70 FLRA No. 15

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL COUNCIL 118
(Union)

and

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

0-AR-5194

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DECISION

November 29, 2016

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

I. Statement of the Case

Under a memorandum of understanding between the parties (the MOU), the Union's president (the grievant) worked a 100%-official-time schedule. But, during the federal-government shutdown in 2013 (the shutdown), the Agency scheduled the grievant to perform non-official-time work, including overtime assignments. After the shutdown ended, the Agency returned the grievant to a 100%-official-time schedule, canceled an overtime assignment that the Agency had previously scheduled him to perform, and denied him the opportunity to perform other non-official-time work. Arbitrator Alan R. Viani issued an award finding that the Agency did not commit an unfair labor practice (ULP), or violate either the parties' collective-bargaining agreement (the CBA) or the MOU (together, the parties' agreements). The Union filed exceptions to the award, and the exceptions present three substantive questions.

The first question is whether the award is based on nonfacts. The Union's nonfact arguments either: (1) concern matters that the parties disputed before the Arbitrator; (2) contest findings that are not central to the Arbitrator's conclusions; or (3) challenge the Arbitrator's evaluation of evidence. As such arguments do not establish that an award is based on a nonfact, the answer to the first question is no.

The second question is whether three of the Union's arguments – concerning the parties' overtime-scheduling practices, the equitable distribution of overtime, or the Arbitrator's reference to a prior arbitration award – demonstrate that the award fails to draw its essence from the parties' agreements. The first two arguments do not establish that the award is irrational, unfounded, implausible, or in manifest disregard of the parties' agreements, and the third argument fails to address the essence standard. Therefore, the answer to the second question is no.

The third question is whether the award is contrary to: (1) several subsections of § 7116(a) of the Federal Service Labor-Management Relations Statute (the Statute);[1] (2) § 7131(d) of the Statute;[2] or (3) contractual provisions that are similar to § 7116(a) or § 7131(d). The Authority's precedent does not support the Union's statutory arguments. Further, the Arbitrator did not find – and the Union does not contend – that these contractual provisions require a different analysis than the pertinent sections of the Statute. Thus, the answer to the third question is also no.

II. Background and Arbitrator's Award

As relevant here, § 7131(d) of the Statute states that "an employee representing" a union during authorized representational activities "shall be granted official time in any amount [that] the agency and the [union] involved agree to be reasonable, necessary, and in the public interest."[3] Consistent with § 7131(d), the parties agreed to the MOU, which states that the Agency will authorize certain Union officials – including the grievant – to work 100%-official-time schedules. The MOU refers to these negotiated official-time arrangements as "[b]lock[-t]ime" schedules.[4]

Beginning after his election as Union president in approximately 2010, and continuing until the shutdown in October 2013, the grievant worked a block-time schedule. When the shutdown occurred, the Agency removed the grievant from block time and, instead, scheduled him to perform Agency work as a deportation officer. During this period of deportation-officer work, the grievant accepted a future overtime assignment for October 28. But the shutdown ended on October 16, and, on October 18, the Agency returned the grievant to his block-time schedule. At that point, the grievant's supervisors told him that, due to the resumption of normal government operations, "he would no longer receive [deportation-officer] assignments . . . [and] would

[1] 5 U.S.C. § 7116(a)(1), (2), (3), (5).
[2] *Id.* § 7131(d).
[3] *Id.*; *see also* Award at 5 n.1 (citing 5 U.S.C. § 7131).
[4] Award at 5 (quoting Arbitration-Hr'g Joint Ex. 2, MOU, Art. 7, § B).

be removed from" his previously scheduled October 28 overtime assignment.[5]

The Union filed a grievance regarding the grievant's return to a block-time schedule and the cancellation of his overtime assignment. In pertinent part, the grievance alleged that the Agency: (1) violated the Statute and the parties' agreements by unilaterally changing the conditions of the grievant's employment; and (2) discriminated against the grievant due to his position as Union president, in violation of § 7116(a)(1) and (2) of the Statute.[6] The grievance reached arbitration, where the Arbitrator agreed to adopt the Union's formulation of the issues before him: "Did the Agency violate [the agreements] . . . or commit a[ULP] when it barred [the grievant] from performing work for the Agency, cancel[ed] the scheduled overtime assignment[,] and/or prohibited [the grievant] from working . . . overtime? If so, what shall be the remedy?"[7]

Before the Arbitrator, the Union contended that the parties' past practice under the MOU established the Union's prerogative to divide its four 100%-block-time schedules into several schedules of less-than-100% block time, as long as the divided allotments did not exceed the four original schedules' official-time amounts. Consistent with that asserted past practice, the Union further contended that the grievant was working a 75%-block-time schedule immediately before the shutdown. In that regard, the Union presented to the Arbitrator a copy of an Agency official's 2010 email (the 2010 email) stating that the grievant worked a "75[%] block [of] official time."[8] Therefore, the Union argued that the Agency unilaterally changed the grievant's conditions of employment when it compelled him to work a 100%-block-time schedule after the shutdown ended.

