

67 FLRA No. 26

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

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL BORDER PATROL COUNCIL
LOCAL 2913
(Union)

0-AR-4875

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DECISION

December 18, 2013

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

I. Statement of the Case

Arbitrator David Gaba found that the Agency failed to pay an employee (the grievant) the full amount of certain expenses related to his transfer to a new work location. Accordingly, the Arbitrator directed the Agency to pay the grievant the unpaid amount. In addition, the Arbitrator found that the Agency improperly delayed forwarding the grievant's application for an Agency program that, when processed, would have helped the grievant sell his home at his pre-transfer work location. The Arbitrator directed the Agency to pay the "actual expenses" for that home – including "mortgage, utilities, and lawn[-]maintenance" expenses – that the grievant incurred during the delay.¹

The main issue before us is whether the Arbitrator's monetary remedies, including an alleged award of attorney fees, are contrary to law. Because the amount of the awarded expenses relating to the transfer exceeds the maximum amount allowed by law, and there is no authority for the Arbitrator's award of "actual expenses,"² the monetary remedies are contrary to law and must be set aside. And as an award of attorney fees

requires an underlying award of monetary remedies, any award of attorney fees is unauthorized. Thus, it is not necessary to resolve the parties' dispute over whether the Arbitrator actually awarded attorney fees because, even assuming that he did, that award also must be set aside.

II. Background and Arbitrator's Award

The grievant is a Border Patrol agent who was assigned to the Border Patrol station in Nogales, Arizona. The Agency selected him for a transfer to a station in Montana. As part of his transfer, the grievant signed a relocation agreement under which the Agency agreed to reimburse him for certain expenses that regulations refer to as "temporary quarters subsistence expenses" (subsistence expenses).³ These are expenses that an employee and/or the employee's immediate family incurs while occupying temporary housing. The amount of the reimbursement as set forth in the relocation agreement was \$8,175.00. After the grievant submitted a voucher to the Agency for payment in that amount, the Agency told him that it was reimbursing him only half that amount – \$4,087.50 – because that was the maximum amount allowed under law. The Agency explained that the per diem amount used to calculate the reimbursement amount in the relocation agreement had been erroneously doubled from the maximum permitted.

In conjunction with his transfer, the grievant applied to participate in the Agency's home-sale program, under which a relocation company purchases a relocating employee's home, in certain circumstances. After a delay of seventy-two days, the Agency forwarded the grievant's application to the program's administrator, and the grievant was accepted into the program.

The grievant filed a grievance, as relevant here, over the partial denial of his subsistence expenses and the delay in forwarding his application for the home-sale program. The grievance went to arbitration.

With regard to the subsistence expenses, the Arbitrator rejected the Agency's reliance on a decision of the General Services Administration Board of Contract Appeals (the Contract Board), which held that "neither erroneous advice from a government employee nor erroneous travel orders can create a right to reimbursement in excess of statutory and regulatory entitlements."⁴ The Arbitrator found that the Agency's reliance was misplaced because the case before him "involve[d] a *contract* which was reviewed and signed by both an 'Authorizing Official' and an 'Asst. Chief.'"⁵

³ *Id.* at 13; 41 C.F.R. § 302-6.2.

⁴ Award at 39 (quoting *Charles J. Smollen*, GSBGA No. 16532-RELO, 05-1 BCA ¶ 32,962 (*Smollen*)).

⁵ *Id.*

¹ Award at 47.

² *Id.*

And although the Arbitrator, citing *OPM v. Richmond*,⁶ agreed with the Agency that it could not honor commitments made by officials who were not authorized to make them, the Arbitrator determined that the Agency officials who entered into the relocation agreement were authorized to do so. Accordingly, the Arbitrator found that the relocation agreement was an enforceable contract between the grievant and the Agency, and that the Agency breached the contract by failing to pay the grievant the full amount in his voucher. The Arbitrator concluded that the grievant was entitled to receive the remaining unpaid amount, and directed the Agency to pay the grievant that amount.

