

71 FLRA No. 22

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

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL BORDER PATROL COUNCIL
CHAPTER 2499
(Union)

0-AR-5382

DECISION

May 15, 2019

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

I. Statement of the Case

We find that § 7131(d) of the Federal Service Labor-Management Relations Statutes requires that an official-time request under that subsection provide sufficient information for an approving official to determine whether the request is consistent with an agreement that is “reasonable, necessary, and in the public interest.”¹ Because Arbitrator Benjamin Wolkinson’s award absolved the grievant of the obligation to provide such information in this case, we set aside the award as contrary to § 7131(d).

II. Background and Arbitrator’s Award

Article 7 of the parties’ agreement (Article 7) states, in part, that “Union offic[ials] . . . will be authorized official time” for the matters listed in Section A.4, Subsections (a) through (h), such as investigating and preparing grievances, and representing the Union in labor-management meetings.² Article 7 further provides that, except in circumstances not relevant here, a Union official must request official time from a supervisor in advance on the Agency’s required form by designating the subsection that encompasses the relevant

official-time activity, and providing the “estimated amount of time to be used.”³ According to Article 7, the supervisor may approve or deny the request.

The Union president (the grievant) requested sixty-four hours of official time. On the request form, the grievant listed Section A.4, and generally referenced Subsections (a), (b), (c), (e), and (f) as the reasons for the official time, but did not specify how much time he needed for each activity.⁴ While reviewing the request, the grievant’s supervisor orally asked the grievant for additional information about the activities that the grievant would perform so that the supervisor could determine whether the amount of time requested was reasonable. When the grievant refused to provide any additional information, the Agency denied the request on the basis that the grievant requested an “excessive amount of time” without providing enough detail for management to determine how he would use the time.⁵ The Union filed a grievance over the denial.

As relevant here, Arbitrator Benjamin Wolkinson found that Article 7 required the grievant to provide only the relevant subsections of Section A.4 in his official-time request. As such, the Agency could not ask the grievant for information, even informally, before deciding whether to approve his request. Consequently, the Arbitrator found that the Agency violated Article 7 when it denied the grievant’s request as excessive.

On June 4, 2018, the Agency filed exceptions to the Arbitrator’s award, and on July 5, 2018, the Union filed an opposition to those exceptions.

III. Analysis and Conclusion: The award is contrary to § 7131(d).

The Agency argues that the award is contrary to law because it prevents the Agency from “gathering . . . very basic information” that the Agency

³ *Id.* (quoting Art. 7, § A.5(a)).

⁴ The subsections listed by the grievant cover “[i]nvestigation, preparation, and representation in regard to discrimination complaints and appeals; informal employee or labor-management complaints; unfair[-]labor[-]practice complaints; grievances/arbitrations . . . ; and statutory appeals [; p]reparation and representation of the Union in labor-management meetings[; r]epresentation at adjustment of grievances, adverse action[.] and [equal-employment-opportunity] matters . . . [; r]eview of and response to memoranda, letters, and requests from the [Agency], as well as review and dissemination of instructions, manuals, and notices . . . [; and p]reparation for labor-management meetings.” *Id.* at 8 (quoting Art. 7, § A.4).

⁵ *Id.* at 19 (quoting Exceptions, Attach. A, Grievant’s Official-Time Request at 1).

¹ 5 U.S.C. § 7131(d).

² Award at 8 (quoting Art. 7, § A.4).

needs to determine whether an official-time request should be approved.⁶

Section 7131(d) of the Statute states that, in order to perform the activities specified in that subsection – which include the activities at issue in this case – “any employee representing [a union] . . . shall be granted official time in any amount that agency and the [union] involved agree to be reasonable, necessary, and in the public interest.”⁷ But, as relevant here, the parties’ agreement does not allot the Union a fixed amount of official time for particular activities, or provide the grievant with a fixed percentage of his duty time as official time. Rather, Article 7 requires the grievant to specify which subsection of Section A.4 describes the activities that give rise to his official-time request, and to provide an estimate of the time needed.⁸ In turn, the article also provides that the Agency may approve or deny that request.⁹

Even when parties have agreed to procedures for requesting official time, those procedures must allow an agency to gather the information necessary to make a reasoned determination about whether to grant or deny an official-time request.¹⁰ Without sufficient information, an agency approving official cannot determine whether a request is consistent with § 7131(d). In this case, the Arbitrator denied the Agency’s ability even to know how many hours of the grievant’s official-time request would be used for each of the five broad categories of activities that the request included.¹¹ We find that, under § 7131(d), the Agency must be permitted to gather the information that it needs to determine whether an official-time request is reasonable.¹² To hold otherwise

would render the act of *requesting* official time superfluous.

