72 FLRA No. 22

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL 238
(Union)

0-AR-5520

_____

DECISION

March 3, 2021

_____

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

I. Statement of the Case

In this case, we once again consider a dispute between the parties over what constitutes a reasonable amount of official time. As it had done in prior years, the Union requested official time for certain local and national representatives to attend, and travel back from, a union-sponsored annual conference in 2018.[1] The Agency granted twenty-four hours of official time per person but denied sixteen hours that the Union requested for lobbying and return travel.

Arbitrator Garvin Lee Oliver issued an award finding that the Agency violated Article 6 of the parties' master-collective-bargaining agreement (Article 6) by denying official time for lobbying and return travel. The Agency argues that the award should be set aside or remanded to the Arbitrator on contrary-to-law and essence grounds. We find that the Agency's exceptions provide no basis for finding the award deficient, and we deny them.

II. Background and Arbitrator's Award

Since at least 2004, the Union has participated in an annual three-day legislative conference held by the American Federation of Government Employees. The 2018 conference was scheduled for June 11, 2018 through June 14, 2018.[2] The Union requested forty hours of official time for thirty-one employees to attend the conference and then travel home during duty time on June 15. The Agency denied the official-time request for return travel, and it made a counteroffer of thirty-two hours per employee. The Agency asked the Union whether it would accept this offer or make a counteroffer. In response, the Union advised that it would not bargain official time for the conference.

On May 30, the Agency informed the Union that it would also not be approving official time for June 13 because the Union scheduled lobbying activities for that day. Consequently, the Agency reduced its offer to twenty-four hours of official time per employee, citing Executive Order 13,837 (EO 13,837).[3]

The Union filed two grievances alleging that the Agency violated Article 6 by denying the lobbying and return-travel portions of its official-time request. As relevant here, Article 6, Section 8 (Section 8) states that official time "shall be granted in reasonable and necessary amounts to Union representatives for representational purposes."[4] The Agency denied the grievances, and the parties proceeded to arbitration.

Both grievances were presented jointly for arbitration. The parties stipulated to the following issues: "Did the Agency's granting of [twenty-four] hours of official time . . . fulfill the Agency's obligations under Article 6 . . . ? [W]hat is the appropriate remedy if it is determined that the Agency violated Article 6 . . . ?"[5]

The Arbitrator found that EO 13,837's provision that precludes the use of official time for lobbying was not in effect at the time of the 2018 conference. Therefore, the Arbitrator determined that EO 13,837 did not support the Agency's denial of official time for June 13. Citing Authority precedent holding that a union may receive official time for lobbying Congress under § 7131(d) of the Federal Service Labor-Management

[1] The Authority considered a similar dispute between these same parties concerning official time for the 2017 annual conference. *U.S. EPA*, 70 FLRA 715 (2018) (*EPA*) (then-Member DuBester concurring in part; Member Abbott concurring).

[2] All dates referenced hereafter occurred in 2018.

[3] Exec. Order 13,837, *Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time Use*, 83 Fed. Reg. 25,335, 25,337 (May 25, 2018) (EO 13,837) ("Employees may not engage in lobbying activities during paid time, except in their official capacities as an employee."). As discussed elsewhere in this decision, President Biden revoked EO 13,837 on January 22, 2021.

[4] Award at 3 (quoting Master Agreement Art. 6, § 8).

[5] *Id.* at 2.

Relations Statute (the Statute), the Arbitrator concluded that the Union was entitled to official time for lobbying.[6]

In considering the Agency's denial of official time for return travel on June 15, the Arbitrator found that the Union's request "met the contractual requirements" of Section 8 because travel was essential to performing representational duties at the conference and was not explicitly excluded from Article 6.[7]

Next, the Arbitrator rejected the Agency's argument that Article 6 required the Union to bargain over its official-time request. Article 6, Section 2 says that "[t]he use of official time[,] including attending union-sponsored training by bargaining[-]unit employees who are Union representatives at the local level[,] is an appropriate matter for local[-]level bargaining" (Section 2).[8] The Arbitrator found that Section 2 did not require the Union to bargain because that provision applied only to "local[-]level training," whereas the 2018 annual conference was a national-level event.[9] The Arbitrator also noted – without further explanation – that official time for the conference was "covered by" Article 6.[10]