On the issue of the home-sale program, the Arbitrator determined that the Agency's "refus[al] to process" the grievant's application "for seventy-two days constituted an unjustified or unwarranted personnel action."⁷ Citing *Naekel v. Department of Transportation, FAA*,⁸ the Arbitrator determined that the appropriate remedy for a "contract violation of this sort is to put the [grievant] in the position he would have occupied but-for the contract violation."⁹ As such, the Arbitrator determined that the grievant was "entitled to . . . [h]is actual expenses including mortgage, utilities, and lawn maintenance for the seventy-two days that the [Agency] did not process his [home-sale program] paperwork."¹⁰ Further, and in disagreement with the Agency, the Arbitrator found that this remedy was "within the scope of the Back Pay Act" (the Act).¹¹ In this connection, the Arbitrator cited *Naekel* and stated that "[r]elocation costs . . . have been found to be within the definition of allowances in the [Act]."¹² The Arbitrator found that the Union had shown that the Agency's delay "resulted in the withdrawal or reduction of pay, allowances, or differentials, which the Office of Personnel Management [(OPM)] defines as 'monetary employment benefits to which an employee is entitled by statute or regulation.'"¹³

He further concluded that, under the Act, "the Union is entitled to reasonable attorney fees related to the personnel action."¹⁴ Accordingly, he directed that, within forty-five days of the award, the Agency pay the grievant reasonable attorney fees.¹⁵ However, the Arbitrator also stated that the award was "provisional" for the limited

purpose, among other things, of allowing the Union to "request reasonable attorney fees."¹⁶

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

III. Preliminary Matter

The Union concedes that the majority of the arguments in the Agency's exceptions were also made to the Arbitrator, but asserts, generally, that the Authority should not consider "any new arguments presented in the Agency's exceptions" with regard to the issues of: "(1) the [r]elocation [a]greement . . . not [being] an enforceable contract; (2) the Arbitrator ordering the Agency to pay \$4,087.50 as a result of the Agency's breach of the [r]elocation [a]greement; and (3) the Arbitrator's [a]ward of actual expenses."¹⁷ But, before the Arbitrator, the Agency made arguments that: (1) the Agency's relocation coordinator was not authorized to obligate the Agency to pay more money than permitted by the Federal Travel Regulation (FTR);¹⁸ (2) the grievant was not entitled to receive an additional \$4,087.50;¹⁹ and (3) the Act did not authorize monetary remedies in connection with the home-sale program.²⁰ So there is no basis for declining to consider "any" arguments regarding these issues.²¹

In addition, the Union claims that two specific Agency arguments – that the home-sale program is discretionary and that the grievant is not entitled to its benefits – are not properly before the Authority because the Agency did not make them below.²² For the reasons discussed later in this decision, it is unnecessary to resolve whether these two arguments are properly before us.

IV. Analysis and Conclusions

A. The award of subsistence expenses is contrary to law.

The Agency contends that the Arbitrator's award of \$4,087.50, the amount of subsistence expenses under the relocation agreement that the Agency refused to reimburse the grievant for, is contrary to 5 U.S.C. § 5724a and the FTR.²³ The Agency maintains that the maximum per diem rate prescribed by law in this case is

⁶ 496 U.S. 414 (1990).

⁷ Award at 44.

⁸ 850 F.2d 682, 687 (Fed. Cir. 1988).

⁹ Award at 45.

¹⁰ *Id.*

¹¹ *Id.* at 46.

¹² *Id.*

¹³ *Id.* at 47 (quoting 5 C.F.R. § 550.803).

¹⁴ *Id.* (internal quotation marks omitted).

¹⁵ *Id.* at 47-48.

¹⁶ *Id.* at 48 (emphasis added).

¹⁷ Opp'n at 25 (internal quotation marks omitted).

¹⁸ Agency's Post-Hr'g Br. at 30; *see also id.* at 21-22, 29.

¹⁹ *Id.* at 29-30.

²⁰ *Id.* at 39-40.

²¹ Opp'n at 25.

²² *Id.*

²³ Exceptions at 13.