Moreover, the Union argued that the Agency discriminated against the grievant based on his Union position when it canceled his previously scheduled overtime assignment, and prohibited him from working overtime after the shutdown ended. To support its argument that the Agency treated the grievant unfairly, the Union identified two Union officials elsewhere who worked block-time schedules but also earned overtime pay for overtime work, with the Agency's approval.

In contrast, the Agency argued before the Arbitrator that the wording of the MOU did not support the Union's contention that it could unilaterally "adjust the[] percentages" of block time assigned to Union officials.[9] Rather, the Agency contended that the MOU percentages could be adjusted only by the parties' mutual agreement. In addition, the Agency asserted that it properly returned the grievant to a 100%-block-time schedule after the shutdown because the grievant worked that same schedule before the shutdown. Further, the Agency asserted that the grievant was "entitled to enter into a local agreement providing for him to be included" in overtime rotations – notwithstanding his block-time schedule – but that the grievant had not reached such an agreement at the time of arbitration.[10]

After considering the parties' arguments, the Arbitrator determined that the dispute "turn[ed] on the interpretation . . . of the . . . MOU, and the parties' past practice pertaining to use of official time."[11] Regarding the MOU, the Arbitrator found its wording "clear and unambiguous in providing the Union with official time for four, and only four, representatives at 100[%] block time."[12] However, the Arbitrator also recognized that the "parties . . . agree[d] that there existed a past practice pertaining to the use of block time by Union officials" that modified the MOU's terms.[13] The Arbitrator found that, under that past practice, "a Union official designated as one of the four" officials on 100% block time "could choose to [use] less" official time, provided that: (1) the Union notified the Agency of the Union official's desire to work less than 100% of the official's block-time schedule; (2) the Union official and authorized Agency managers mutually agreed to the terms for deviating from the MOU; and (3) the parties "memorialized" the arrangement in writing.[14] Further, the Arbitrator found that this past practice was in effect before the shutdown began and remained in effect after the shutdown ended.

In order to determine whether the Agency violated the MOU by directing the grievant to work 100% block time after the shutdown, the Arbitrator found that he had to determine "what percentage of block time [the grievant worked] . . . immediately prior to the shutdown."[15] And the Arbitrator determined that "testimony and evidence establish[ed] . . . that [the grievant] was on 100[%] block time" immediately before the shutdown.[16] In particular, the Arbitrator noted that the grievant was unable to identify any law-enforcement duties that he performed before the shutdown, and that the grievant's pre-shutdown duty-assignment sheets indicated that he performed 100% Union duties during the workday.

[5] *Id.* at 6.
[6] 5 U.S.C. § 7116(a)(1), (2).
[7] Award at 2.
[8] *Id.* at 17.
[9] *Id.* at 20.
[10] *Id.* at 30.
[11] *Id.* at 24.
[12] *Id.*
[13] *Id.* at 25.
[14] *Id.*
[15] *Id.*
[16] *Id.* at 26.

As for the 2010 email on which the Union relied to show that the grievant did not work a 100%-block-time schedule before the shutdown, the Arbitrator found that the email's author did not have the power to approve changes to the grievant's block-time schedule. Moreover, the Arbitrator found that, even if he assumed that the email showed that the grievant worked 75% block time in 2010, the email nevertheless failed to show "that [the grievant] *remained* on 75[%] block time through October 1, 2013."[17] Thus, the Arbitrator found that the Agency did not change the grievant's conditions of employment by returning him to a 100%-block-time schedule after the shutdown. In the alternative, the Arbitrator found that even if the Agency had allowed the grievant's block time to deviate from the terms of the MOU before the shutdown, the Agency could have properly returned the grievant to 100% block time after the shutdown because the Agency was "entitled to enforce the contract language."[18]

Because the Arbitrator found the Agency justified in returning the grievant to 100% block time after the shutdown, the Arbitrator determined that the Agency's actions in that regard did not violate the parties' agreements, or constitute a ULP.

Next, the Arbitrator turned to the Union's allegations that canceling the grievant's overtime assignment and prohibiting him from working overtime amounted to unlawful discrimination on the basis of the grievant's Union position. By way of background, the Arbitrator stated that deportation officers worked two distinct types of overtime.

