69 FLRA No. 35

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
IMMIGRATION AND CUSTOMS ENFORCEMENT
NATIONAL COUNCIL 118
(Union)

and

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

0-NG-3248
(68 FLRA 910 (2015))

_____

ORDER DENYING
MOTION FOR RECONSIDERATION

March 17, 2016

_____

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

I. Statement of the Case

This matter comes before the Authority on the Agency's motion for reconsideration of the Authority's decision in *AFGE, ICE National Council 118* (*AFGE*).[1] In *AFGE*, the Union filed an appeal concerning the negotiability of proposed ground rules (proposal). This proposal would prevent bargaining-team members and alternates eligible for administratively uncontrollable overtime (AUO) from suffering a loss of pay due to either a reduction in their rate of AUO pay or the decertification of their AUO eligibility as a result of their participation in negotiations, during which they would be on official time.

The Authority found that the Agency failed to demonstrate that the proposal was contrary to law, government-wide regulation, or an Agency regulation for which there is a compelling need. Additionally, the Authority found that the Agency did not demonstrate that a previous agreement covered the subject of the proposal. As a result, the Authority concluded that the proposal was negotiable.

The Agency's motion for reconsideration presents several arguments to the Authority. Initially, the Agency argues that an intervening change in an Agency policy is an extraordinary circumstance warranting reconsideration. However, even assuming that such a change is something that the Authority would consider on a motion for reconsideration, the Agency fails to demonstrate that there is a compelling need for the Agency policy. Therefore, this argument does not warrant a reconsideration of the Authority's finding.

Additionally, the Agency alleges that the Authority raised an issue sua sponte, specifically guidance from the U. S. Office of Personnel Management (OPM) and its interpretation. However, because the Agency, not the Authority, raised the issue of the OPM guidance and its interpretation, the Authority did not raise the issue sua sponte, and this argument does not present an extraordinary circumstance warranting reconsideration.

Finally, the Agency contends that the Authority made four errors of law in *AFGE*. First, the Agency argues that the Authority made an error in law in its interpretation of OPM guidance. Because the plain text of the guidance supports the Authority's interpretation, the Agency does not demonstrate that the Authority made an error of law.

Second, the Agency alleges that the Authority incorrectly dismissed the binding nature of Comptroller General opinions relying on the defunct Federal Personnel Manual (FPM). However, because the Agency fails to provide any authority in support of its contentions that these Comptroller General opinions remain binding without reliance on the FPM – and the Agency does not contend that these opinions are themselves binding government-wide rules or regulations – this argument does not demonstrate that the Authority made an error of law.

Third, the Agency contends that the Authority erred in determining that the Union was a public or federal entity. Because the Agency bases this argument on a misinterpretation of the decision, it does not demonstrate that the Authority made an error of law.

Fourth, the Agency argues that the Authority made an error of law by not considering the impact of the proposal. Because this argument simply challenges the merits of the Authority's decision and attempts to relitigate matters already addressed, it does not demonstrate extraordinary circumstances warranting the reconsideration of *AFGE*.

As a result, we deny the Agency's motion for reconsideration.

[1] 68 FLRA 910 (2015).

II. Background

In *AFGE*, the Authority ordered the Agency to bargain over, at the request of the Union, a proposal for a ground rule concerning AUO, specifically the Agency's treatment of time AUO-certified negotiation-team members and alternates spend in negotiations. One section of the proposal, Section A.1, states that AUO-eligible employees on the negotiation team "will not have their AUO computed in such a way that would result in reduction or decertification as a result of their participation in the negotiations process."[2] In order to achieve this goal, the proposal further requires that "official time . . . will be classified and paid as 'administrative leave.'"[3] Of relevance here, another section of the proposal, Section A.2, requires the Agency to use an AUO-computation period of twenty-six weeks. The Agency does not request that the Authority reconsider any of its conclusions regarding the remainder of the proposal.

The Authority considered, and rejected, the Agency's arguments that Section A.1 is contrary to 5 U.S.C. § 7131 and government-wide regulations. Of relevance, the Authority – noting that the FPM is no longer a binding government-wide regulation – rejected the Agency's argument that Section A.1 is contrary to a government-wide regulation because it is contrary to the FPM and opinions of the Comptroller General relying on the FPM. Additionally, the Authority rejected the Agency's interpretation of OPM's Compensation Policy Memoranda (CPM) 97-5. Specifically, the Authority found that, as relevant here, this guidance only addressed the exclusion of hours, not days, and that it did not address the subject of the proposal – the exclusion of official time from the computation of AUO certification and AUO pay.