\$109.00 and that the maximum amount payable to the grievant under § 5724a(b)(1)(B)(ii), the pertinent wording of which is set forth below, is \$4,087.50.²⁴ The Union contends that the Arbitrator properly concluded that the relocation agreement was an enforceable contract and that the grievant relied, to his financial detriment, on the relocation agreement's statement of his entitlement.²⁵

Section 5724a(b)(1) provides, in pertinent part: “[A]n agency may pay to . . . an employee who transfers in the interest of the Government between official stations located within the United States . . . (B) . . . (ii) an amount for subsistence expenses, that may not exceed a maximum amount determined by the Administrator of General Services” (the Administrator).²⁶ In 41 C.F.R. § 302-6.201, the Administrator has specified the following calculation to determine the lump-sum payment for subsistence expenses:

(a) For [the employee], multiply the number of days . . . authorize[d] [subsistence expenses] by .75 times the maximum per diem rate . . . prescribed by § 301-11.6 . . . for the locality . . . wherever [temporary quarters] will be occupied. . . .

(b) For each member of [the employee's] immediate family, multiply the same number of days by .25 times the same per diem rate, as described in paragraph (a) of this section.

(c) [The] lump[-]sum payment will be the sum of the calculations in paragraphs (a) and (b) of this section.

At the time of the grievant's relocation, § 301-11.6 stated, in pertinent part: “For per diem, see applicable FTR Per Diem Bulletins issued periodically by the Office of Governmentwide Policy, Office of Transportation and Personal Property, Travel Management Policy, and available on the Internet at <http://www.gsa.gov/perdiem>.”²⁷ The Agency alleges, and there is no dispute, that the applicable maximum per diem rate was the “standard rate for the continental United States.”²⁸ And at the time of the grievant's relocation, the applicable FTR Per Diem Bulletin provided that the standard rate for the continental United States, or “Standard CONUS Rate,” was \$70 for lodging and \$39 for meals and incidentals, for a total of \$109 per diem.²⁹

²⁴ *Id.* at 13-15.

²⁵ Opp'n at 18, 20.

²⁶ 5 U.S.C. § 5724a(b)(1)(B)(ii).

²⁷ 41 C.F.R. § 301-11.6 (2008).

²⁸ Exceptions at 5 (internal quotation marks omitted).

²⁹ See www.gsa.gov/portal/content/103168, FY 08 Per Diem Rates (Downloadable), at 1.

Using that rate, and calculating the lump-sum payment of subsistence expenses under the formula set forth above, the maximum amount that the grievant could lawfully recover was \$4,087.50 – the amount that the Agency paid the grievant. The Union contends that the lump-sum amount of \$8,175.00 was not a “mistake,”³⁰ but does not explain how \$8,175.00 is accurate under the formula. Thus, the Union provides no basis for finding that the grievant had a statutory or regulatory entitlement to more than \$4,087.50.

Although the Arbitrator found that the Agency entered into an enforceable contract providing more than \$4,087.50, it is well established that the federal government may not make commitments that are contrary to law.³¹ Therefore, the Arbitrator erred in finding that the contract was enforceable.

Further, the Union's claim that the grievant relied – to his detriment – on the contract does not support a contrary conclusion. For support, the Union cites Contract Board decisions that ordered agencies to pay employees travel allowances on which the employees relied, when the agencies had discretion to pay the authorized amounts.³² But these decisions do not apply in cases where, as here, the claim for reimbursement exceeds statutory and regulatory entitlements.³³ Thus, the Union's reliance on them is misplaced.

Finally, the Union asserts that the award is supported by the Contract Board's decision, *Lori Giannantonio (Giannantonio)*,³⁴ and by 41 C.F.R. § 302-6.203, which allows employees to “retain any balance left over from [their] . . . lump[-]sum payment [of subsistence expenses] if such payment is more than adequate.”³⁵ But *Giannantonio* and § 302-6.203 both pertain to instances where a lump-sum payment has been calculated correctly. Here, the lump-sum amount was not calculated correctly. Therefore, the Union's reliance on *Giannantonio* and § 302-6.203 is also misplaced.

Based on the foregoing, the payment of the amount of expenses set forth in the relocation agreement would result in a reimbursement in excess of the maximum amount allowed by law. Consequently, the Arbitrator's conclusion – that the Agency's breach of contract entitled the grievant to the full amount of

³⁰ Opp'n at 20.