As for the first type – administratively uncontrollable overtime (AUO) – the Arbitrator found that, under government-wide regulations, "no union official on 100[%] block time can legally be certified for AUO."[19] Further, the Arbitrator cited a prior arbitration award that reached that same conclusion regarding AUO eligibility for employees on 100% official time. Thus, the Arbitrator found that the grievant's 100% block time rendered him prospectively ineligible for AUO pay.

As for the second type – "regular overtime" – the Arbitrator found that the Agency did not seek "to prevent [the grievant] from working regular overtime,"[20] which included the subsequently canceled assignment that the grievant accepted during the shutdown. On that point, the Arbitrator reiterated his earlier findings that, under the parties' MOU and past practice, Union officials on block time must "negotiate an arrangement with the Agency" to deviate from the MOU's terms before they could be eligible for overtime assignments.[21] In that regard, the Arbitrator determined that an email between the grievant and his supervisor in late October 2013 showed "that the Agency was amenable to working out such an arrangement" for the grievant,[22] although it had not done so yet.

For those reasons, the Arbitrator rejected the Union's claims of discrimination based on the grievant's Union position. The Arbitrator concluded that the Agency did not make its overtime-scheduling decisions due to anti-Union animus, but, rather, acted to "comply with" the parties' agreements.[23] According to the Arbitrator, absent negotiated modifications, those agreements required that the grievant – as the Union president – work a 100%-block-time schedule. More specifically, the grievant could not work overtime without a memorialized side agreement permitting deviations from his 100%-block-time schedule. Consequently, the Arbitrator denied the Union's discrimination claims under the Statute and the parties' agreements.

In sum, with regard to all of the contractual and statutory claims discussed above, the Arbitrator denied the grievance. The Union filed exceptions to the award, and the Agency filed an opposition to the Union's exceptions.

III. Preliminary Matter: We consider the Agency's June 24 opposition filing.

Under § 2429.23(a) of the Authority's Regulations,[24] the Agency requested an extension of time to file its opposition.[25] The Authority's Office of Case Intake and Publication granted the request, and, on June 24, 2016, the Agency filed its opposition within the extended time frame. Therefore, we consider the June 24 opposition in reaching the conclusions below.

[17] *Id.* at 27 (emphasis added).
[18] *Id.* at 26.
[19] *Id.* at 28.
[20] *Id.* at 30.
[21] *Id.*
[22] *Id.*
[23] *Id.* at 31.
[24] 5 C.F.R. § 2429.23(a).
[25] *See* Agency's Mot. for Extension of Time (May 27, 2016).

IV. Analysis and Conclusions

A. The award is not based on nonfacts.

The Union argues that the award is based on two nonfacts,[26] discussed in greater detail below. To establish that an award is based on a nonfact, the excepting party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[27] However, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration.[28] Further, disagreement with an arbitrator's evaluation of evidence, including the weight to be accorded such evidence, provides no basis for finding that an award is based on a nonfact.[29]

First, the Union contends that the award is based on the nonfact that the Agency was "amenable" to working with the grievant to reach a side agreement that would allow him to work overtime while also continuing on a block-time schedule.[30] But because the parties disputed that matter at arbitration,[31] this argument does not establish that the award is based on a nonfact.[32]

Second, the Union contends that the award is based on the nonfact that the author of the 2010 email did not have the power to change the grievant's percentage of block time.[33] However, the Union fails to establish that this determination was a central fact underlying the award,[34] because the Arbitrator also found that the 2010 email was insufficient to show that the grievant *remained* on a 75%-block-time schedule in October 2013.[35] And, as mentioned earlier, challenges to the Arbitrator's evaluation of evidence – such as the 2010 email – do not provide a reason to find the award deficient as based on a nonfact.[36]

Therefore, we deny the Union's nonfact exception.

B. We reject three of the Union's arguments that the award fails to draw its essence from the parties' agreements.

The Union asserts that the award fails to draw its essence from the parties' agreements for three reasons,[37] discussed in greater detail below. In reviewing an arbitrator's interpretation of a collective-bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector.[38] Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from a collective-bargaining agreement when the excepting 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.[39] The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained."[40]

First, the Union argues that the Arbitrator failed to recognize that 100% block time relates only to an employee's regular duty hours, and not additional work hours, such as overtime assignments. Contrary to the Union's assertions, the Arbitrator recognized that employees on block-time schedules could work overtime outside of their regular duty hours.[41] However, the Arbitrator determined that, under the parties' MOU, as modified by their past practice, an employee on a block-time schedule "would have to negotiate an arrangement with the Agency" to permit overtime work in addition to a block-time schedule.[42] The Union does not show that the Arbitrator's determination in that regard is irrational, unfounded, implausible, or in manifest