The decisions on which the dissent relies to criticize our holding are irrelevant.¹³ Nor does this decision “violate[]” our precedent.¹⁴ It is for this Authority to interpret the Statute and, when needed, apply and clarify that interpretation. That this decision fills what appears to be a gap in our precedent is all the more reason why we must act. The award before us went so far as to effectively render null and unenforceable the agreement provision providing for the very act of *requesting* official time, hence our decision today.

Accordingly, we grant the Agency’s contrary-to-law exception.

IV. Decision

We set aside the award.

⁶ Exceptions at 12.

⁷ 5 U.S.C. § 7131(d).

⁸ Award at 8 (quoting Art. 7, § A.4).

⁹ *Id.* at 9 (quoting Art. 7, § A.5(b)).

¹⁰ *Cf. DOD, Def. Logistics Agency, Def. Depot Memphis*, 16 FLRA 1036, 1040, 1047-48 (1984) (although the parties’ agreement specified how to record official time for certain activities, those procedures did not guarantee the union’s vice president his desired amount of official time for union duties).

¹¹ In the award, the Arbitrator discussed at length previously issued awards by other arbitrators invoked by both parties that interpreted the agreement language at issue or official time requests generally. We note that while the Arbitrator considered these awards and found some to be persuasive, he did not conclude that any one award was binding upon him. *See AFGC Local 2459*, 51 FLRA 1602, 1606-07 (1996). That is in keeping with the Authority’s precedent that, in general, awards issued earlier by different arbitrators are not binding as precedent on later arbitrators or on the Authority. *See U.S. Dep’t of the Treasury, IRS, Wash., D.C.*, 60 FLRA 966, 967 n.3 (2005).

¹² We note that this case is distinguishable from *U.S. DHS, U.S. CBP, U.S. Border Patrol, El Paso, Tex.*, 61 FLRA 122 (2005), in which the Authority denied a contrary-to-law exception based on § 7131(d) because the agency there did not

argue that the arbitrator’s interpretation of an official-time contract provision was unenforceable, *id.* at 125. In contrast, here, the Agency’s exception is premised on its contention that, *as interpreted by the Arbitrator in this case*, the parties’ official-time provision is unenforceable because the interpretation is inconsistent with § 7131(d). Exceptions at 8-9, 12-14.

¹³ *See Dissent* at 6 nn.12-14, 7 nn.15 & 21. Only one of those decisions even addressed whether an official-time provision, as interpreted by an arbitrator, was *unenforceable*, and that decision had nothing to do with providing the information necessary to make a reasoned determination about whether to grant or deny an official-time request. *Compare U.S. Dep’t of Commerce, Nat’l Oceanic & Atmospheric Admin., Nat’l Weather Serv.*, 36 FLRA 352, 361-62 (1990) (rejecting argument that contract provision, as interpreted by arbitrator, was unenforceable because it allowed union representatives to receive official time without using “the most efficient means of transportation”), *with Cong. Research Emps. Ass’n, IFPTE, Local 75*, 64 FLRA 486, 491 (2010) (“[T]he [u]nion has not asserted that Article XXXIV of the parties’ agreement is unenforceable . . .”), *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Big Spring, Tex.*, 62 FLRA 49, 50 (2007) (“The [a]gency does not argue that the contractual standard for denying official time, which the [a]rbitrator applied, was unenforceable.”), *U.S. Dep’t of the Air Force, HQ Air Force Materiel Command*, 49 FLRA 1111, 1116-17 (1994) (exceptions did not include a claim of unenforceability), and *U.S. Dep’t of the Navy, Naval Mine Warfare Eng’g Activity, Yorktown, Va.*, 39 FLRA 1207, 1210-11, 1212-13 (1991) (same).

¹⁴ *Dissent* at 6.