³¹ *OPM*, 496 U.S. at 415-16.

³² Opp'n at 20 (citing *Thelma H. Harris*, GSBCA No. 16303-RELO, 04-1 BCA ¶ 32,540; *Linda M. Conaway*, GSBCA No. 15342-TRAV, 00-2 BCA ¶ 31,133; *Elizabeth A. Hair*, GSBCA No. 14285-RELO, 98-2 BCA ¶ 29,914).

³³ *Smollen*, GSBCA No. 16532-RELO.

³⁴ GSBCA No. 16208-RELO, 04-1 BCA ¶ 32,466.

³⁵ 41 C.F.R. § 302-6.203.

subsistence expenses as stated in the relocation agreement – is contrary to law. Therefore, we set it aside.

The Agency also contends that the Arbitrator's award of subsistence expenses is based on a nonfact.³⁶ But as that award is deficient as contrary to law, it is unnecessary to resolve the nonfact exception. Accordingly, we do not address it further.

B. The award of “actual expenses” is contrary to law.

The Agency asserts that the Act does not authorize the “actual expenses” awarded by the Arbitrator in connection with the home-sale program, because the “actual expenses” are not pay, allowances, or differentials under the Act.³⁷ The Union disputes this and argues that the Act allows the award of “actual expenses.”³⁸

Under the Act, an award of backpay is authorized only when: (1) an unjustified or unwarranted personnel action; (2) resulted in the withdrawal or reduction of pay, allowances, or differentials.³⁹ If these requirements are met, then an employee, on correction of the personnel action, is entitled to receive “an amount equal to all or any part of the pay, allowances, or differentials . . . which the employee normally would have earned.”⁴⁰ Accordingly, the Authority has found that a remedy under the Act must be pay, allowances, or differentials, as defined by OPM.⁴¹ And applying OPM's definition of “[p]ay, allowances, and differentials,”⁴² the Authority has held that a remedy under the Act must be “pay, leave, [or] other monetary employment benefits” to which the employee “is entitled by statute or regulation.”⁴³ Where there is no statute or regulation permitting that remedy, the Authority has set the remedy aside.⁴⁴

Here, the Arbitrator did not cite a statute or regulation entitling the grievant to “actual expenses

including mortgage, utilities, and lawn maintenance” under the Act.⁴⁵ Instead, he cited *Naekel*,⁴⁶ and stated that “[r]elocation costs . . . have been found to be within the definition of allowances in the [Act].”⁴⁷ Similarly, the Union also argues that under *Naekel*, relocation costs are “allowances” under the Act.⁴⁸ However, *Naekel* did not hold that relocation costs are “allowances” under the Act.⁴⁹ Rather, *Naekel* addressed what amount should be included in a wrongfully discharged employee's interim earnings, which are set off against an agency's backpay obligation. In addressing this issue, *Naekel* merely held that the employee was entitled to deduct certain normally reimbursed relocation costs from his interim earnings.⁵⁰ Moreover, *Naekel* does not obviate the requirement that there be a federal law or regulation entitling the grievant to “actual expenses.” The Union does not cite, and the record does not show, any federal law or regulation entitling the grievant to “actual expenses.” Accordingly, the “actual expenses” that the grievant incurred for his former home's “mortgage, utilities, and lawn maintenance”⁵¹ are not “pay, leave, [or] other monetary employment benefits to which the grievant is entitled by statute or regulation.”⁵² Therefore, they are not pay, allowances, or differentials recoverable under the Act.⁵³ Accordingly, the Arbitrator's award of “actual expenses” is not authorized by the Act.

The Agency also argues that “sovereign immunity” bars the award of “actual expenses.”⁵⁴ Other than the Act, the Union does not cite any statute to support its claim that the award of “actual expenses” is permissible.⁵⁵ And the record does not disclose any waiver of sovereign immunity other than the Act. For these reasons, we conclude that sovereign immunity bars the Arbitrator's award of “actual expenses.”