In sustaining both grievances, the Arbitrator determined that the Agency violated Article 6 by denying official time for lobbying on June 13 and return travel on June 15. As a remedy, the Arbitrator directed the Agency to restore any personal leave employees used on those days or to provide backpay to the employees "for time taken outside duty hours as a result of the Agency's denial."[11]

The Agency filed exceptions to the award on May 20, 2019, and the Union filed an opposition on June 24, 2019.[12]

III. Analysis and Conclusions

A. The award is not contrary to law.

The Agency argues that the award is contrary to law in two respects, which we address separately below.[13] When an exception involves an award's consistency with law, the Authority reviews any questions of law de novo.[14] 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.[15]

1. The award is not deficient based on Executive Order 13,837.

The Agency argues that the Arbitrator erroneously found that EO 13,837 was not in effect when the Agency denied the official-time request for lobbying.[16] According to the Agency, Section 8(a) of EO 13,837 required the Agency to implement the executive order within forty-five days if it could do so without abrogating any provisions of the parties' agreement.[17]

As an initial matter, we note that Executive Order 14,003 revoked EO 13,837 during the pendency of this case.[18] Even if EO 13,837 had not been revoked, the Agency's reliance on that executive order is inapposite. Although Section 4(a)(i) of EO 13,837 stated that "[e]mployees may not engage in lobbying activities

---

[6] 5 U.S.C. § 7131(d) (official time "shall be granted . . . in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest"); Award at 7 (citing *NTEU, Chapter 243*, 49 FLRA 176, 207 (1994) (Member Armendariz concurring in part and dissenting in part)).

[7] Award at 6.

[8] *Id.* at 3 (quoting Master Agreement Art. 6, § 2).

[9] *Id.* at 6.

[10] *Id.*

[11] *Id.* at 8.

[12] Member Abbott notes that the Authority has two goals by which it assesses its performance in terms of issuing timely decisions. The first goal is for a case to be issued no later than 210 days from the filing of an application for review. FLRA, *2021 Congressional Budget Justification*, https://www.flra.gov/CJ (last visited March 1, 2021). The backstop is 365 days. *Id.* This case went overage on September 2, 2020. As he has stated before, when the Authority fails to meet its own internal case processing goals, the Authority does not promote an effective and efficient government. *U.S. EPA, Off. of Rsch. & Dev., Ctr. for Envtl. Measuring & Modeling, Gulf Ecosystems Measurement & Modeling Div., Gulf Breeze, Fla.*, 71 FLRA 1199, 1202-03 (2020) (Concurring Opinion of Member Abbott) (explaining the Authority's internal case processing goals of 210 and 365 days, respectively).

[13] Exceptions Br. at 6-14.

[14] *AFGE, Loc. 3506*, 65 FLRA 121, 123 (2010) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995)).

[15] *AFGE, Loc. 3854*, 71 FLRA 951, 952 (2020) (citing *U.S. Dep't of State, Bureau of Consular Affs., Passport Serv. Directorate*, 70 FLRA 918, 919 (2018)).

[16] Exception Br. at 6.

[17] *Id.* at 6-7. Section 8(a) of EO 13,837 states, in relevant part, that "[e]ach agency shall implement the requirements of this order within [forty-five] days of the date of this order." EO 13,837, 83 Fed. Reg. at 25,339.

[18] Exec. Order 14,003, *Protecting the Federal Workforce*, 86 Fed. Reg. 7,231, 7,231 (Jan. 22, 2021). Consistent with principles of administrative law, the Authority has held that "in general, agencies must apply the law in effect at the time a decision is made, even when that law has changed during the course of a proceeding . . . unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *U.S. Dep't of the Navy, Mare Island Naval Shipyard, Vallejo, Cal.*, 49 FLRA 802, 811 (1994) (quoting *Aacon Auto Transp., Inc. v. Interstate Com. Comm'n*, 792 F.2d 1156, 1161 (D.C. Cir. 1986)).

during paid time,"[19] Section 4(c)(i) provided that "[t]he requirements of [Section 4] shall become effective [forty-five] days from the date of this order."[20] EO 13,837 was signed on May 25, 2018; therefore, Section 4 was in effect no earlier than July 9, 2018. Thus, contrary to the Agency's contention, the executive order's preclusion of lobbying on official time was not in effect on June 13, 2018.[21]

Accordingly, EO 13,837 provides no basis for finding the award deficient, and we deny the exception.

