

67 FLRA No. 97

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL BORDER PATROL COUNCIL
LOCAL 2595
(Union)

and

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

0-AR-4961

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DECISION

April 23, 2014

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Before the Authority: Carol Waller Pope, Chairman, and
Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

Arbitrator John P. DiFalco found that the Agency did not violate a negotiated Agency policy (the 2010 policy) when it sought to recover Agency uniforms from a probationary trainee whom the Agency fired (the trainee). The Arbitrator also found that the Agency did not demonstrate anti-Union animus by: (1) saying “yes” when a deputy sheriff asked whether the Agency wanted to press criminal charges against the trainee and the Union president (the grievant) after the trainee and the grievant interfered with the Agency’s attempt to recover the uniforms;¹ and (2) rescinding a portion of the grievant’s previously approved official time. However, the Arbitrator found that the partial rescission of official time violated the parties’ collective-bargaining agreement (the CBA). There are two main, substantive questions before us.

The first question is whether the Union has demonstrated that the award fails to draw its essence from the 2010 policy. Because the Union has not demonstrated that the Arbitrator’s interpretation of that policy is irrational, unfounded, implausible, or in manifest disregard of the policy, the answer is no.

¹ Award at 10.

The second question is whether the Arbitrator’s failure to find anti-Union animus is contrary to § 7116(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute).² Even assuming that the Arbitrator resolved statutory issues, we find that, viewed objectively, the disputed Agency actions would not tend to interfere with, restrain, or coerce employees in the exercise of their rights protected under the Statute. Accordingly, the answer is no.

II. Background and Arbitrator’s Award

One day, an Agency supervisor (the time approver) approved the grievant’s request to use eight hours of official time the following day in order to perform Union duties involving a “health and safety committee” and a “camp issue.”³ On the day when the grievant was using that official time, the Agency fired the trainee. The trainee contacted the grievant, told him of the firing, and stated that certain Agency supervisors (the supervisors) were going to the trainee’s house to collect his Agency gear.

When the grievant decided to go to the trainee’s house to assist the trainee, the time approver told the grievant that he could no longer work on “whatever he had been working on at that time, . . . as he had only been authorized to work on the health and safety issues.”⁴ The grievant told the time approver that, if he was not allowed to use official time to help the trainee, then he wanted to use annual leave for that purpose, and “he would grieve the matter later.”⁵ The time approver approved the grievant’s annual-leave request.

One of the supervisors (the list supervisor) had a list of property that the Agency sought to recover from the trainee. The grievant went inside the trainee’s home, collected some of the listed property, and returned that property to the list supervisor. The grievant and the list supervisor discussed the fact that the trainee possessed Agency uniforms, and the list supervisor agreed that the grievant could take possession of those uniforms. The supervisors left the trainee’s residence. But when the list supervisor contacted a management official (the manager), the manager ordered the supervisors to immediately return to the trainee’s residence to collect the uniforms as well as certain books. The supervisors returned to the residence, where the grievant – “upset”⁶ because he believed that the list supervisor “had reversed his position regarding the uniforms”⁷ – allowed the list

² 5 U.S.C. § 7116(a)(1).

³ Award at 6.

⁴ *Id.* at 7.

⁵ *Id.*

⁶ *Id.* at 8.

⁷ *Id.* at 9.

supervisor to collect the books, which were in the trainee's garage.

Then the grievant, "on his own initiative, called the . . . [s]heriff's office to request a 'preserve[-]the [-]peace' service."⁸ The grievant explained that he did so "because there were three supervisors who told him they were not leaving the premises until they received the uniforms."⁹ The deputy sheriffs arrived and spoke to the list supervisor, who stated that the trainee had been fired and that it was "Border Patrol official policy to collect all uniforms back from" discharged employees.¹⁰ The deputy sheriffs then spoke with the grievant, who stated that: (1) "the matter was a civil dispute"; (2) the uniforms did not belong to the supervisors; (3) the grievant was the "authorized user" of the uniforms because the trainee had given them to him; and (4) the grievant "did not want to be harmed by the supervisors while going to his vehicle carrying the uniforms."¹¹