[26] *See* Exceptions at 5, 10-11, 29, 56, 60.
[27] *NFFE, Local 1984*, 56 FLRA 38, 41 (2000) (*NFFE*).
[28] *Id.*
[29] *AFGE, Local 953*, 68 FLRA 644, 646 (2015) (*Local 953*) (citing *AFGE, Local 2382*, 66 FLRA 664, 668 (2012)).
[30] Exceptions at 10; *see* Award at 30 (finding that "undisputed evidence [showed] that the Agency was amenable to working out . . . an arrangement" to allow the grievant to work overtime).
[31] *Compare* Exceptions, Attach., Union's Post-Hr'g Br. at 13 (arguing that the grievant's supervisors did not give him the choice to work less than 100% block time), 20 (contending that Agency managers "did not respond" to the grievant's questions about how he could continue performing some deportation-officer duties, including overtime), *with* Award at 13 (describing testimony of Agency official with authority for resolving labor-management issues that the official tried to find a way to "implement" the schedule changes that the grievant wanted), 15 n.18 (crediting Agency official's testimony that the parties may enter "a local agreement" to permit the grievant's schedule to deviate from the MOU's terms).
[32] *See NFFE*, 56 FLRA at 41.
[33] Exceptions at 5, 11, 59-61.
[34] *See NFFE*, 56 FLRA at 41.
[35] *See* Award at 27.
[36] *See Local 953*, 68 FLRA at 646.
[37] Exceptions at 8, 10, 37-38, 43-46, 48.
[38] 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998).
[39] *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990) (*OSHA*).
[40] *Id.* at 576.
[41] *See* Award at 30.
[42] *Id.*

disregard of the MOU.[43] Therefore, we reject this essence argument.

Second, the Union contends that the Agency's decision to deny the grievant overtime assignments was inconsistent with the CBA's guarantee of fair-and-equitable overtime distribution.[44] But this contention ignores the Arbitrator's determination that all of the employees who worked block-time schedules and performed overtime assignments differed from the grievant because those other employees had written, signed agreements permitting their schedules to deviate from the MOU's terms regarding block time.[45] In contrast, the grievant did not have a signed agreement to deviate from the MOU's terms.[46] Thus, the Union's contention provides no basis for finding that the award is irrational, unfounded, implausible, or in manifest disregard of the CBA's overtime-distribution provisions.[47]

Third, the Union argues that the Arbitrator's reliance on a prior arbitration award concerning AUO eligibility was "misplaced."[48] But this allegedly misplaced reliance does not address any part of the standard under which the Authority resolves essence exceptions.[49] Thus, we reject this essence argument as well.

For the foregoing reasons, we reject these three essence arguments. The Union also raises some additional essence arguments, which we address in the next section.

C. The Union does not demonstrate that the award conflicts with § 7116(a) or § 7131(d) of the Statute, or fails to draw its essence from similar provisions in the parties' agreements.

The Union contends that the award is contrary to law because the Arbitrator should have found that the Agency committed several ULPs by violating § 7116(a)(1), (2), (3), and (5), as well as § 7131(d), of the Statute.[50] Further, the Union argues that certain provisions of the parties' agreements are similar to the pertinent provisions of §§ 7116(a) and 7131(d), and that the Arbitrator's award fails to draw its essence from the parties' agreements because the Arbitrator did not find those contractual provisions violated. We discuss each of these ULP and contractual arguments separately below.

Regarding the Union's statutory arguments, when an exception involves an award's consistency with law, the Authority reviews any question of law de novo.[51] In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[52] In making that assessment, the Authority defers to the arbitrator's underlying factual findings, unless the excepting party establishes that they are nonfacts.[53]

1. The Union does not demonstrate that the Arbitrator allowed the Agency to change a past practice without bargaining with the Union.