As stated previously, the Union contends that the Authority should not consider the Agency's claims that the home-sale program is discretionary and that the grievant is not entitled to its benefits. The Authority previously has declined to resolve whether an argument was properly before it when the Authority did not need to do so to resolve the exception.⁵⁶ As that is the case here,

³⁶ Exceptions at 11-13.

³⁷ *Id.* at 19-20.

³⁸ Opp'n at 23; *see also id.* at 22.

³⁹ 5 U.S.C. § 5596(b)(1).

⁴⁰ *Id.* § 5596(b)(1)(A)(i); *accord U.S. DOD Educ. Activity, Arlington, Va.*, 56 FLRA 836, 841 (2000).

⁴¹ *See* 5 U.S.C. § 5596(b)(1); *U.S. Dep't of HHS, Gallup Indian Med. Ctr., Navajo Area Indian Health Serv.*, 60 FLRA 202, 212 (2004) (*HHS*) (Chairman Cabaniss and then-Member Pope dissenting in part); *see also AFGE, Local 1592*, 64 FLRA 861, 862 (2010); *U.S. Dep't of Transp., FAA, Salt Lake City, Utah*, 63 FLRA 673, 676 (2009) (*FAA Salt Lake City*).

⁴² 5 C.F.R. § 550.803.

⁴³ *HHS*, 60 FLRA at 212 (quoting 5 C.F.R. § 550.803) (internal quotation marks omitted).

⁴⁴ *See id.*; *see also U.S. Dep't of Transp., FAA, Detroit, Mich.*, 64 FLRA 325, 329 (2009); *FAA Salt Lake City*, 63 FLRA at 676.

⁴⁵ Award at 45; *see also id.* at 44, 46.

⁴⁶ 850 F.2d at 685-86.

⁴⁷ Award at 46.

⁴⁸ Opp'n at 22.

⁴⁹ 850 F.2d at 685-86.

⁵⁰ *Id.*

⁵¹ Award at 47.

⁵² 5 C.F.R. § 550.803.

⁵³ *See HHS*, 60 FLRA at 212.

⁵⁴ Exceptions at 19-20.

⁵⁵ *See* Opp'n at 21-23.

⁵⁶ *U.S. DOL*, 61 FLRA 64, 66 (2005) (Chairman Cabaniss concurring as to another matter).

we do not resolve whether these arguments are properly before us.

- C. The alleged award of attorney fees is contrary to law.

The Agency contends that the Arbitrator awarded attorney fees, and that this award is contrary to law.⁵⁷ The Union asserts that the Arbitrator did not award fees and merely retained jurisdiction.⁵⁸ Even assuming that the Arbitrator awarded attorney fees, the Arbitrator's monetary remedies are contrary to law. As the Act does not authorize an award of attorney fees without an underlying monetary award,⁵⁹ the Arbitrator's – alleged – award of attorney fees is unauthorized. Thus, to the extent that the Arbitrator awarded fees, the award of fees is deficient and is set aside.

V. Decision

We set aside the award of subsistence expenses and the award of “actual expenses.” To the extent that the Arbitrator awarded attorney fees, we also set aside that award.

Chairman Pope and Member DuBester, concurring:

We are pleased to issue this unanimous decision as our first with the current complement of Members. We write separately to emphasize that in this and future cases, we understand that our responsibility is: to apply the law to the issues and facts properly before us to the best of our abilities. And in discharging this responsibility, we honor the section of the Federal Service Labor-Management Relations Statute (the Statute) requiring that its provisions be interpreted in a manner consistent with an effective and efficient government.¹ Where other statutory and regulatory provisions apply, we are guided, as adjudicators, by the fundamental principle that the terms and intent of those statutory and regulatory provisions control, not purely policy-based considerations.² As we believe it is wrong to incorporate other matters into decisions, we will not comment further on the outside-the-case considerations raised in our colleague's concurring opinion.