The list supervisor then advised the deputy sheriffs that the grievant had "no authority to collect any equipment."¹² One deputy sheriff spoke with the grievant and the trainee. The trainee stated that he wanted the grievant to have the uniforms, and the grievant said that he wanted to take the uniforms with him. The deputy sheriff contacted his supervisor, who stated that "the matter was a civil matter, but if [the trainee] did not return the uniforms to the Agency," then the deputy sheriffs would turn the matter over to the county prosecutor (the prosecutor) so that the prosecutor could decide whether to prosecute.¹³ The deputy sheriff then communicated this information to the supervisors, the trainee, and the grievant. Additionally, the deputy sheriffs asked the supervisors whether they wanted to press charges against the grievant, and, "upon contacting their [s]uperiors, the response from [Agency] management officials was yes, that they would prefer that charges be pressed against" the grievant.¹⁴

The grievant began carrying the uniforms to his vehicle. When the list supervisor ordered the grievant to turn the uniforms over, the grievant refused and, instead, walked back to the trainee's house and tossed the uniforms on the floor inside the front door. The grievant told the trainee that he "could return the uniforms if he wanted to," but that the trainee should close the door and neither open it for, nor talk to, the supervisors.¹⁵ The trainee closed the door. The list supervisor rang the

doorbell, but there was no answer. Later, the trainee was reached by telephone and told to turn the uniforms over to the supervisors. The trainee said that "although he did not want to turn the uniforms in, . . . he would do so because he did not want to make matters any worse."¹⁶ The grievant told the trainee to "shut the door and not let the supervisors in, as what they were doing was not right."¹⁷

The grievant then told the trainee that "the only option remaining was to remove the patches and Agency identifiers [from the uniforms] and then turn those in."¹⁸ The trainee and the grievant left the house and gave the list supervisor some Border Patrol patches, but no uniforms. After counting the patches, the list supervisor did not believe that he had received all of the patches that he should have received. The list supervisor again contacted the manager, who told him to return to the station.

The Agency's Office of Internal Affairs then investigated the incident. "It was through the process of the Internal Affairs report that [the grievant] first determined that there had been an attempt to have him prosecuted," but he later learned that the prosecutor had declined to prosecute him.¹⁹

The grievant then filed a grievance, which went to arbitration. The Arbitrator framed several issues, including, as relevant here: (1) whether the Agency violated the CBA by recommending prosecution; (2) whether the Agency violated the CBA when the time approver partially rescinded the grievant's official time; (3) whether the Agency violated the 2010 policy when it sought the return of the uniforms; and (4) whether the Agency "engage[d] in a pattern of conduct demonstrating [anti-U]nion animus toward[] the Union and [the grievant] by frustrating or interfering with his efforts to carry out his assigned duties as a [U]nion official."²⁰

As an initial matter, the Arbitrator found that "[t]he unique status of the Agency as a police[-]protective organization guarding the border[,] and the potential for individuals misusing the [Agency's] uniforms, patches[,] and identifications to smuggle or otherwise cross the border illegally or engage in any other number of nefarious acts, provides a sound reason for the [Agency] to recover uniforms from individuals" whom the Agency no longer employs.²¹ Therefore, the Arbitrator stated that

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 10.

¹⁴ *Id.*

¹⁵ *Id.* at 11.

¹⁶ *Id.* at 12.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 13.

²⁰ *Id.* at 3.

²¹ *Id.* at 41.

the Agency's attempts to recover the trainee's uniforms were "entirely appropriate."²²