Member DuBester, dissenting:

Under the guise of resolving a contrary-to-law exception, the majority tosses aside the Arbitrator's carefully reasoned construction of the parties' collective-bargaining agreement and rewrites the agreement to suit its own views regarding how official time should be approved. Because the majority disregards the parties' authority to negotiate official time agreements under § 7131(d) of the Federal Service Labor-Management Relations Statute (Statute),¹ and ignores the deference owed to arbitrators' interpretations of those agreements, I dissent.

This case arose when the Union grieved the Agency's denial of the Union president's request for official time. Using a form provided in an appendix to the parties' agreement, the Union president indicated that he was seeking the time to perform activities associated with five categories of activities approved for official time use under Article 7(A)(4) of the parties' agreement. The Agency denied the request because of the "excessive amount of time requested" and because the request lacked sufficient details concerning how the time would be used.²

The Arbitrator carefully reviewed arbitration awards dating back to 2002 that specifically addressed the parties' prior experiences in resolving official time requests under Article 7(A), and he accorded persuasive force to awards concluding that the Union was required only to identify the particular subsection of Article 7(A)(4) that described the activity for which the time was requested.³ The Arbitrator also found that it was "apparent" from the parties' bargaining history "that the parties intended that the Union's obligation to supply the reasons for its leave requests would be satisfied" by simply identifying the relevant subsections.⁴

Noting that the request form provided only a small box in which to list the activities for which the official time was requested, the Arbitrator concluded that the "content and structure of [the form] does not anticipate that the Union will normally do more than identify the particular sub-sections" of Article 7(A)(4) to support an official time request.⁵ Based on his review of the prior arbitration awards, the Arbitrator recognized that "there may be occasions . . . where the Union will be required to supply additional information," such as where management has "good cause to question the amount or purpose of the official time" requested, or where

management has a "reasonable suspicion based on facts, which are presented to the Union" for questioning the leave.⁶ However, the Arbitrator found that there was "nothing unusual, problematical, or suspect in the amount of leave" sought by the Union president,⁷ nor was there any evidence that his supervisor "had any factual basis [beyond observing the total number of hours requested] for believing that the amount of official time sought was excessive given the myriad representational duties [the Union president] identified in his [request] form."⁸

Based on these findings, the Arbitrator concluded that the Agency breached Article 7(A) when it denied the Union president's official time request.⁹ He also found that the "inevitable effect" of challenging leave requests "when there is no objective factual basis for doing so, will be to generate distrust and hostility harmful to productive labor-management relationships."¹⁰

There is no question that the Arbitrator's decision draws its essence from the parties' agreement. In the majority's view, however, the Arbitrator's construction of the parties' official time agreement is unenforceable because it is inconsistent with § 7131(d). This conclusion ignores the Statute's plain language and violates Authority precedent.

Section 7131(d) of the Statute provides that representatives of an exclusive representative, or any bargaining unit employee, "shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest."¹¹ Citing the Statute's legislative history, the Authority has consistently recognized that this provision makes all matters concerning the use of official time under § 7131(d) – including its amount, allocation and scheduling – subject to bargaining.¹²

Accordingly, once the parties have agreed to terms and conditions governing the use of § 7131(d) official time, "whether the parties have complied with the agreement is not a legal question; rather, it is a matter of contractual interpretation to be resolved under the

¹ 5 U.S.C. § 7131(d).

² Award at 18-19.

³ *Id.* at 21-25, 27.

⁴ *Id.* at 27.

⁵ *Id.* at 25.

⁶ *Id.* at 28-29.

⁷ *Id.* at 32.

⁸ *Id.* at 31.

⁹ *Id.* at 34.

¹⁰ *Id.* at 26.

¹¹ 5 U.S.C. § 7131(d).