2. The award is not inconsistent with the covered-by doctrine.

The Agency contends that the award is contrary to law because the Arbitrator misapplied the Authority's covered-by doctrine.[22] The doctrine excuses parties from bargaining if they have already bargained over the subjects at issue, and it provides a defense against an alleged violation of a statutory duty to bargain.[23]

As neither party alleged a violation of a *statutory* duty to bargain, the covered-by doctrine is inapposite to this case.[24] And even though the Arbitrator used the words "covered by" in the award, the record does not reflect that the Arbitrator actually relied on, or otherwise applied, the covered-by doctrine.[25] Thus, the Agency's "covered by" arguments provide no basis for finding the award contrary to law.[26] Accordingly, we deny this exception.

B. The award does not fail to draw its essence from the parties' agreement.

The Agency contends that the award is deficient because it fails to draw its essence from the parties' agreement for two reasons, which we address separately below.[27]

1. The Arbitrator's finding that Article 6 did not require the Union to bargain its official-time request does not fail to draw its essence from the parties' agreement.

[19] EO 13,837, 83 Fed. Reg. at 25,337. The Authority recently clarified its precedent regarding the use of official time for lobbying under the Statute. *Nat'l Right to Work Legal Def. Found., Inc.*, 71 FLRA 923 (2020) (*Right to Work*) (then-Member DuBester dissenting). While "direct" lobbying on official time is expressly authorized by the Statute, "indirect" lobbying on official time is not authorized under the Statute and is prohibited by the Anti-Lobbying Act. *See* 18 U.S.C. § 1913; *Right to Work*, 71 FLRA at 925-26 (holding that the Statute permits official time for union representatives to "directly 'present the view of [a] labor organization to heads of agencies . . . Congress, or other appropriate authorities'" (quoting 5 U.S.C. § 7102(1))). In the instant case, the Union requested official time for union representatives to directly lobby members of Congress or their staffs. Award at 4 (finding that the Union's lobbying day was "designated for congressional appointments"), 5 ("On June 13, 2018, Union representatives met with members of Congress or their staff in their offices."). Because the Union requested official time for "direct" lobbying of Congress, the restrictions of the Anti-Lobbying Act are not implicated here. *See Right to Work*, 71 FLRA at 925-26.

[20] EO 13,837, 83 Fed. Reg. at 25,337.

[21] Accepting the Agency's argument that Section 8(a) permitted immediate implementation of Section 4(a)(i) would nullify Section 4(c)(i)'s unambiguous mandate that Section 4 not take effect for forty-five days. EO 13,837, 83 Fed. Reg. at 25,337 (stating that Section 4 "shall become effective [forty-five] days from the date" of the order). We reject this reading of EO 13,837 as it is contrary to the fundamental canon of construction that a statute or executive order be interpreted in a way that leaves no part inoperative. *See U.S. Dep't of Com., Pat. & Trademark Off.*, 54 FLRA 360, 374 (1998) (Member Wasserman concurring, in part, and dissenting, in part) (rejecting proposed interpretation of Section 2(d) of Executive Order 12,871 that would have rendered "nugatory" Section 3 of that same executive order (citing *S.C. v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 510 n.22 (1985))). Consequently, the Agency could not immediately implement Section 4(a)(i) to deny the Union's official-time request for lobbying.

[22] Exceptions Br. at 8-14.

[23] *U.S. DOJ, Fed. BOP*, 70 FLRA 398, 407 (2018) (then-Member DuBester dissenting).