The Arbitrator then addressed whether the Agency violated the CBA by recommending prosecution. The Arbitrator found that, during the events at the trainee's residence, the supervisors acted appropriately. The Arbitrator also found that the grievant, "although obviously well intentioned in an effort to provide representation to a [U]nion member, . . . engaged in acts that were neither appropriate nor necessary to do his representation job."²³ In this connection, the Arbitrator determined that the grievant "demonstrated a lack of good judgment in pursuing person[-]to[-]person confrontation rather than going through proper grievance procedures in resolving the dispute,"²⁴ and that the grievant acted "in a somewhat contumacious and confrontational manner."²⁵ In addition, the Arbitrator noted that it was the grievant, not the Agency, who called the sheriff's office, and that the grievant "never really explained why" he made the call, as "it did not appear that he felt he was in any physical harm[,] and he . . . acknowledged that the matter was primarily a civil matter involving what he viewed as" CBA and policy violations.²⁶ The Arbitrator found that, "[n]otably, the [d]eputy [s]heriff, after investigating . . . , essentially identified the actions of the [g]rievant and the [trainee] as more of a potential local criminal problem than any of the efforts by [the] supervisors."²⁷ The Arbitrator also found that after the deputy sheriff recommended that the matter be turned over to the prosecutor for assessment, "[i]t was the . . . [s]heriff's department and [the p]rosecutor's office that went a step further and inquired of higher-level Agency officials [whether] they wanted to prosecute."²⁸ The Arbitrator stated that, although it was "unfortunate[]"²⁹ that the Agency said "yes,"³⁰ the Agency did not violate the CBA by doing so.

As for whether the Agency violated the CBA by partially rescinding the grievant's official time, the Arbitrator found that the CBA entitled the grievant to official time to investigate why the Agency was removing the trainee. The Arbitrator also stated that, despite the denial of official time, the Agency "seems to have recognized" that the Union had a right to investigate, as "[n]otably, the [time approver] did approve the [g]rievant's request for annual leave."³¹ The Arbitrator

found that the Agency did not prevent the grievant from "carrying out his representational duties,"³² but that the Agency made a "mistake,"³³ and violated the CBA, by denying the grievant official time. Accordingly, the Arbitrator directed the Agency to restore three hours of the grievant's annual leave and convert those hours to paid official time.

Next, the Arbitrator addressed whether the Agency violated the 2010 policy when it sought to recover the uniforms. The Arbitrator stated that the grievant should have followed "the well[-]established theory that you . . . follow orders and grieve later."³⁴ The Arbitrator also found that the grievant "was wrong in advising"³⁵ the trainee to engage in "self-help"³⁶ by "disobey[ing] management orders."³⁷ The Arbitrator found that the grievant's conduct "became more of obstructionism than any attempt to enforce" a collective-bargaining agreement.³⁸ The Arbitrator then stated: "The record indicates that both in terms of past practice and compliance with regulations, a part of any termination process for probationary trainees includes the collection of their government[-]issued equipment."³⁹ As for past practice, the Arbitrator stated: "The evidence is that the [Agency] has been collecting uniforms essentially in the manner in which [the trainee's] uniform was collected, for at least the last ten years for terminated[,] probationary trainees" (the uniform past practice).⁴⁰ As for compliance with regulations, the Arbitrator cited a 2008 memorandum (the 2008 memo) that provides, in pertinent part: "Managers need to take reasonable measures to ensure that any employee who is being removed . . . physically turns in his or her shoulder and badge patches from his or her uniforms."⁴¹

The Arbitrator rejected a Union claim that the 2010 policy superseded the uniform past practice and the 2008 memo. Specifically, the Arbitrator found that Section 6.15 of the 2010 policy – the pertinent wording of which is set forth in Section IV.A. below – "is silent regarding the collection of uniforms of terminated trainees," and "there is nothing in the [CBA] on any of the cited policies that would preclude any of the actions taken by management in collecting" uniforms and related items.⁴² Further, the Arbitrator stated that the CBA gives management "extensive rights to determine 'the mission,

²² *Id.*

²³ *Id.* at 43.

²⁴ *Id.*

²⁵ *Id.* at 43-44.

²⁶ *Id.* at 44.

²⁷ *Id.* at 44-45.

²⁸ *Id.* at 45.

²⁹ *Id.*

³⁰ *Id.* at 10.

³¹ *Id.* at 51.

³² *Id.* at 51-52.

³³ *Id.* at 54.

³⁴ *Id.* at 56.

³⁵ *Id.* at 57.

³⁶ *Id.*

³⁷ *Id.* at 58.

³⁸ *Id.*

³⁹ *Id.* at 59.

⁴⁰ *Id.* at 60.