We also write separately to note the guiding force of the principle of governmental effectiveness and efficiency in other areas of Authority activity. For example, since 2009, the Authority has pursued various initiatives to help the parties we serve, and the Authority itself, conserve scarce resources. Our arbitration case initiative included regulatory revisions, the development of a *Guide to Arbitration under the Statute*, and extensive training of parties and arbitrators to clarify what are – and are not – proper grounds for Authority review of arbitration awards under the Statute. The Authority recently undertook a similar initiative for negotiability cases. As part of this initiative, the Authority continues to offer alternative-dispute-resolution (ADR) services in all negotiability cases. The result: complete resolution of over ninety-five percent of all negotiability disputes where parties agree to use ADR.

Finally, as we begin this new chapter in the Authority's history, we remain committed to fulfilling our mission in a manner that, insofar as we are able, recognizes and respects all stakeholders' concerns.

⁵⁷ Exceptions at 24-27.

⁵⁸ Opp'n at 23-24.

⁵⁹ E.g., *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Beckley, W. Va.*, 64 FLRA 775, 776 (2010).

¹ 5 U.S.C. § 7101(b).

² See, e.g., *United States v. Hopkins*, 427 U.S. 123, 125 (1976).

Member Pizzella, concurring:

In my first opinion as a Member of the Federal Labor Relations Authority (Authority), I am happy to concur with my colleagues and make this decision unanimous.

However, I would be remiss if I failed to take this excellent opportunity to share with the federal labor-management relations community what I expect to be a major focus of my term as an Authority Member.

When Congress enacted the Federal Service Labor-Management Relations Statute (the Statute), it did so in part to promote “the effective conduct of public business,”¹ and to develop and implement “work practices [that] facilitate and improve . . . the efficient accomplishment of the operations of the Government.”² Indeed, the Statute itself requires that it “be interpreted in a manner consistent with the requirement of an effective and efficient government.”³

Therefore, as I stated in response to a question that was posed to me during the confirmation hearing, “the taxpayer is the FLRA’s biggest stakeholder.”

In reviewing past, and some pending Authority cases, one must not forget that in every one of these cases all of the parties – agencies, unions, arbitrators and employees of the Authority itself – and the costs associated with these cases – are paid for by hardworking American taxpayers. Therefore, cases that are resolved by the Authority differ in one significant respect from private-sector cases that are resolved by the National Labor Relations Board and the National Mediation Board. In private-sector cases, labor unions and businesses expend their own funds to resolve their disputes. But in cases before the Authority, it is essentially *all taxpayer money – all the time*. As such, I do not believe that, in carrying out my responsibilities as a Member of the Authority, I can ignore this fact any more than I can ignore the plain wording of the Statute or the precedents that have been established by the courts.

Despite the fact that nearly all collective bargaining agreements include a provision for the parties to “split” costs for grievances that advance to arbitration, the parties, in no real sense, actually pay anything. That is because cases that come before the Authority amount to a sort of reverse “Dutch Treat.” American taxpayers not only pay the costs associated with the official time used by union representatives and witnesses to pursue a grievance, unfair labor practice (ULP), negotiability, or

representation matter, but they also pay the salaries of agency employees who must respond to, or defend against, these matters – regardless of the merit, or frivolity, of the case. And those are only part of the costs tabbed to the taxpayer. Even before a case is elevated to the Authority, countless union and agency resources – time, money, and human capital – are invested to process, challenge, and negotiate the initial conflicts and grievance processes. And, once the Authority has issued its final decision, the cost to the taxpayer does not end there. The agency – and thus the taxpayer – may be assessed a myriad of additional costs that include arbitration fees (paid to the arbitrator), attorney fees (paid to either an in-house union attorney or an attorney retained by the union), and in some cases backpay (to the grievant).

For example, consider union “official time.”⁴ According to a recent Office of Personnel Management (OPM) report, official time is defined as “paid time off from assigned Government duties to represent a union or its bargaining unit employees.” That OPM report indicated that federal employees were paid more than \$155 million of taxpayer dollars in 2011 for 3.4 million hours spent on labor union activities that fell outside of the representatives’ normal government duties (translation: doing union work on government time). To put that in perspective, the entire annual budget for the Authority is \$25 million – the amount spent by the Federal Government just for union official time is more than six times that amount.