Likewise, the Authority considered and rejected the Agency's argument that Section A.2 is inconsistent with an Agency regulation for which there is a compelling need. Specifically, the Authority found that the Agency failed to demonstrate that there was a compelling need within the meaning of § 2424.50 of the Authority's Regulations[4] for the Agency regulation in question.

The Agency now requests that we reconsider our decision in *AFGE*.

[2] *Id.* at 911.
[3] *Id.*
[4] 5 C.F.R. § 2424.50.

III. Preliminary Matters

A. We decline to consider the Agency's supplemental submissions.

The Agency requests leave under § 2429.26 of the Authority's Regulations[5] to file, and does file, a motion to correct the record and to submit a revised Agency AUO guide (revised guide). In its motion to correct the record, the Agency contends that the Authority's decision in *AFGE* mischaracterized the Agency's position as stated in the record of the post-petition conference. Additionally, the Agency submits a copy of the revised guide, which was published on May 7, 2015.

Although the Authority's Regulations do not provide for the filing of supplemental submissions, § 2429.26 of the Regulations provides that the Authority may, in its discretion, grant leave to file "other documents" when appropriate.[6] The Authority has held that a filing party must show why its supplemental submission should be considered.[7] The Authority has granted leave to file other documents where the supplemental submission responds to issues that could not have been addressed previously.[8] Conversely, where a party seeks to raise issues that it could have addressed in a previous submission, the Authority ordinarily denies requests to file supplemental submissions concerning those issues.[9]

Concerning the Agency's motion to correct the record – filed a month after the Agency's motion for reconsideration – the Agency alleges that, in *AFGE*, the Authority mischaracterized the record of the post-petition conference in this case. However, the Agency could have raised any alleged mischaracterization of the record in its motion for reconsideration. Because it failed to do so, we deny the Agency's motion to file a supplemental submission to correct the record.[10]

The Agency also requests leave to file the revised guide, which was published on May 7, 2015. However, the Agency published the revised guide prior to the issuance of *AFGE* on September 11, 2015 and prior to its filing a motion for reconsideration on September 21, 2015. Because the Agency could have addressed the revised guide in its motion for reconsideration (if not

[5] *Id.* § 2429.26.
[6] *Id.*
[7] *U.S. Dep't of Transp., FAA*, 66 FLRA 441, 444 (2012) (citing *NTEU*, 65 FLRA 302, 305 (2010)).
[8] *U.S. DHS, U.S. CBP*, 68 FLRA 524, 526 (2015), *recons. denied*, 69 FLRA 22 (2015) (citing *Cong. Research Emps. Ass'n, IFPTE, Local 75*, 59 FLRA 994, 999 (2004)).
[9] *Id.*
[10] *Id.*

sooner), we will not consider it now as a supplemental submission filed a month after the Agency's motion for reconsideration.[11] Consequently, we deny the Agency's motion to submit the revised guide.

B. We consider the Union's opposition to the Agency's motion for reconsideration but do not consider the Union's reply to the Agency's supplemental submissions.

The Union requested permission to file – and did file – an opposition to the Agency's motion for reconsideration and motion for supplemental submissions.[12] As it is the Authority's practice to grant requests to file an opposition to a motion for reconsideration,[13] we consider the Union's opposition to the Agency's motion for reconsideration.

Concerning the Union's reply to the Agency's supplemental submissions, because we do not consider the Agency's supplemental submissions, the Union's request to file a reply to those supplemental submissions is moot.[14] Consequently, we will not consider the Union's arguments concerning the Agency's supplemental submissions.