[24] *See SSA, Headquarters, Balt., Md.*, 57 FLRA 459, 460 (2001) (*SSA, Balt.*) (rejecting the union's covered-by argument because neither the union nor the agency alleged that the other party violated a statutory duty to bargain).

[25] Award at 6 (stating, without elaboration, that "the amount of official time to be provided by the Agency . . . was 'covered by' Article 6").

[26] *See U.S. Dep't of the Air Force, 442nd Fighter Wing, Whiteman Air Force Base, Mo.*, 66 FLRA 357, 363 (2011) (denying claim that the award was contrary to the covered-by doctrine because the agency failed to establish that the arbitrator actually relied on it); *SSA*, 65 FLRA 339, 342-43 (2010) (same); *see also AFGE, Loc. 1916*, 64 FLRA 532, 533 n.5 (2010) (finding it unnecessary to determine whether the arbitrator misapplied the covered-by doctrine because that doctrine did not apply to the dispute (citing *SSA, Balt.*, 57 FLRA at 461 n.4)).

[27] Exceptions Br. at 14-18. To demonstrate that an award fails to draw its essence from an agreement, the excepting party must show that the award: (1) cannot in any rational way be derived from the agreement; or (2) is so unfounded in reason and fact, and so unconnected with the wording and the purpose of the agreement as to manifest an infidelity to the obligation of the arbitrator; or (3) evidences a manifest disregard for the agreement; or (4) does not represent a plausible interpretation of the agreement. *U.S. Dep't of VA, Augusta, Ga.*, 59 FLRA 780, 783 (2004) (citing *U.S. Dep't of the Treasury, U.S. Customs Serv., N.Y.C., N.Y.*, 39 FLRA 278, 284 (1991)).

The Agency asserts that the Arbitrator's interpretation of Article 6 "conflicted with the plain wording of the agreement that specifically contemplated bargaining."[28] Specifically, the Agency argues that the Arbitrator incorrectly found that Section 2 only applied to local-level training, when in fact Section 2 "explicitly contemplated bargaining" over official time for local-level union officials to participate in *any* union-sponsored training.[29] The Agency also contends that the Arbitrator erred by failing to find that Section 8 "contemplates the parties negotiating over official[-]time disagreements."[30]

As relevant here, Section 2 states that "[t]he use of official time[,] including attending union-sponsored training by bargaining[-]unit employees who are Union representatives at the local level[,] *is an appropriate matter* for local[-]level bargaining."[31] Even assuming that the Agency is correct that Section 2 "contemplates negotiation at the local level,"[32] the plain wording of Section 2 does not mandate that the parties collectively bargain what constitutes a reasonable and necessary amount of official time, under Section 8, every time an employee requests official time. Rather, Section 2 simply encourages the parties to reach local-level agreements regarding the use of official time, and it provides union-sponsored training as an example of an activity that might be considered during bargaining. The Agency also fails to identify any language in Section 8 that establishes a bargaining obligation under the specific circumstances presented in this case.

Although Authority precedent recognizes that agencies have the right to obtain information necessary for determining whether a discrete official-time request is reasonable,[33] this exchange of information is distinct from "collective bargaining," as that term is defined in the Statute.[34] Because the Agency does not demonstrate that Article 6 required the parties to bargain over the Union's official-time request, this exception does not establish that the award fails to draw its essence from the parties' agreement.[35] Accordingly, we deny it.

2. The Arbitrator's remedy does not fail to draw its essence from the parties' agreement.

The Agency argues that the Arbitrator's backpay remedy – for "time taken outside of duty hours" – fails to draw its essence from Article 6.[36] As noted above, the Arbitrator found that employees who used nonduty time for lobbying on June 13 or return travel on June 15 were entitled to backpay because the Agency violated Article 6 by withholding official time for those activities.[37] The Authority has held that when representational activities are performed on nonduty time because official time was wrongfully denied, § 7131(d) of the Statute "entitles the aggrieved employee[s] to be paid at the appropriate straight-time rate."[38] Accordingly, the Agency's exception provides no basis for setting aside the Arbitrator's backpay remedy, and we deny the exception.[39]

IV. Decision

We deny the Agency's exceptions.