⁴¹ Exceptions, Attach., Mar. 28, 2008 Memo at 1.

⁴² Award at 60.

budget, termination, number of employees[,] and internal[-]security practices of the [Agency]’ unless those rights are restricted by any provision of the [CBA].”⁴³ The Arbitrator concluded that the Agency did not violate the 2010 policy when it sought to retrieve the uniforms.

Further, the Arbitrator addressed whether the Agency “engaged in a pattern of conduct demonstrating [anti-U]nion animus.”⁴⁴ The Arbitrator found that the Agency’s agreement to pursue criminal charges occurred only after the grievant called the sheriff “into the labor dispute and the [d]eputy [s]heriffs conducting the investigation had made a suggestion to the Agency that [it] may wish to pursue charges.”⁴⁵ The Arbitrator stated that “[i]t might have resulted in some perverse delight on the part of management officials or a particular supervisor or two to turn the [g]rievant’s tactic back upon him,”⁴⁶ and that “[p]erhaps the Agency officials . . . should not have risen to the bait.”⁴⁷ Nevertheless, the Arbitrator concluded that the agreement to pursue criminal charges “does not appear to be a concerted effort to demonstrate a general [anti-Union] animus.”⁴⁸

In addition, the Arbitrator found that the partial rescission of official time did not demonstrate anti-Union animus. According to the Arbitrator, “[t]he failure to provide official time . . . was undoubtedly a mistake[,] but it was a minor mistake in that the [grievant] was immediately granted annual leave[,] . . . and the decision to deny official time did not appear to be based on any animus but only upon a misunderstanding of the [CBA] in a decision made in a very short timeframe by an individual supervisor.”⁴⁹

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

III. Preliminary Matter: §§ 2425.4(c) and 2429.5 of the Authority’s Regulations do not bar the Union’s arguments regarding § 7116(a)(1) of the Statute

The Agency argues that the Union did not argue, in its grievance or its post-hearing brief, that the Agency violated § 7116(a)(1) of the Statute.⁵⁰ Under §§ 2425.4(c) and 2429.5 of the Authority’s Regulations, the Authority will not consider any arguments that could

have been, but were not, presented to the arbitrator.⁵¹ The Union argued in its post-hearing brief to the Arbitrator that certain provisions of the CBA should be interpreted consistently with Authority precedent concerning § 7116(a)(1),⁵² and set forth the Authority’s standards for finding § 7116(a)(1) violations.⁵³ As the Union raised these issues before the Arbitrator, §§ 2425.4(c) and 2429.5 do not bar the Union’s arguments.

IV. Analysis and Conclusions

A. The award does not fail to draw its essence from the 2010 policy.

The Union argues that the award fails to draw its essence from the 2010 policy.⁵⁴ We note that the Arbitrator referred to the policy as an “[a]greement,”⁵⁵ and the Union claims⁵⁶ – without dispute from the Agency – that the 2010 policy is a negotiated agreement.

The Union argues that – in finding that the Agency had the right to recover the uniforms – the Arbitrator failed to address plain wording of the policy that concerns “unique agency identifiers” attached to the uniforms, rather than the entire uniform itself.⁵⁷ In addition, the Union contends that the Arbitrator erroneously held that the 2010 policy did not rescind the 2008 memo.⁵⁸ According to the Union, Sections 2.7 and 3 of the 2010 policy demonstrate that the 2008 memo was rescinded, because Section 2.7 rescinded “all relevant policies” except those listed in Section 3, and Section 3 does not list the 2008 memo among the exceptions.⁵⁹ The Union also contends that the 2008 memo directly conflicts with the 2010 policy.⁶⁰

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.⁶¹ Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective-bargaining agreement when the excepting party establishes that the award: (1) cannot

⁴³ *Id.* at 61 (quoting the Collective-Bargaining Agreement (CBA)).

⁴⁴ *Id.* at 62.

⁴⁵ *Id.* at 64.

⁴⁶ *Id.* at 64-65.

⁴⁷ *Id.* at 64.

⁴⁸ *Id.*

⁴⁹ *Id.* at 63.

⁵⁰ Opp’n at 10.