IV. Analysis and Conclusions

The Authority's Regulations permit a party to request reconsideration of an Authority decision.[15] But "a party seeking reconsideration 'bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action.'"[16]

The Authority has found that extraordinary circumstances exist, and as a result has granted reconsideration, in a limited number of situations. These have included where a moving party has established that: (1) an intervening court decision or change in the law affected dispositive issues;[17] (2) evidence, information, or issues crucial to the decision had not been presented to the Authority;[18] or (3) the Authority had erred in its remedial order, process, conclusion of law, or factual finding.[19] Extraordinary circumstances may also be present when the moving party has not been given an opportunity to address an issue raised sua sponte by the Authority in rendering its decision.[20] The Authority has held that attempts to relitigate conclusions reached by the Authority are insufficient to establish extraordinary circumstances.[21]

A. The intervening release of an Agency regulation does not provide a basis for reconsidering *AFGE*.

The Agency argues that the release of an Agency regulation with the force of law warrants the reconsideration of the Authority's decision.[22] Specifically, the Agency notes that the U.S. Department of Homeland Security (DHS) released a directive (DHS directive) providing an exhaustive list of permissible reductions of time for the purpose of calculating AUO and that the exhaustive list does not allow for the reduction of hours or days as required by the proposal. Further, the Agency argues that such directives bind it by law, and the Agency has "no authority to negotiate anything to the contrary."[23]

When examining whether extraordinary circumstances exist warranting the reconsideration of an Authority decision, the Authority will consider intervening changes in federal law and government-wide rules or regulations within the meaning of § 7117(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute).[24] However, even where a regulation has the force and effect of law, that regulation is not a government-wide rule or regulation within the meaning of § 7117(a)(1) of the Statute where that regulation or rule only applies within an agency.[25] Even assuming, without deciding, that a change in an *agency*-wide regulation such as the DHS directive could qualify as an intervening change that the Authority would consider on a motion for reconsideration, the Agency does not demonstrate that this directive renders the proposal nonnegotiable.

---

[11] *Id.*
[12] Union's Mot. for Leave at 1.
[13] *U.S. Dep't of the Treasury, IRS*, 67 FLRA 58, 59 (2012) (citing *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 61 FLRA 352, 353 (2005)).
[14] *AFGE, Local 3652*, 68 FLRA 394, 396-97 (2015) ("Where the Authority declines to consider a document, the Authority also declines to consider a subsequent response to that document because the response is moot.").
[15] 5 C.F.R. § 2429.17.
[16] *AFGE, Council 215*, 67 FLRA 164, 165 (2014) (quoting *NAIL, Local 15*, 65 FLRA 666, 667 (2011)).
[17] *U.S. Dep't of HHS, Office of the Assistant Sec'y for Mgmt. & Budget, Office of Grant & Contract Fin. Mgmt., Div. of Audit Resolution*, 51 FLRA 982, 984 (1996).
[18] *NTEU*, 66 FLRA 1030, 1031 (2012) (citation omitted).
[19] *Id.* (citation omitted).
[20] *Id.*
[21] *Id.*
[22] Mot. for Recons. at 1-3.
[23] *Id.* at 2 (citing *Dep't of the Army*, 12 FLRA 216 (1983)).
[24] *See IFPTE, Local 12*, 26 FLRA 854, 857-58 (1987).
[25] *See AFGE, AFL-CIO, Nat'l Council of VA Locals*, 29 FLRA 515, 554-55 (1987) ("[S]ince the [a]gency's regulations apply only within the [agency] itself, they are not [g]overment-wide regulations within the meaning of § 7117(a)(1) of the Statute . . . .).

As we noted in *AFGE*,

> [t]o establish that a conflict with an agency rule or regulation relieves an agency of its duty to bargain, the agency must: (1) identify a specific agency-wide regulation; (2) show that there is a conflict between its regulation and the proposal; and (3) demonstrate that its regulation is supported by a compelling need within the meaning of § 2424.50 of the Authority's Regulations.[26]

In order to demonstrate a compelling need, an agency must address the specific criteria outlined in § 2424.50.[27] Although the Agency identifies the specific directive and argues that there is a conflict between the directive and the proposal, the Agency does not address the criteria for determining a compelling need within the meaning of § 2424.50 of the Authority's Regulations.[28] As such, the Agency fails to demonstrate – even were we to consider the release of the DHS directive an extraordinary circumstance warranting reconsideration – that we should alter our decision in *AFGE*.

B. The Authority did not raise the issue of CPM 97-5 sua sponte.

The Agency contends that extraordinary circumstances exist because the Authority raised a legal argument sua sponte, "namely the interpretation of [OPM]'s guidance on the AUO regulations at CPM 97-5."[29] As noted above, extraordinary circumstances warranting the reconsideration of a decision may exist where the moving party has not been given an opportunity to address an issue raised sua sponte by the Authority in its decision.[30] However, the Agency, not the Authority, first presented the issue of CPM 97-5 and its interpretation.[31] Consequently, the Authority did not raise this issue sua sponte, and this argument does not provide an extraordinary circumstance warranting reconsideration of *AFGE*.