---

[28] Exceptions Br. at 14.
[29] *Id.* at 14-15.
[30] *Id.* at 15.
[31] Award at 3 (quoting Master Agreement Art. 6, § 2) (emphasis added).
[32] Exceptions Br. at 16.
[33] *U.S. DHS, U.S. CBP*, 71 FLRA 119, 120 (2019) (then-Member DuBester dissenting) (holding that an agency must be allowed to obtain "sufficient information" to "determine whether a[n official-time] request is consistent with § 7131(d)" of the Statute).
[34] 5 U.S.C. § 7103(a)(12) (defining "collective bargaining" as the "performance of the mutual obligation . . . to consult and bargain in a good-faith effort to *reach agreement with respect to conditions of employment*" and "*execute a written document* incorporating any collective[-]bargaining agreement reached" (emphasis added)); *see also U.S. Dep't of Transp., FAA, Standiford Air Traffic Control Tower, Louisville, Ky.*, 53 FLRA 312, 320 n.8 (1997) (noting that not all communications between a union and an agency constitute collective bargaining within the meaning of the Statute).
[35] *See AFGE, Loc. 900*, 63 FLRA 536, 539 (2009) (denying essence exception challenging arbitrator's conclusion that a provision of the parties' agreement did not establish a duty to bargain). The Agency does not challenge the Arbitrator's finding that the Union's official-time request was reasonable and necessary under Section 8, so we defer to the arbitrator's application of that section. Award at 6-7. Because the Agency only excepted to the Arbitrator's interpretation that Article 6 did not require bargaining over the Union's official-time request, our discussion is limited to that issue. *See EPA*, 70 FLRA at 716 (limiting review of the award to the issues raised by the exceptions).
[36] Exceptions Br. at 18 (quoting Award at 8).
[37] Award at 8.
[38] *U.S. Dep't of the Treasury, IRS*, 63 FLRA 157, 159 (2009) (quoting *U.S. Dep't of Transp., FAA, Sw. Region, Fort Worth, Tex.*, 59 FLRA 530, 532 (2003) (*FAA*)).
[39] *See U.S. Dep't of Agric., Rural Dev., Wash., D.C.*, 60 FLRA 527, 529 (2004) (holding that a grievant was entitled to straight-time pay because the agency's wrongful denial of official time required the grievant to perform representational duties during nonduty time); *FAA*, 59 FLRA at 532 (emphasizing "straight-time compensation" as the Authority's preferred remedy for wrongful denials of official time that result in representational duties being performed on nonduty time).

Chairman DuBester, concurring:

I agree that the Agency's exceptions should be denied.

Member Kiko, concurring:

Although the Agency's exceptions are properly denied, I write separately to note that the Union's practice of requesting, and the Agency's practice of approving, official time for more than thirty employees to attend a week-long union-sponsored annual conference exemplifies why Executive Order 13,837 (EO 13,837)[1] was necessary.[2]

From approximately 2004 to 2017, each Union representative attending this annual conference received about thirty-two hours of official time.[3] In 2018, the American Federation of Government Employees (AFGE) extended the conference by an entire day,[4] and, as a result, the Union requested forty hours of official time for each of thirty-one employees to attend.[5]

AFGE's decision to elongate the conference from three to four days is unsurprising considering how often agencies approve official-time requests in a cursory fashion. However, because of this additional day, the Union received *1,240 hours* of official time – 248 more hours compared to the amount granted in previous years.[6] Union representatives used this taxpayer-funded time to lobby, travel, and learn how to file grievances against the Agency.[7] The 1,240 hours at issue equates to *more than seven months* of a single employee working forty hours per week.[8] Simply put, this amount of official-time usage does not "contribute[] to the effective conduct of public business."[9]

---

[1] Exec. Order No. 13,837, *Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time Use*, 83 Fed. Reg. 25,335 (May 25, 2018).

[2] The executive order stated, in part, that "[a]n effective and efficient government keeps careful track of how it spends the taxpayers' money and eliminates unnecessary, inefficient, or unreasonable expenditures. To advance this policy, executive branch employees should spend their duty hours performing the work of the Federal Government and serving the public." EO 13,837, 83 Fed. Reg. at 25,335.