¹² *U.S. Dep't of the Air Force, HQ Air Force Materiel Command*, 49 FLRA 1111, 1119 (1994); *see also United Power Trades Org.*, 64 FLRA 440, 441-42 (2010), *pet. for review denied sub nom. United Power Trades Org. v. FLRA*, 427 F. App'x 5 (D.C. Cir. 2011).

essence standard,” unless the agreement is unenforceable.¹³ And because the parties are explicitly authorized to negotiate all aspects of official time use, the Authority has consistently rejected arguments that awards enforcing official time agreements are contrary to § 7131(d).¹⁴

Indeed, the Authority has applied this principle to reject the argument that an arbitrator’s construction of Article 7(A) – the same provision at issue in this case – is contrary to § 7131(d). Specifically, in *U.S. DHS, U.S. CBP, U.S. Border Patrol, El Paso, Texas (CBP, El Paso)*,¹⁵ the union grieved the agency’s denial of official time requests based on operational necessity. After examining the parties’ bargaining history, the arbitrator “interpreted Article 7(A) as a presumption that the official time requests of [u]nion officials participating in appropriate union activities will be granted,” and sustained the grievance because the agency had failed to establish legitimate grounds for denying the requests.¹⁶

Before the Authority, the agency argued that the award was contrary to § 7131 because the arbitrator did not “take into account whether granting the disputed requests was in the public interest.”¹⁷ Rejecting this argument, the Authority concluded that the award was not contrary to § 7131, because “the [a]rbitrator was simply enforcing appropriate terms and conditions for granting official time under § 7131(d).”¹⁸

The majority would distinguish *CBP, El Paso* because the agency there did not argue that the arbitrator’s interpretation of the parties’ official time agreement was unenforceable.¹⁹ And in the majority’s view, the Arbitrator’s award in the instant case is unenforceable because under § 7131(d), the Agency “must be permitted to gather the information that it needs to determine whether an official-time request is reasonable.”²⁰

But § 7131(d) does not dictate particular procedures that the parties must adopt to govern approval of official time, and the majority fails to cite a single Authority decision supporting its conclusion in this respect. To the contrary, the Authority has explicitly recognized that its precedent “does not establish specific requirements for official time requests.”²¹

Lacking supporting precedent, and faced with Authority case law consistently rejecting contrary-to-law arguments with respect to arbitrators’ interpretations of official-time agreements, the majority is left to argue that it “must” fill the “gap in our precedent” by setting aside the award because it rendered the parties’ agreement governing official-time requests “null and unenforceable.”²² But even this rationale is belied by the Arbitrator’s recognition of circumstances – discussed supra, and not present in the instant case – under which the Agency could require more information from the Union as a condition of approving an official-time request.

In sum, the majority’s decision is grounded upon nothing more than its own view of what the Agency should have negotiated as part of its official time agreement.²³ To conclude that the parties’ agreement, as plausibly interpreted by the Arbitrator, is unenforceable as a matter of law impermissibly intrudes upon the Union’s right to negotiate official time agreements under § 7131(d) and to have those agreements enforced through the negotiated grievance procedure.

¹³ *Cong. Research Emps. Ass’n, IFPTE, Local 75*, 64 FLRA 486, 491 (2010).

¹⁴ *See, e.g., id.* at 490 (rejecting union’s argument that award is contrary to law “because the Arbitrator misinterpreted § 7131 of the Statute by requiring more detail in reporting official time than either the Statute or the parties’ agreement requires”); *U.S. Dep’t of the Navy, Naval Mine Warfare Eng’g Activity, Yorktown, Va.*, 39 FLRA 1207, 1213 (1991) (rejecting argument that an arbitrator’s award “merely enforc[ing] his interpretation and application” of the parties’ official time agreement is contrary to § 7131(d)).

¹⁵ 61 FLRA 122 (2005).

¹⁶ *Id.* at 123.

¹⁷ *Id.*

¹⁸ *Id.* at 125.

¹⁹ Majority at 3 n.11.

²⁰ *Id.* at 3.

²¹ *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Big Spring, Tex.*, 62 FLRA 49, 51 (2007); *see also U.S. Dep’t of Commerce, Nat’l Oceanic & Atmospheric Admin., Nat’l Weather Serv.*, 36 FLRA 352, 362 (1990) (rejecting agency’s argument that arbitrator’s award was unenforceable under § 7131(d) by requiring official time award for time inefficiently spent, because “[t]he Statute does not define the terms ‘reasonable and necessary’ as used in § 7131(d)”).

²² Majority at 4.

²³ *See, e.g., U.S. Dep’t of the Navy, Naval Supply Sys. Command, Fleet Logistics Ctr.*, 70 FLRA 817, 819 (2018) (Dissenting Opinion of Member DuBester) (“[T]he majority is now in the business of rewriting parties’ contracts for them.”).