C. The Authority did not err in a conclusion of law in its interpretation of CPM 97-5.

The Agency also argues that the Authority erred in a conclusion of law by its interpretation of CPM 97-5. Specifically, the Agency argues that the Authority's distinction between "days" and "hours" when interpreting CPM 97-5 "cannot be supported under any reasonabl[e] understanding of the guidance or regulations."[32] The Agency argues that 5 C.F.R. § 550.103 defines "day" as "any [twenty-four]-hour period."[33] The Agency continues that this means that the exclusion of "days" from AUO computation encompasses the exclusion of "hours" and that "the exclusion of 'days' in reality does not refer to full periods of [twenty-four] hours, but instead the exclusion of [eight-]hour workdays."[34] The Agency also acknowledges that 5 C.F.R. § 550.154(c) only refers to "periods of time" and neither "hours" nor "days."[35]

However, none of these arguments demonstrates that the Authority erred in its analysis of CPM 97-5, which is guidance from OPM interpreting 5 C.F.R. § 550.154(c). As noted in *AFGE*, the guidance in CPM 97-5 states that:

> in determining the number of weeks in a review period, there is no authority to reduce the number of weeks by subtracting hours of paid leave (such as annual leave or sick leave), hours of unpaid leave (such as hours of leave without pay, including leave without pay under the Family and Medical Leave Act of 1993 . . ., or hours during which an employee is suspended without pay), hours of excused absence with pay, hours or days during which an employee has been detailed to other duties for which employees seldom or never perform irregular or occasional overtime work, or hours in a training status.[36]

In *AFGE*, the Authority determined that this guidance largely concerns the exclusion of hours, not days, from the calculation of AUO. Although the Agency asserts that "days" are the same thing as "hours," the guidance indicates otherwise. Specifically, the guidance refers both to "days" and "hours or days."[37] In

[26] *AFGE*, 68 FLRA at 914 (citing *AFGE, SSA Gen. Comm.*, 68 FLRA 407, 408 (2015) (Member Pizzella dissenting); *AFGE, Local 3824*, 52 FLRA 332, 336 (1996)).
[27] *NAIL, Local 5*, 67 FLRA 85, 90 (2012) ("Because the [a]gency does not address [the criteria for determining a compelling need under § 2424.50], the [a]gency has failed to show that there is a compelling need for the [i]nstruction.").
[28] Mot. for Recons. at 3 (stating only that "[a]ccordingly, . . . there is a compelling need for the" directive).
[29] Mot. for Recons. at 3.
[30] *U.S. Dep't of the Air Force, 375th Combat Support Group, Scott Air Force Base, Ill.*, 50 FLRA 84, 86 (1995).
[31] Agency's Amended Statement of Position (Amended Statement) at 4-5, 7; Agency's Reply at 3, 6, 11.
[32] Mot. for Recons. at 3.
[33] *Id.* (quoting 5 C.F.R. § 550.103).
[34] *Id.*
[35] *Id.*
[36] CPM 97-5.
[37] *Id.*

using the term "hours or days" in one instance and "days" in all others, the guidance demonstrates that the terms "days" and "hours" are distinct.[38] Consequently, the Agency fails to demonstrate that the Authority made an error in law. We also note that, in *AFGE*, the Authority further found that CPM 97-5 does not address the subject of the proposal – the exclusion of official time from the computation of AUO certification and AUO pay,[39] and the Agency does not demonstrate that the Authority erred in this regard.

D. The Authority did not err in finding that Comptroller General opinions based on the defunct FPM are not binding government-wide regulations.

The Agency argues that the Authority erred in a conclusion of law when it dismissed opinions by the Comptroller General, the head of the Government Accountability Office (GAO) as not being binding government-wide regulations.[40] The Agency again[41] concedes[42] that the FPM is no longer binding[43] but argues that "the underlying decisions of the Comptroller General, over its area of expertise and authority[,] . . . still exist" as binding authority.[44] The Agency continues, noting that, absent these decisions, "there is absolutely no authority in any [s]tatute or [r]egulation for the grant of administrative leave, at all"[45] and arguing that the Authority "has repeatedly cited to Comptroller General decisions on the subject of administrative leave since the expiration of the FPM."[46]