Because taxpayers are footing the bill – there is no shortage of cases that many would describe as frivolous. For example, in one notable case, the taxpayers paid for the parties to bicker over whether the agency or the union should pay the cost of leftover food from a union-sponsored event that had lower-than-expected attendance purportedly because the agency would not permit the union to use its public address system.⁵ In another, the Authority was asked to resolve whether an agency was required to bargain over the union’s request to place an American flag near the entrance of a cafeteria.⁶ And in yet another, taxpayers paid for an arbitrator, and then the Authority, to resolve a grievance filed after the agency decided to investigate possible misconduct of employees, even though the agency ultimately decided to impose no discipline.⁷ Although agencies are not immune from bringing such cases, federal labor unions *initiate* well over 90% of the cases that ultimately come before the Authority. Regardless of how, or by whom, these disputes are

¹ 5 U.S.C. § 7101(a)(1)(B).

² *Id.* § 7101(a)(2).

³ *Id.* § 7101(b).

⁴ *Id.* § 7131.

⁵ *AFGE, Nat’l Border Patrol Council, Local 1929*, 63 FLRA 465 (2009).

⁶ *NAGE, Local R1-144*, 43 FLRA 1331 (1992).

⁷ *SEC v. FLRA*, 568 F.3d 990 (D.C. Cir. 2009).

initiated, cases of this nature have caused the U.S. Court of Appeals for the D.C. Circuit to bemoan them as the type of disputes that “could only arise between public employees and a governmental agency.”⁸

Similarly, when a ULP charge is filed with the Authority’s General Counsel (4,300 in fiscal year 2012 (FY 12) according to the Congressional Budget Justification), an investigation is undertaken by Authority attorneys to determine the merits of each filing. The investigation almost always involves the interview of agency and union witnesses and, more often than not, requires the preparation of statements, responses, and legal briefs by agency and union representatives. And the time spent in all of these activities is again paid by the taxpayer – and to what result? Of the 4,300 charges filed in FY 12 (well over 90% by federal labor unions), only 20 proceeded to trial before an Authority administrative law judge, and, of those, the Authority Members found an actual violation of our Statute in only 13 instances – or .003% of the 4,300 charges filed.

It is, therefore, axiomatic to me that the filing of what could be considered frivolous grievances unwisely consumes federal resources, including: time, money, and human capital; serves to undermine “the effective conduct of [government] business;”⁹ and completely fails to take into account the resulting costs to the taxpayers who fund agency operations and pay for the significant costs of union official time used to process such grievances. Therefore, as I stated at the confirmation hearing, I intend to keep the interests of the American taxpayer primarily in mind while serving as a Member of the Authority.

Without a doubt, countless numbers of diligent labor relations professionals and union representatives faithfully utilize the Statute to create positive working relationships and resolve good-faith disputes. I believe that, in order for the federal labor-management relations community to contribute to the effective conduct of government:

- Agencies need to engage in good-faith bargaining and honor those lawful commitments to which they have agreed;
- Unions need to avoid frivolous and repetitive grievances that fail to distinguish legitimate, good-faith disputes from everyday workplace annoyances;

- Arbitrators need to avoid rendering “circular[.]” and “incoherent” arbitral awards;¹⁰ and
- The Authority needs to issue decisions that withstand judicial scrutiny by refraining from endorsing such awards by arbitrators.¹¹

In the brief time I have served as a Member of the Authority, I am impressed by hardworking Authority employees who exercise their statutory responsibilities to ensure that all matters that come before the Authority are addressed impartially and in accordance with the law. However, during this same time, it is apparent to me that the Authority is forced to expend time and resources addressing matters that could, and should, have been resolved by the parties before ever reaching us.

Accordingly, I look forward to an ongoing and lively debate with my experienced and distinguished colleagues – Chairman Pope and Member DuBester – as we endeavor to address and resolve important issues that are brought before us.

Thank you.

⁸ *Id.* at 992.

⁹ 5 U.S.C. § 7101(a)(1)(B).

¹⁰ *U.S. DOJ, Fed. BOP v. FLRA*, 654 F.3d 91, 96-97 (D.C. Cir. 2011).

¹¹ *See id.* at 97.