The Union argues that the award is "contrary to . . . § 7116 [of the Statute] because the Arbitrator improperly found that the Agency did not unilaterally change the parties' past practice . . . regard[ing]" the distribution of block time among Union representatives.[54] More specifically, as relevant here, the Union quotes the wording of § 7116(a)(1) and (5)[55] – which provides that it shall be a ULP for an agency "to interfere with, restrain,

[43] *See OSHA*, 34 FLRA at 375.
[44] *See* Exceptions at 43-46.
[45] *See, e.g.*, Award at 30 ("[As an] example, both[a] Union witness . . . and [an] Agency witness . . . testified that [the Union's witness] has a locally-negotiated agreement . . . enabling him to accept overtime assignments, such as escort duty, even though he is on 100[% block] . . . time.").
[46] *See id.* at 26 (finding that grievant had "no confirmation . . . in writing" that he had reached an agreement to work overtime in addition to maintaining a block-time schedule).
[47] *See OSHA*, 34 FLRA at 375.
[48] Exceptions at 48.
[49] *E.g.*, *U.S. Dep't of DOD, Def. Commissary Agency*, 69 FLRA 379, 383 (2016) (finding that, because "the covered-by doctrine does not provide a basis for finding the award deficient under the essence standard," an essence argument based on the covered-by doctrine fails); *see OSHA*, 34 FLRA at 375 (essence standard).
[50] *See, e.g.*, Exceptions at 5, 9-10, 29-35, 42, 49.
[51] *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).
[52] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[53] *U.S. DHS, U.S. CBP, Laredo, Tex.*, 66 FLRA 567, 567-68 (2012).
[54] Exceptions at 9; *see also id.* at 10 (arguing that Arbitrator "acknowledged the established past practice, which the Agency changed . . . without . . . bargaining"), 36 (contending that Agency committed ULP because directing the grievant to work 100% block time was "directly contrary to the past practice acknowledged by the Arbitrator").
[55] *Id.* at 30 (quoting § 7116(a)(1), (5)).

or coerce any employee in the exercise by the employee of any right"[56] under the Statute, and "to refuse to consult or negotiate in good faith with a labor organization as required by"[57] the Statute – and the Union relies on previous Authority decisions concerning alleged violations of those same subsections.[58] In addition, the Union argues that the award fails to draw its essence from Article 9 of the CBA because the award allegedly permits the Agency to change a past practice without bargaining.[59]

As discussed earlier, the Arbitrator determined that the parties' past practice required Union officials on 100% block time to take several specific steps before they "could choose to [use] less" than 100% official time.[60] And the Arbitrator found that the same past-practice requirements existed both before and after the shutdown, which indicated that the Agency did not change the past practice.[61]

Moreover, as relevant here, the Arbitrator found that the grievant never satisfied the past-practice requirement of obtaining a "memorialized" arrangement[62] – that is, an agreement in writing – to deviate from his 100%-block-time schedule, in order to work overtime.[63] Because the grievant never satisfied the past-practice requirements to deviate from a 100%-block-time schedule, the Agency's insistence that the grievant adhere to his block-time schedule after the shutdown did not change the parties' past practice.[64] Therefore, we reject the Union's arguments that the award permits a change in past practice without bargaining in violation of § 7116(a)(1) and (5) of the Statute, and that the award fails to draw its essence from Article 9 of the CBA for the same reason.

2. The Union does not demonstrate that the Arbitrator allowed the Agency to unilaterally direct Union officials to take official time, or to unilaterally determine their allotment of official time.

As mentioned earlier, the parties negotiated their MOU concerning "block time" under § 7131(d) of the Statute – which, as stated previously, pertinently provides that "any employee representing" a union during authorized representational activities "shall be granted official time in any amount [that] the agency and the [union] involved agree to be reasonable, necessary, and in the public interest."[65] The Authority has previously recognized that the parameters of official-time agreements under § 7131(d) "must be determined bilaterally" between the parties.[66] The Union argues that the award is contrary to §§ 7116(a)(3) and 7131(d) of the Statute,[67] and that it fails to draw its essence from Articles 6 and 7 of the CBA,[68] because the award allows the Agency to "unilaterally" direct Union officials to use official time[69] in amounts that the Agency "unilaterally" determines.[70]

As relevant here, § 7116(a)(3) of the Statute states that "it shall be a[ULP] for an agency . . . to . . . control . . . any" union.[71] The Union argues that the award conflicts with that legal prohibition because it permits an "agency to *order* a union representative onto official time, despite the representative's requests otherwise."[72] Further, the Union asserts that the award permits the Agency to "pick and choose the amounts of official time that Union representatives receive."[73] However, the Agency's direction to the grievant to return to his 100%-block-time schedule after the shutdown ended was consistent with the Arbitrator's interpretation of the MOU, as modified by the parties' past practice. And, contrary to the Union's assertions, the Arbitrator found that *the Union* – rather than the Agency – had attempted to unilaterally change the amounts of official time that the grievant received under the MOU, as well as