[3] Award at 4.

[4] *Id.*

[5] *Id.* at 2, 4.

[6] *Compare U.S. EPA*, 70 FLRA 715, 715 (2018) (then-Member DuBester concurring in part; Member Abbott concurring) (requesting thirty-two hours of official time for thirty-one employees), *with* Award at 2, 4 (requesting forty hours of official time for thirty-one employees).

[7] Exceptions, Attach. 4, Conference Agenda at 4-7.

[8] This calculation considers only the thirty-one representatives of *this* Union, employed by *this* Agency, attending this *one* conference. If we considered employees from other agencies using official time to attend similar AFGE-sponsored conferences, the amount of official time being used would increase astronomically – to several years' worth.

[9] 5 U.S.C. § 7101(a)(1)(B); *see id.* § 7101(b) (noting that the Statute "should be interpreted in a manner consistent with the requirement of an effective and efficient [g]overnment").

I agree with the majority that the Agency's exceptions should be denied. However, regardless of EO 13,837's revocation, agencies should be particularly mindful of their duty to scrupulously review official-time requests consistent with the following two statutory mandates: (1) official time should be granted only in amounts that are "reasonable, necessary, and in the public interest,"[10] and (2) the Statute, including § 7131, should be interpreted and applied "in a manner consistent with the requirement of an effective and efficient [g]overnment."[11]

[10] *Id.* § 7131(d).
[11] *Id.* § 7101(b).

Member Abbott, concurring:

I agree wholeheartedly and completely with each point addressed by Member Kiko in her concurring opinion. In my view, these thoughts are as compelling as the similar observations we made in dicta to *U.S. EPA*[1] two years ago. Those concerns raised herein and in *U.S. EPA*, were foreshadowed by Member Pizzella's equally compelling concurring and dissenting opinions in *AFGE, National Council 118*;[2] *GSA, Eastern Distribution Center, Burlington, New Jersey*;[3] and *U.S. DHS, CBP*.[4]

[1] *U.S. EPA*, 70 FLRA 715, 716 (2018) (then-Member DuBester concurring in part; Member Abbott concurring). We stated:

> Although we deny the Agency's exceptions, we note that the Union's official-time request, and the parties' roughly ten-year past practice, exemplify why Executive Order No. 13,837 is necessary. The Executive Order's purpose is to 'ensure that taxpayer-funded union time is used efficiently and authorized in amounts that are reasonable, necessary, and in the public interest.' Four consecutive days of official time for thirty-one employees to engage in lobbying activities is simply not an effective or efficient use of government resources. In fact, under the Executive Order, neither attendance at the conference, nor any associated travel, would be a permissible use of official time. However, the Executive Order was not in effect when the Agency granted the official-time request or when the employees attended the conference. Therefore, it does not apply to this dispute.

Id. at 716 (internal citation omitted).

[2] 70 FLRA 63, 71 (2016) (Member Pizzella concurring). Member Pizzella stated in his Concurring Opinion:

> I do not believe that all official time used by union officials serves the public interest, contributes to the effective conduct of public business or facilitates and encourages the amicable settlement of disputes . . . . [O]fficial 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.
>
> . . . .
>
> 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. 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 and that nearly 400 federal employees work on union activities full-time (i.e., 100% official time).

Id. at 71-72 (internal quotations omitted).

[3] 68 FLRA 70, 78 (2014) (Member Pizzella dissenting). Member Pizzella noted in his Dissenting Opinion:

> I applaud Arbitrator Zaiger for recognizing the legitimate responsibility and prerogative of supervisors to ensure that official time is requested in accordance with all relevant laws and agreements and that a supervisor does not violate the Statute when he questions the timing of an official-time request to ensure that it comports with the parties' agreement and will not interfere with the demands of the workplace. As I noted in my concurring opinion in *U.S. DHS, CBP* (*CBP*), it is incumbent upon union officials to 'distinguish legitimate, good-faith disputes from everyday workplace annoyances' in conducting their important representational role. The most recent government data available demonstrates that in a recent year, federal employees, acting as union representatives, were paid more than $155 million taxpayer dollars to perform more than 3.4 million hours of union representational activities.