⁵¹ 5 C.F.R. §§ 2425.4(c), 2429.5; *e.g.*, *U.S. DHS, CBP*, 66 FLRA 495, 497 (2012).

⁵² Exceptions, Attach., Union’s Post-H’rg Br. at 25.

⁵³ *Id.* at 25-26.

⁵⁴ Exceptions Br. at 5-7.

⁵⁵ Award at 57.

⁵⁶ Exceptions Br. at 6.

⁵⁷ *Id.* at 4.

⁵⁸ *Id.* at 7-8.

⁵⁹ *Id.*

⁶⁰ *Id.* at 8.

⁶¹ 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998).

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 collective-bargaining 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.⁶² 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.”⁶³

Section 2.7 of the 2010 policy provides, in pertinent part: “This policy replaces and supersedes all relevant existing policies and memoranda except as indicated in [S]ection 3.”⁶⁴ In turn, Section 3 lists three items – none of which is the 2008 memo.⁶⁵

The Arbitrator found that the 2010 policy did not supersede the uniform past practice or the 2008 memo.⁶⁶ In this regard, the Arbitrator found that Section 6.15 of the 2010 policy does not address the collection of uniforms of terminated trainees.⁶⁷ Section 6.15 – entitled “Disposal of Uniforms”⁶⁸ – provides, in pertinent part:

6.15.1 Uniformed employees must exercise reasonable care when *disposing of* uniform articles that contain specific and unique [A]gency identifiers Uniformed employees are required to take reasonable measures to guard against the potential misuse of uniform articles by unauthorized personnel.

6.15.2 When *discarding* uniform articles containing official and unique identifiers, Border Patrol agents must take reasonable measures to ensure that the discarded item cannot be illegally obtained and/or used in an unofficial capacity. Agents should remove these identifiers prior to being discarded. In cases where the unique identifier cannot be removed, it should be defaced beyond recognition or destroyed.

6.15.3 Uniform articles that are not serviceable for wear in an official capacity may be used for personal use as long as official and unique agency identifiers have been removed or defaced beyond recognition.⁶⁹

This section discusses disposal of uniforms. It was not irrational, implausible, unfounded, or in manifest disregard of the 2010 policy for the Arbitrator to find that Section 6 does not apply to collection of uniforms from terminated trainees – which the Arbitrator found to be the subject of the uniform past practice and the 2008 memo. As a result, the Union’s reliance on Section 2.7 of the 2010 policy – which supersedes only “relevant” existing policies⁷⁰ – does not demonstrate that the Arbitrator erred in finding that the 2010 policy did not supersede the 2008 memo and the uniform past practice.

In addition, the Union asserts that there were only “a little over four months” between the implementation of the 2010 policy and the events at issue here – and there was no evidence that, during that brief period, the Agency removed any employees in a manner that deviated from the 2010 policy.⁷¹ But, as the Union has not demonstrated that the 2010 policy superseded the uniform past practice and the 2008 memo, the alleged lack of evidence regarding the parties’ practice after the 2010 policy’s implementation is immaterial.

For the foregoing reasons, the Union has not demonstrated that the award fails to draw its essence from the 2010 policy, and we deny the essence exception.

B. The Union has not supported its claim that the award is contrary to an Agency-wide regulation.

In its exceptions, the Union states that the award is contrary to an Agency-wide regulation.⁷² Although the Union argues that the 2010 policy rescinded the 2008 memo,⁷³ the Union does not contend that the Arbitrator erred in his interpretation of – or otherwise reached a conclusion that conflicts with – the 2008 memo. And the Union does not otherwise provide any arguments as to why the award is contrary to an Agency-wide regulation.

Section 2425.6(e)(1) of the Authority’s Regulations provides that an exception “may be subject to . . . denial if . . . [t]he excepting party fails to

⁶² *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).

⁶³ *Id.* at 576.

⁶⁴ Exceptions, Attach., U.S. Border Patrol Policy (2010 Policy) at 1.

⁶⁵ *Id.*

⁶⁶ Award at 60.

⁶⁷ *Id.*

⁶⁸ 2010 Policy at 11.