[56] 5 U.S.C. § 7116(a)(1).
[57] *Id.* § 7116(a)(5).
[58] *E.g.*, Exceptions at 35 (citing *SSA, Gilroy Branch Office, Gilroy, Cal.*, 53 FLRA 1358, 1358 (1998) (alleged violations of § 7116(a)(1) and (5) due to Agency "scheduling appointments for claims representatives on Fridays without negotiating")).
[59] *See id.* at 54.
[60] Award at 25.
[61] *See id.* at 31 ("[T]he Agency did not alter this practice[,] and . . . the practice is still in place.").
[62] *Id.* at 25.
[63] *See id.* at 26 (finding "no confirmation . . . that [an] agreement exists in writing" to allow the grievant to deviate from 100% block time).
[64] *Cf., e.g., SSA*, 68 FLRA 693, 695 (2015) (denying contrary-to-law argument that administrative law judge failed to address past practice, where judge recognized existing past practice, but found that agency's actions did not run afoul of the established terms of the past practice).
[65] 5 U.S.C. § 7131(d).
[66] *NTEU*, 52 FLRA 1265, 1284 (1997) (*NTEU*).
[67] *See, e.g.*, Exceptions at 42 (alleging violation of § 7116(a)(3)), 49 (arguing that award "plainly violates both . . . §[§] 7131 and . . . 7116(a)(3)").
[68] *Id.* at 38, 42, 53.
[69] *Id.* at 40.
[70] *Id.* at 49.
[71] 5 U.S.C. § 7116(a)(3).
[72] Exceptions at 42 (emphasis added) (citing 5 U.S.C. § 7116(a)(3)).
[73] *Id.*

to determine unilaterally when the grievant worked those official-time hours.[74]

The Arbitrator's determination that the parties' past practice requires a written agreement to allow deviations from the MOU's block-time requirements is consistent with the Authority's precedent that official time under § 7131(d) must be negotiated bilaterally,[75] rather than determined unilaterally. Thus, we reject the Union's arguments that this determination sanctioned unlawful Agency control of the Union, or violated § 7131(d). And, because the Union does not argue that Articles 6 and 7 of the CBA impose requirements on the parties that differ from those in §§ 7116(a)(3) and 7131(d),[76] for the same reasons, we reject the Union's argument that the award fails to draw its essence from Articles 6 and 7.[77]

3. The Union does not demonstrate that the Arbitrator misapplied the legal standards for unlawful discrimination, or permitted Agency retaliation against the grievant based on his Union position.

The Union argues that, although the Arbitrator recognized the framework from *Letterkenny Army Depot* (*Letterkenny*)[78] for determining whether the Agency's treatment of the grievant was discriminatory under § 7116(a)(1) and (2) of the Statute, the Arbitrator misapplied that framework.[79] According to the Union, the Arbitrator denied that the Agency committed a ULP based solely on the absence of "[anti-]union animus."[80] In that regard, the Union contends that the "only reason" for the Agency's denial of overtime opportunities to the

[74] *See* Award at 25 n.19 ("[T]he evidence does reflect that the Union – and not the Agency – generally assessed the percentage of block time below 100[%] that its representative intended to [use, but *the Union*] *could not implement* [*an*] *allocation* [*change*] *without the Agency's approval and a memorialization of the arrangement*." (emphasis added)), 26 (finding Agency "entitled to enforce the contract language"), 28 (finding that Agency returned grievant to the same schedule after the shutdown that the grievant worked before the shutdown).

[75] *See NTEU*, 52 FLRA at 1284.

[76] *See* Exceptions at 38 (stating that Article 7 "implements the official[-]time provision" in § 7131(d)), 53 (stating that relevant provisions of Article 6 "reinforce[] . . . the statutory prohibition [in § 7116(a)(3)] on an [a]gency supporting or controlling" a union).

[77] Member DuBester takes issue with his concurring colleague's remarks concerning official time use. Those remarks overlook the important role official time plays in aiding government employees, agencies, and unions achieve governmental effectiveness and efficiency. As the Authority has commented before, "[o]fficial time has a unique statutory purpose as a component of the collective-bargaining system that Congress created for the federal government." *AFGE, ICE, Nat'l Council 118*, 69 FLRA 248, 253 (2016) (Member Pizzella concurring). And because official time facilitates effective labor-management relations, it directly supports Congress' determination when it enacted the Statute that "labor organizations and collective bargaining in the civil service are in the public interest." 5 U.S.C. § 7101(a).

Moreover, I take issue with my colleague's claim that official time is used only for union business. Contrary to my colleague's view, much official time is used for traditional labor-management-relations purposes like enabling unions and agencies to conduct negotiations and process grievances.