Id. (internal citation omitted).

[4] 67 FLRA 107, 112 (2013) (Chairman Pope and then-Member DuBester concurring; Member Pizzella concurring). Member Pizzella stated in his Concurring Opinion:

> For example, consider union official time. 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.
>
> . . . .

The circumstances of this case and those cited above not only "exemplif[y] why Executive Order 13,837 . . . was necessary,"[5] but it further exemplifies that the executive order served as an effective and fair balance between the legitimate interests of federal unions to provide effective representation and the requirement to apply our Statute in a manner that is consistent with an effective and efficient government. Without the commonsense balance adopted by EO 13,837, it is reasonable to anticipate that the use of official time, and its cost to taxpayers, will continue the growth and expansion that was observed for decades before.[6]

There are few issues that come before the Authority that so fundamentally impact the balance between the legitimate interests of federal unions and agencies and those of the taxpayers that are called upon to foot the costs of maintaining that balance. Thus, I believe these concerns are sufficiently significant to be addressed in the decision. However, that is a choice which I cannot make on my own.

> 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; 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.

Id. (internal quotations omitted).

[5] Concurring Opinion of Member Kiko at 9.

[6] *See, e.g.*, Jessie Bur, *The Government Has Failed to Standardize 'Official Time' for Decades*, Federal Times (May 18, 2018), https://www.federaltimes.com/management/2018/05/18/the-government-has-failed-to-standardize-official-time-for-decades/. The article noted:

> The Office of Personnel Management released a report May 17, 2018, that detailed the usage rate and cost of official time to the federal government in FY16. According to the OPM report, the federal government's 1.2 million 'bargaining unit' employees spent a total of 3.6 million hours performing duties under official time in 2016. Those numbers account for a 1.7 percent increase in bargaining unit employees and 4.12 percent increase in the number of hours used compared to 2014.
>
> . . . .
>
> According to OPM, the 2016 cost is 7.55 percent higher than the cost of official time in 2014, but even that number is a vague accounting of actual costs.

Id.; *see also* Nicole Ogrysko, *Official Time Debate Takes Center Stage Again with OPM's Latest Data*, Federal News Network, (May 17, 2018, 4:34 PM), https://federalnewsnetwork.com/workforce-rightsgovernance/2018/05/official-time-debate-takes-center-stage-again-with-opms-latest-data/. The article stated:

> Employees spent a total of 3,611,112 hours on official time in fiscal 2016, slightly more than the 3,468,170 hours bargaining unit employees spent on official time in fiscal 2014, the last time OPM reviewed data on this topic. Official time cost $174.8 million in 2016, an increase of 7.55 percent over the two-year period, OPM said. Bargaining unit employees used official time at a rate of 2.95 hours per year in 2016, more than the 2.88 hour rate in 2014.
>
> . . . .
>
> Twenty-three agencies reported decreases in official time use, while 37 added more to their totals in 2016. The Health and Human Services Department, for example, increased official time hours by nearly 210 percent between 2014 and 2016.

Id.; *see also* Trey Kovacs, *Federal Employees Spend Over 3 Million Hours on Union Business*, Competitive Enterprise Institute (May 17, 2018), https://cei.org/blog/federal-employees-spend-over-3-million-hours-on-union-business/. The article stated:

> Today, the Office of Personnel Management (OPM) released a new report: "Official Time Usage in the Federal Government Fiscal Year 2016." In 2016, official time cost approximately $175 million and federal employees spent 3.6 million hours conducting union business. This represents about a $12 million increase in the cost of official time from fiscal year 2014, with federal employees spending nearly 200,000 more hours on union activities instead of public service.
>
> . . . .
>
> A report issued by the Government Accountability Office (GAO) found that the methodology used by OPM to estimate the cost of official time is inaccurate . . . . Using a more sound methodology that uses the actual salary of employees using official time, GAO found official time costs are about 15 percent higher than the OPM cost estimates at four of the six agencies it examined.

Id.