⁶⁹ *Id.* (emphasis added).

⁷⁰ *Id.* at 1.

⁷¹ Exceptions Br. at 8.

⁷² Exceptions at 5.

⁷³ Exceptions Br. at 7-8.

. . . support a ground” listed in § 2425.6(a)-(c).⁷⁴ Consistent with this Regulation, when a party does not provide any arguments to support its exception, the Authority will deny the exception.⁷⁵ As the Union has not supported its claim that the award is contrary to an Agency-wide regulation, we deny the exception under § 2425.6(e)(1).

C. The award is not contrary to § 7116(a)(1) of the Statute.

The Union argues that the award is contrary to law because the Arbitrator failed to find violations of § 7116(a)(1) of the Statute.⁷⁶ The Union argues that Articles 4.E and 6.C of the CBA “are worded almost verbatim as” §§ 7102 and 7116(a)(1) of the Statute, and that “Authority precedent should be used in their interpretation and application.”⁷⁷ But, as stated previously, the Agency argues that the Union did not allege § 7116(a)(1) violations at arbitration.⁷⁸ Therefore, the Agency claims, the Arbitrator “was not bound to apply” statutory standards.⁷⁹

Article 4.E of the CBA provides, in pertinent part, that “[e]mployees shall have and shall be protected in the exercise of the right, freely and without fear of penalty or reprisal, to form, join, and assist [the Union] or to refrain from any such activity.”⁸⁰ Similarly, § 7102 of the Statute provides, in pertinent part, that “[e]ach employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right.”⁸¹ And Section 6.C of the CBA provides, in pertinent part, that “there shall be no restraint, interference, coercion, or discrimination against a Union official because of the performance of” duties that “may be properly assigned to them under the terms of the [Statute].”⁸² Similarly, § 7116(a)(1) provides, in pertinent part, that it is an unfair labor practice “to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under” the Statute.⁸³

As discussed previously, the Union did raise § 7116(a)(1) before the Arbitrator.⁸⁴ But, in framing the

issue regarding anti-Union animus, the Arbitrator did not cite § 7116(a)(1) or state whether he: (1) considered the animus issue to be statutory, or purely contractual, in nature; or (2) viewed Articles 4.E and 6.C of the CBA to impose the same requirements as the Statute.⁸⁵ In the latter connection, the Authority has applied statutory standards in assessing the application of contract provisions that mirror, or are intended to be interpreted in the same manner as, the Statute.⁸⁶ And the Authority has assumed, without deciding, that an arbitrator addressed statutory issues where: (1) it was unclear what type of issues the arbitrator addressed; and (2) even assuming that the arbitrator addressed statutory standards, the award was not contrary to those standards.⁸⁷ As it is unclear whether the Arbitrator resolved statutory issues – and, for the reasons discussed below, the award is not contrary to the pertinent statutory standards – we assume, without deciding, that the Arbitrator resolved statutory issues.

When an exception involves an award’s consistency with law, the Authority reviews any question of law de novo.⁸⁸ In making that assessment, the Authority defers to the arbitrator’s underlying factual findings.⁸⁹

As an initial matter, the Union claims that the Arbitrator applied the wrong standard for determining whether § 7116(a)(1) was violated.⁹⁰ Although the Arbitrator did not expressly set out the Authority’s standard for finding a § 7116(a)(1) violation,⁹¹ that does not provide a basis for finding the award contrary to law. In this regard, in conducting de novo review, the Authority assesses whether the arbitrator’s legal *conclusion* – not his or her underlying *reasoning* – is consistent with the relevant legal standard.⁹²

As for whether the Arbitrator’s conclusion is consistent with the relevant legal standard, the test for determining whether a statement or conduct violates § 7116(a)(1) is an objective one.⁹³ Although the circumstances of the pertinent incident are taken into consideration, the standard is not based on the subjective

⁷⁴ 5 C.F.R. § 2425.6(e)(1).

⁷⁵ *NTEU, Chapter 215*, 67 FLRA 183, 184 (2014).

⁷⁶ Exceptions Br. at 8-9.

⁷⁷ *Id.* at 9.