But this is not its only use. What my colleague appears to disregard is that a significant amount of official time is used to enable unions to work with agencies to effectively and efficiently resolve problems, and help agencies meet their goals, through nontraditional, alternative procedures for resolving disputes. Emphasizing cooperation and collaboration, these nonadversarial processes enable managers, employees, and union representatives to discuss government operations, and improve performance, thereby supporting agencies' efforts to accomplish their mission requirements effectively and efficiently. This use of official time, and the problem-solving it facilitates, is entirely in keeping with the Statute's fundamental purpose of ensuring effective and efficient government operations.

[78] 35 FLRA 113 (1990).

[79] *E.g.*, Exceptions at 30.

[80] *Id.*

grievant was his position as Union president.[81] The Union argues that, consequently, the award is inconsistent with the Authority's holding regarding § 7116(a)(1) and (2) in *U.S. Department of Transportation, FAA* (*FAA*)[82] that, when an agency makes an "explicit connection" between an employee's protected activity and later unfavorable treatment, that connection supports finding that the employee's protected activity unlawfully motivated the unfavorable treatment.[83] For the same reasons, the Union argues that the award fails to draw its essence from the "plain wording" of the CBA that prohibits discrimination based on protected union activity.[84]

The wording of § 7116(a)(1) of the Statute is set forth in Section IV.C.1. above. Section 7116(a)(2) of the Statute provides that it shall be a ULP "to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment."[85] As relevant here, the Authority applies the *Letterkenny* framework in cases alleging discrimination based on protected activity under the Statute.[86] Under the *Letterkenny* framework, where a complaining party establishes a prima facie case that (1) an employee engaged in activity protected under the Statute; and (2) the protected activity was a motivating factor in the agency's treatment of the employee in connection with conditions of employment, then the agency may establish an affirmative defense.[87] To successfully establish such a defense, the agency must demonstrate that "(1) there was a legitimate justification for its action; and (2) the same action would have been taken in the absence of protected activity."[88] Of particular relevance here, an agency establishes its affirmative defense under *Letterkenny* if an arbitrator's findings show that "provisions of the parties' agreements permitted the [a]gency's disputed actions."[89]

Even assuming that the Union established a prima facie case under *Letterkenny*, the Arbitrator essentially found that the Agency successfully established an affirmative defense by demonstrating that it directed the grievant to return to a 100%-block-time schedule in order to "comply with" the MOU,[90] as modified by the parties' past practice.[91] These circumstances differ from those in the Authority's *FAA* decision, mentioned above, because the agency in *FAA* failed to offer any argument to support an affirmative defense.[92] Thus, the Arbitrator's denial of the Union's discrimination claims was consistent with § 7116(a)(1) and (2) and the *Letterkenny* framework, and we reject the Union's arguments to the contrary. Further, because the Union does not assert that the CBA provides any protected-activity safeguards beyond those that § 7116(a) and the *Letterkenny* framework provide, we likewise reject the Union's argument that this aspect of the award fails to draw its essence from the agreement's plain wording.

For all of the foregoing reasons, we find that the Union has not demonstrated that the award is contrary to § 7116(a)(1), (2), (3), or (5) of the Statute or § 7131(d), and has not demonstrated that the award fails to draw its essence from similar provisions in the parties' agreements. Thus, we deny the Union's contrary-to-law and related essence exceptions.

V. Decision

We deny the Union's exceptions.

[81] *Id.* at 31.
[82] 64 FLRA 365 (2009).
[83] Exceptions at 31 (quoting *FAA*, 64 FLRA at 369).
[84] *Id.* at 10.
[85] 5 U.S.C. § 7116(a)(2).
[86] *GSA, E. Distrib. Ctr., Burlington, N.J.*, 68 FLRA 70, 73 (2014) (*GSA*) (Member Pizzella dissenting) (citing *AFGE, Local 3506*, 65 FLRA 30, 32 (2010)).
[87] *See, e.g., Pension Benefit Guar. Corp.*, 64 FLRA 692, 698 (2010) (*PBGC*).
[88] *GSA*, 68 FLRA at 73 (citing *PBGC*, 64 FLRA at 698).
[89] *AFGE, Local 2441, Council of Prison Locals*, 65 FLRA 201, 205 (2010) (citing *IRS, Wash., D.C.*, 47 FLRA 1091, 1110 (1993)).
[90] Award at 31.
[91] *See id.* at 25 (stating that local arrangements to deviate from standard 100%-block-time schedule were "required to be memorialized" in writing), 26 (finding "Agency entitled to enforce the contract language"), 30 (reiterating that, in order to work overtime with a block-time schedule, the grievant must "negotiate an arrangement with the Agency").
[92] *See FAA*, 64 FLRA at 370.