The Authority has noted in the past that Comptroller General opinions serve as an expert opinion that the Authority should prudently consider;[47] however, the Authority has not found that such opinions are binding on the Authority,[48] let alone binding as government-wide rules or regulations.[49] Furthermore, as we noted in *AFGE*,[50] the Comptroller General opinions in question rely solely on the FPM and not on any binding, government-wide rule or regulation, or law; the Agency does not provide any argument to the contrary. Additionally, it should be noted that neither the Comptroller General nor the GAO is currently responsible for issuing opinions concerning federal-employee leave matters.[51]

Concerning the Agency's argument that, absent treating Comptroller General opinions as binding law, "there is absolutely no authority in any [s]tatute or [r]egulation for the grant of administrative leave, at all,"[52] the GAO has acknowledged that "[t]here is no general statutory authority for the use of paid administrative leave."[53] However, both the GAO and OPM have recognized that agencies have discretion to grant administrative leave as part of their inherent authority as employers.[54]

Finally, the Agency argues that, subsequent to the sunsetting of the FPM, the Authority has relied on Comptroller General opinions concerning administrative leave.[55] However, nothing in the cited cases indicates

---

[38] *Cf. United States v. Williams*, 340 F.3d 1231, 1236 (11th Cir. 2003) ("[D]eliberate variation in terminology within the same sentence of a statute suggests that Congress did not interpret the two terms as being equivalent." (citing *United States v. Bean*, 537 U.S. 71, 76 n.4 (2002))).
[39] *AFGE*, 68 FLRA at 914.
[40] Mot. for Recons. at 5-7.
[41] *AFGE*, 68 FLRA at 912 ("As the Agency concedes, the FPM is no longer a binding government-wide regulation." (citing the Amended Statement at 12)).
[42] Mot. for Recons. at 6 ("[I]t is true that the FPM has been sunsetted . . . .").
[43] *See AFGE, Local 2142*, 50 FLRA 44, 47 (1994) (finding that "the Authority follow[s] the well-established principle of administrative law that, in general, agencies must apply the law in effect at the time a decision is made" and that "there is no statutory direction or legislative history to apply the abolished provision" of the FPM); Compensation & Leave Decisions, OPM GC 02-0010, 2002 WL 31431936, *1 (May 7, 2002) ("[T]he FPM is sunsetted, and is no longer used as a guide by agencies.").
[44] Mot. for Recons. at 6.
[45] *Id.* at 5.
[46] *Id.* at 6.
[47] *U.S. Dep't of the Air Force, Whiteman Air Force Base, Mo.*, 68 FLRA 969, 971-72 (2015) (quoting *AFGE, Local 1458*, 63 FLRA 469, 471 n.5 (2009)).
[48] *Id.* at 971-72.
[49] *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 67 FLRA 356, 358 (2014); *AFGE, AFL-CIO, Local 3231*, 25 FLRA 600, 600 (1987); *see also NTEU, Chapter 41*, 57 FLRA 640, 644 (2001) ("[I]nterpretations which lack the force of law, such as opinion letters, manuals[,] and the like, do not warrant such deference." (citations omitted)).
[50] 68 FLRA at 912.
[51] Federal Paid Administrative Leave: Additional Guidance Needed to Improve OPM Data, GAO-15-79, 6 (2014) (GAO Report) ("OPM is . . . responsible for settling federal[-]employee leave and compensation claims and issuing decisions to agency officials on such matters. [GAO] had performed this function until it was transferred to OPM in 1996.").
[52] Mot. for Recons. at 5.
[53] GAO Report, GAO-15-79, 3.
[54] *Id.* at 1 ("Federal agencies have the discretion to authorize paid administrative leave . . . ."); *id.* at 5 (noting OPM guidance "regarding [agencies] exercising their discretion to use administrative leave").
[55] Mot. for Recons. at 6 (citing *U.S. Dep't of the Air Force, 439th Airlift Wing, Westover Air Reserve Base, Mass.*, 55 FLRA 945, 949 (1999) (finding that an agency had discretion to grant administrative leave for rest periods); *NTEU*, 55 FLRA 1174, 1177-78 (1999) (finding negotiable proposal requiring grant of administrative leave for exercise program)).

that the Authority adopted Comptroller General opinions as binding on the Authority or that the Authority has found that these opinions act as binding law for decades beyond the abolition of the basis for those opinions.[56]

Consequently, the Agency's arguments fail to demonstrate that we erred in a conclusion of law.

