] *NFFE, FD-1, IAMAW, Local 951 v. FLRA*, 412 F.3d 119, 124 (D.C. Cir. 2005) (quoting *Local 32, AFGE, AFL-CIO v. FLRA*, 774 F.2d 498, 502 (D.C. Cir. 1985)).

[40] 798 F.2d at 1528 (emphasis added) (quoting *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983)). The court further warned that it would "not 'rubber-stamp' an agency's statutory construction if that construction is inconsistent with a statutory mandate or frustrates a congressional policy underlying the statute." *Id.*

[41] *Id.* (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)).

[42] Majority at 9 (concluding that such concerns "are unfounded" because "many official-time awards, proposals, and provisions will continue to be lawful").

[43] 70 FLRA 398 (2018) (Member DuBester dissenting).

[44] *U.S. DHS, U.S. CBP, Detroit Sector, Detroit, Mich.*, 70 FLRA 572, 576 (2018) (Dissenting Opinion of Member DuBester) (quoting *Sessions v. Dimaya*, 138 S.Ct. 1204, 1223-24 (2018) (Concurring Opinion of Justice Gorsuch)); *see also U.S. Dep't of the Treasury, Office of the Comptroller of the Currency*, 71 FLRA 387, 393 (2019) (Dissenting Opinion of Member DuBester) (in vacating the award on grounds that it excessively interferes with management's right to direct employees and assign work, "the majority does not purport to articulate any discernible standard by which parties or arbitrators might, in future cases, ascertain whether an award will be vacated on these grounds").

[45] *U.S. Dep't of the Treasury, IRS*, 70 FLRA 792, 795-96 (2018) (Dissenting Opinion of Member DuBester) (citation omitted).

[46] *NTEU*, 52 FLRA at 1284 (further recognizing that "Congress intended for representatives of labor organizations to be able to use and schedule [official] time in a meaningful way"); *see also AFGE*, 798 F.2d at 1530 (holding that the Authority "cannot assume that Congress' explicit provision for official time was not meant to be a meaningful guarantee").

[47] 5 U.S.C. § 7131(d); *see also AFGE*, 798 F.2d at 1530 (reminding the Authority that a "finding of negotiability means only that a proposal is a proper subject of bargaining, not that the proposal ought to be implemented on the merits," and that "[a]n agency has no obligation to abandon what it conceives to be the best interests of the agency merely because it must negotiate on an official time proposal").

obligations under the Statute" and to "further weaken[] the institution of collective bargaining in the federal sector."[48] And so, once again, I refuse to join a decision "so fundamentally adverse to the principles and purposes of our Statute."[49]

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[48] *OPM*, 71 FLRA 571, 579 (2020) (Dissenting Opinion of Member DuBester).

[49] *Id*.