Member Pizzella, concurring:

I agree wholeheartedly with the majority that AFGE, Council 118's exceptions must be denied.

Unlike my footnoting colleague, however, I do not believe that all official time used by union officials serves the "public interest,"[1] "contributes to the effective conduct of public business"[2] or "facilitates and encourages the amicable settlement[] of disputes."[3]

In fact, this case has nothing whatsoever to do with whether official time serves a valid purpose in the construct established for public-sector collective bargaining by the Federal Service Labor-Management Relations Statute.[4] On the other hand, however, official time was never supposed to serve as a blank check without any consideration of how that time may or may not contribute to the government's interest. And, most certainly, Congress did not intend for union officials to use a negotiated-official-time arrangement in such a manner so as to enhance their paychecks.

These circumstances, therefore, warrant further comment.

In 2006, AFGE, Council 118 asked the Immigration and Customs Enforcement agency (ICE) to agree to permit not one, not two, not three, but four of Council 118's union officials to work 100% for Council 118.[5] Translated, that means that four union representatives perform no work at all for ICE but spend all of their time on union business.

Chris Crane, president of Council 118, was hired as a deportation officer and performed those duties until 2010 when he became president. As president, he put himself on one of the four coveted 100% time blocks.[6] Everyone seemed to be happy with the arrangement. But when the federal government "shut down" in October 2013, Crane was recalled by ICE to "perform work duties for [ICE]" as a deportation officer[7] because no representational functions could occur during the shutdown. During the shutdown (October 1–16, 2013), Crane was paid both regular pay and administratively uncontrollable overtime.[8]

At some point during the shutdown Crane was offered an international-detainee-escort assignment. That assignment would have begun on October 28 and would have qualified Crane for a "significant" amount of overtime pay.[9] But when the federal shutdown ended on October 16, Crane was directed to return back to his 100% official time block that he had elected and because of that could not work the international assignment.

Crane and Council 118 now argue that he should have been able to work the overtime assignment. But as Crane acknowledged, as one of the four 100% official time representatives, he did not "qualify" for overtime *before* the shutdown,[10] and the Arbitrator reasonably determined that he therefore did not qualify *after* the shutdown.[11]

As I have noted before, "the federal workplace is not an elective-come-and-go-whenever-you-feel-like-it hangout."[12] It then stands to reason that union officials who elect to work for a union on a 100% official time block cannot expect to float into and out of that block just to satisfy a personal desire to earn overtime compensation.

Cases of this nature cause the American public to lose confidence in the federal workforce and to believe that that the federal government does not work well and needs to be changed substantially.[13]

This case is a perfect textbook example of why Congress and the Government Accountability Office (GAO) have questioned the prevalence of, and the value of, having hundreds of federal employees working full time on union, rather than agency, business. Congress has elevated its scrutiny of this practice as the result of one report which demonstrates that 3.43 million hours of official time were used by union representatives during fiscal year 2012.[14] GAO has similarly called for "accountability in labor-management relations" when its research showed that the use of official time increased by 25% from fiscal year 2006 to fiscal year 2013[15] and that

[1] Majority at 12 n.77 (quoting 5 U.S.C. § 7101(a)).
[2] 5 U.S.C. § 7101(a)(1)(B).
[3] *Id.* § 7101(a)(1)(C).
[4] *Id.* §§ 7101-7135.
[5] Award at 5.
[6] *Id.*
[7] *Id.*
[8] *Id.* at 9.
[9] *Id.* at 6 n.6.
[10] *Id.* at 9.
[11] *Id.* at 31.
[12] *See AFGE, Local 1815*, 69 FLRA 621, 624 (2016) (Concurring Opinion of Member Pizzella).
[13] *See U.S. Dep't of HUD*, 68 FLRA 631, 636 (2015) (Dissenting Opinion of Member Pizzella) (citing http://www.military.com/daily-news2014/01/02poll, "Americans Have Little Faith in Government" (Jan. 2, 2014)).
[14] Eric Katz, *Lawmakers want to know everything about official union time, down to square footage of offices used*, Government Executive (Mar. 1, 2016).
[15] GAO Highlights, *Actions Needed to Improve Tracking and Reporting of the Use and Cost of Official Time*, (Oct. 2014) (highlights of GAO-15-9, a report to congressional requesters).

nearly 400 federal employees work on union activities full-time (i.e., 100% official time).[16]

Perhaps now was not the most prudent time for this case to be elevated for our review.

Thank you.

[16] Kathryn Watson, *Congress Turns up Heat on Taxpayer-Funded Union Business*, The Daily Caller (Feb. 16, 2016).