E. The Agency's remaining arguments do not warrant the reconsideration of *AFGE*.

The Agency argues that the Authority made further errors of law: (1) the Authority erred in finding that the Union is a "public entity" or a "federal entity"; and (2) the Authority erred by "failing to consider the impact of the proposal as applied to the rest of the ground rules."[57]

The Agency bases the first of these allegations on a misinterpretation of the Authority's decision. In *AFGE*, the Authority noted that 5 C.F.R. § 2635.101(b)(8) and (14) – stating that "[e]mployees shall act impartially and not give preferential treatment to any private organization or individual" and "shall endeavor to avoid any actions creating the appearance" of such partiality – were not applicable.[58] The Authority never stated that the Union was either a public entity or a federal entity; rather, the cited sections are inapplicable because the proposal involves the Agency, not a federal employee, and AUO-eligible federal employees, not private organizations or private individuals. Consequently, the Agency bases this argument on a misinterpretation of the decision, which provides no basis for reconsidering *AFGE*.[59]

Further, the Agency argues that the Authority made an error in law by failing to consider the impact of the proposal. The Agency contends that, although the Authority was correct that AUO does not require absolute equity among employees, "what is being discussed here is not some relatively mild variation, but the ignoring of half the days in each month in calculating . . . AUO rates."[60] Furthermore, the Agency states that "official time . . . allows for the retention of basic salary under law, [but] that does not extend to overtime."[61] However, this argument simply challenges the merits of the Authority's decision and attempts to reintroduce arguments already made[62] and to relitigate matters already addressed. As such, it does not establish extraordinary circumstances warranting consideration of *AFGE*.[63]

Although our colleague agrees that the Agency's motion for reconsideration should be denied, we also note his observation that reimbursing employees for official time they spend in negotiations with the Agency as Union representatives, at a level comparable to what their coworkers earn, "goes beyond the protections of [the official-time provisions of the Statute]."[64] In response, some context is important.

What the Authority found negotiable in the underlying case is a bargaining proposal. The parties are free to achieve through their negotiations a result that respects the Agency's, the Union's, and the public's interests to the maximum extent practicable.

In addition, the Union's proposal does no more than guarantee that employees who volunteer to negotiate on behalf of the other employees in the bargaining unit are not treated any differently, and therefore are not treated unfairly, as a result of the collective-bargaining activities they undertake. Assuring equitable treatment for employees on official time is especially important given the role of official time in maintaining effectiveness and efficiency in government operations. Official time has a unique statutory purpose as a component of the collective-bargaining system that Congress created for the federal government. Congress decided that union membership in the federal sector should be a choice that individual federal-government employees had a right to make. But Congress also decided that federal-employee unions would be legally required to represent all employees in the bargaining unit, including to fairly represent those who chose not to become dues-paying union members. Congress enacted the Statute's official time provisions as an essential

[56] *See NTEU, Chapter 215*, 67 FLRA 183, 184 n.16 (2014) ("[W]here agency alleged proposal was nonnegotiable based on Comptroller General decisions 'rely[ing] on a version of the Federal Travel Regulations that ha[d] become outdated,' Authority found that agency had not cited any 'law or regulation . . . to support its allegation.'" (quoting *NAGE, Local R1-109*, 53 FLRA 403, 413 (1997))).
[57] Mot. for Recons. at 7.
[58] 68 FLRA at 914-15.
[59] *See U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Pollock, La.*, 68 FLRA 716, 717 (2015).
[60] Mot. for Recons. at 7.
[61] *Id.* (citing *Bureau of Alcohol, Tobacco, & Firearms v. FLRA*, 464 U.S. 89, 103-08 (1983) (*BATF*)).
[62] Agency's Reply at 4 n.3 (citing *BATF*, 464 U.S. 89, 103-108).
[63] *See Bremerton Metal Trades Council*, 64 FLRA 543, 545 (2010).
[64] Concurrence at 12.

means of enabling federal-employee unions to meet their mandatory statutory obligations."[65]

V. Order

We deny the Agency's motion for reconsideration.