⁷⁸ Opp’n at 10.

⁷⁹ *Id.*

⁸⁰ Exceptions, Attach., CBA at 7.

⁸¹ 5 U.S.C. § 7102.

⁸² CBA at 9.

⁸³ 5 U.S.C. § 7116(a)(1).

⁸⁴ Exceptions, Attach., Union’s Post-H’rg Br. at 25.

⁸⁵ See Award at 3, 62-65.

⁸⁶ *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Lompoc, Cal.*, 66 FLRA 978, 980 (2012).

⁸⁷ *AFGE, Local 1164*, 64 FLRA 599, 601 (2010) (Authority assumed statutory principles applied, but found award not contrary to law).

⁸⁸ *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)).

⁸⁹ *NTEU, Chapter 32*, 67 FLRA 174, 176 (2014) (*Chapter 32*).

⁹⁰ Exceptions Br. at 10, 12.

⁹¹ Award at 63-65.

⁹² *Chapter 32*, 67 FLRA at 176.

⁹³ *U.S. EPA, Region 2, N.Y.C., N.Y.*, 63 FLRA 476, 478 (2009) (*EPA*).

perceptions of the employee or the intent of the employer.⁹⁴ Rather, the question is whether, viewed objectively, the agency's action would tend to interfere with, restrain, or coerce employees in the exercise of their rights protected under the Statute.⁹⁵ Here, the relevant (asserted) right is set forth in § 7102, which guarantees employees the right to engage in activities on behalf of a union, including the right to act for a union in the capacity of a representative.⁹⁶

The Union argues that the Agency violated § 7116(a)(1) in two respects,⁹⁷ which we discuss separately below.

1. Agreeing to Press Criminal Charges

The Union contends that it was a § 7116(a)(1) violation for the Agency to “seek” criminal prosecution of the grievant.⁹⁸ According to the Union, under the 2010 policy, the uniforms became the trainee's personal property once the Agency identifiers were removed.⁹⁹ “In that light,” the Union contends, the grievant's actions should be viewed as “an attempt to preserve the [trainee's] property rights,” and he should not have had to “comply now, grieve later” – particularly given the grievant's status as a law-enforcement officer who “is supposed to stand up to illegal and inappropriate[,] coercive conduct by” other law-enforcement officers.¹⁰⁰ The Union claims that “an employee discovering that his employer sought criminal prosecution of him” is likely to deter that employee from acting to protect “employee rights . . . [and] property rights.”¹⁰¹ In addition, the Union notes that the supervisors had agreed to allow the grievant to keep the uniforms, but then “rescinded that . . . agreement . . . without explaining why their satisfaction was suddenly gone.”¹⁰²

As an initial matter, the Arbitrator found that the CBA, the uniform past practice, and the 2008 memo allowed the Agency to recover the trainee's uniforms, and that the 2010 policy did not rescind the uniform past practice or the 2008 memo.¹⁰³ We have found that the Union does not challenge the Arbitrator's interpretation of the 2008 memo, and we have denied the Union's essence exception to the Arbitrator's finding regarding

the uniform past practice and the 2010 policy. And the Union has provided no other basis for finding that the grievant had a statutorily protected right to interfere with management's retrieval of the uniforms. The Authority has found that, where an agency official made statements regarding possible criminal prosecution of an employee¹⁰⁴ – and those statements merely referred to “justifiable action [that] the agency could pursue,” without any express or implied threat that criminal prosecution was in response to the employee engaging in protected activity¹⁰⁵ – the agency did not violate § 7116(a)(1) of the Statute.¹⁰⁶ This precedent supports finding no § 7116(a)(1) violation here because the Agency merely agreed to pursue criminal charges, at the prompting of the deputy sheriffs, and did not make any express or implied threats that its agreement to do so was in response to the grievant engaging in any activity that was statutorily protected. Further, the Arbitrator noted that management agreed to pursue charges against the grievant, but only after the grievant had called the sheriff “into the labor dispute and the [d]eputy [s]heriffs conducting the investigation had made a suggestion to the Agency that [it] may wish to pursue charges.”¹⁰⁷ Taking into account all of these circumstances, we find that, viewed objectively, the Agency's agreement to press criminal charges would not tend to interfere with, restrain, or coerce employees in the exercise of any rights protected under the Statute. Accordingly, the Arbitrator did not err in finding no anti-Union animus concerning this event.