[65] *See* 124 Cong. Rec. H9638 (daily ed. Sept. 13, 1978), reprinted in Committee on Post Office and Civil Service, House of Representatives, 96th Cong., 1st Sess., Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978 (Comm. Print 1979) (Legis. Hist.), at 934 ("Title VII imposes heavy responsibilities on labor organizations and on agency management. These organizations should be allowed official time to carry out their statutory representational activities just as management uses official time to carry out its responsibilities."); Report & Recommendations of the Federal Labor Relations Council on the Amendment of Executive Order 11491, as amended, Labor-Management Relations in the Federal Service (Jan. 1975), Legis. Hist. at 1335 ("[P]olicies on official time have, on balance, stimulated the businesslike conduct of labor relations while minimizing financial hardships on individual employees.").

Member Pizzella, concurring:

In a quote widely attributed to Abraham Lincoln, our sixteenth president asked, "How many legs does a dog have if you call his tail a leg? Four. Saying that a tail is a leg doesn't make it a leg."[1]

Under the circumstances of this case, it is understandable that the Agency would object to the Union's proposal to bring a new perspective to "official time" and call it "administrative leave" just so Union negotiators can still receive overtime while they are negotiating a new collective-bargaining agreement for the Union.

While I agree with the majority that the Agency has not raised any argument that would warrant the reconsideration of our decision in *AFGE, ICE National Council 118*,[2] I write separately to address the subject of the proposal. In this instance, § 7131(a) of the Federal Service Labor-Management Relations Statute (the Statute)[3] – granting union representatives official time for negotiations – may benefit all parties involved. By allowing official time for negotiations, all parties may come to the bargaining table to mutually and amicably construct a collective-bargaining agreement.

However, the Agency's concerns regarding *this* proposal are valid. This proposal gives employees an overtime premium even when they are engaged *only in official time* for long periods. By guaranteeing an overtime premium under these circumstances, this proposal goes beyond the protections of § 7131(a) of the Statute guaranteeing a base pay during negotiations. In other words, not only are these employees not performing their regular duties while in negotiations; they are being paid a premium as if they were.

Under the shadow of looming concerns over the amount of official time that is being logged every year,[4] agencies and unions alike should take notice of the concerns expressed by Congress and the public with the lack of accurate reporting on the use of official time[5] and whether such use contributes to an effective and efficient government.[6]

I, too, question whether paying employees an overtime premium, on top of official time, while those employees engage in duties on behalf of the Union, "contributes to the effective conduct of public business."[7]

While the Union may have crafted a proposal that is legally negotiable, neither party appears to have considered how this proposal would be perceived by those who have to pay for it (or people better known as *taxpayers*).

Thank you.

---

[1] http://www.brainyquote.com/quotes/quotes/a/abrahamlin107482.html.

[2] 68 FLRA 910 (2015).

[3] 5 U.S.C. § 7131(a).

[4] Bob Gilson, *May 100% Official Time for Union Officials be a Per Se Statutory Violation?*, FedSmith (Mar. 26, 2015), http://www.fedsmith.com/2015/03/26/may-100-official-time-for-union-officials-be-a-per-se-statutory-violation; Ian Smith, *House Concerned About Cost of Union Activity at IRS*, FedSmith Blogs (Sept. 12, 2014), http://blogs.fedsmith.com/2014/09/12/house-concerned-about-cost-of-union-activity-at-irs; Ralph Smith, *69% of Survey Respondents Say Official Time Reduces Efficiency or Wastes Government Resources*, FedSmith (June 9, 2014), http://www.fedsmith.com/2014/06/09/69-of-survey-respondents-say-official-time-reduces-efficiency-or-wastes-government-resources; Ralph Smith, *"Official Time" for Union Officials Under Fire in Congress*, FedSmith (July 19, 2013), http://www.fedsmith.com/2013/07/19/official-time-for-union-officials-under-fire-in-congress.

[5] Kathryn Watson, *Congress Turns up Heat on Taxpayer-Funded Union Business*, The Daily Caller (Feb. 16, 2016 12:42 AM), http://dailycaller.com/2016/02/16/congress-turns-up-heat-on-taxpayer-funded-union-business/ ("Republicans on the House Committee on Oversight and Government Reform . . . are demanding more information on all federal employees who collect taxpayer-funded salaries while conducting business for government worker unions.").

[6] *U.S. DHS, U.S. CBP*, 68 FLRA 157, 168 (2015) (Dissenting Opinion of Member Pizzella) ("[T]he Authority has an obligation to promote 'the effective conduct of government business.' Part of that charge is to recognize the significant impact that our decisions may have . . . on the taxpayers who are ultimately called upon to foot this bill." (citations omitted)).

[7] 5 U.S.C. § 7101.