2. Denying Official Time

The Union argues that it was a § 7116(a)(1) violation for the Agency to rescind the grievant's preapproved official time.¹⁰⁸ According to the Union, the Arbitrator acknowledged that the Agency had improperly done so “because of the [grievant's] desire to investigate and represent” the trainee.¹⁰⁹ The Union asserts that

being removed from pre-approved official time for choosing to engage in an activity that the Arbitrator found was a clearly appropriate representational activity, when the consequence of choosing to engage in the activity is [a] reduction of accrued annual leave . . . , could easily tend to

⁹⁴ *SSA, Office of Disability Adjudication & Review, Nat'l Hearing Ctr.*, 66 FLRA 193, 197 (2011).

⁹⁵ *EPA*, 63 FLRA at 478.

⁹⁶ *Id.* (citing 5 U.S.C. § 7102).

⁹⁷ Exceptions Br. at 10-12.

⁹⁸ *Id.* at 10.

⁹⁹ *Id.* at 11.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 10.

¹⁰³ Award at 60-61.

¹⁰⁴ *IRS, Headquarters & IRS, Detroit Dist., Detroit, Mich.*, 40 FLRA 469, 469 (1991).

¹⁰⁵ *Id.* at 478.

¹⁰⁶ *Id.* at 470 n.*.

¹⁰⁷ Award at 64-65.

¹⁰⁸ Exceptions Br. at 11-12.

¹⁰⁹ *Id.* at 11.

deter employees from further engaging in protected activities.¹¹⁰

The Arbitrator found that the Agency “made a mistake” – and thereby violated the CBA – in rescinding three hours of the grievant’s official time.¹¹¹ But the Arbitrator determined that this mistake was “minor” and “appear[ed] to be based . . . only upon a misunderstanding of the [CBA] in a decision made in a very short timeframe by an individual supervisor.”¹¹²

Section 7131 of the Statute sets forth the rights and restrictions associated with the use of official time.¹¹³ Subsections (a) and (c) authorize union representatives official time for bargaining and certain Authority-related matters, and subsection (b) bars the use of official time for internal union matters.¹¹⁴ The use of official time for all other types of representational activities is subject to negotiation under subsection (d).¹¹⁵ There is “no statutory entitlement to perform on official time representational duties of the type covered by [§] 7131(d) [of the Statute].”¹¹⁶ And there is no dispute that the type of official time at issue here is within the categories negotiated under subsection (d). So, by rescinding part of the grievant’s approved official time, the Agency violated the parties’ *agreement*, not any statutory rights. Further, there are no findings, or claims, that the partial rescission of official time was accompanied by any statements or conduct that indicated an anti-Union animus. The Union provides no authority demonstrating that an individual supervisor’s rescission of preapproved official time – based solely on the supervisor’s misinterpretation of an agreement, and without accompanying statements or actions indicating an anti-union animus – is sufficient to demonstrate a § 7116(a)(1) violation.

Taking into account all of these circumstances, we find that, viewed objectively, the partial rescission of the grievant’s official time would not tend to interfere with, restrain, or coerce employees in the exercise of rights protected under the Statute. Consequently, the Arbitrator did not err in finding no anti-Union animus concerning this event.

V. Decision

We deny the Union’s exceptions.

¹¹⁰ *Id.* at 12.

¹¹¹ Award at 54.

¹¹² *Id.* at 63.

¹¹³ *U.S. Dep’t of the Army, Headquarters, 10th Mountain Div. (Light Infantry) & Fort Drum, Fort Drum, N.Y. & U.S. Dep’t of the Army, U.S. Army Med. Activity, Fort Drum, N.Y.*, 64 FLRA 337, 339 (2009).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* (quoting *U.S. Dep’t of the Air Force, HQ Air Force Materiel Command*, 49 FLRA 1111, 1120 (1994)).