74 FLRA No. 16

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 172
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
CUSTOMS AND BORDER PROTECTION
CHICAGO, ILLINOIS
(Agency)

0-AR-5965

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DECISION

November 4, 2024

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko and Anne Wagner, Members

I. Statement of the Case

Arbitrator Richard Fincher issued an award finding that the Agency did not violate the law, the parties' national collective-bargaining agreement (national agreement), or a local memorandum of understanding (MOU) by changing the availability of a particular compressed work schedule, without first notifying and bargaining with the Union. The Arbitrator recognized that the Agency reduced the number of employees who could work a 4/10 schedule – consisting of four ten-hour workdays each week. However, the Arbitrator also determined that there was no obligation to notify or bargain with the Union because the parties already bargained over the matter, and the Agency did not terminate 4/10 schedules completely.

The Union has filed exceptions arguing that: (1) the Arbitrator exceeded his authority by failing to resolve an unfair-labor-practice (ULP) issue; (2) the award is contrary to § 7116(a)(5) of the Federal Service Labor-Management Relations Statute (the Statute),[1] §§ 6130 and 6131 of the Federal Employees Flexible and Compressed Work Schedules Act (the Work Schedules Act),[2] and the covered-by doctrine;[3] and (3) the award fails to draw its essence from the national agreement and MOU. For the reasons explained below, we deny the exceptions.

II. Background and Arbitrator's Award

The Agency performs law-enforcement duties related to the nation's borders, and the Union represents some Agency employees at one port of entry (employees). Once each year, the Agency reviews the port's operational data, including flight information for two airports, to determine the appropriate work schedules for employees. Under the Port Director's supervision, the Agency proposes a list of schedules, and the Union reviews and provides feedback on that proposal – after which the Agency may change the schedules that it ultimately makes available through announcements to employees. Then, according to their seniority and qualifications, employees "bid to" the announced schedules.[4] Based on the bidding results, the Agency assigns employees their schedules, which generally remain in place until the same process reoccurs the following year.

Compressed work schedules are a type of alternative work schedule. All employees in this case work one of two compressed work schedules. Most employees prefer a 4/10 schedule. Nevertheless, employees may work a 5-4/9 schedule, involving a week of four nine-hour workdays and one eight-hour workday, and another week of four nine-hour workdays. During the scheduling-proposal period in 2023, the Agency notified the Union that the Port Director intended to change all but two existing 4/10 schedules into 5-4/9 schedules for the next bid cycle. The Union protested and demanded negotiations before any changes occurred, but the Agency stated it had no obligation to negotiate. The parties had some discussions, and the Agency asked the Union whether it wanted to reopen the MOU, which is the parties' local agreement implementing alternative work schedules at their port. The Union declined to reopen the MOU but continued to demand negotiations over the reduction of 4/10 schedules. However, the Agency announced the available schedules without negotiating first. The announcements included roughly twenty-five 4/10 schedules, with the remainder being 5-4/9. As a

[1] 5 U.S.C. § 7116(a)(1), (5).
[2] *Id.* §§ 6130, 6131.
[3] The covered-by doctrine excuses parties from bargaining on the ground that they have already bargained and reached agreement concerning the matter at issue. *U.S. Dep't of VA*, 72 FLRA 781, 783 n.18 (2022) (citing *U.S. DOD, U.S. Air Force, 325th Fighter Wing, Tyndall Air Force Base, Fla.*, 66 FLRA 256, 260 (2006) (*Tyndall AFB*)).
[4] Award at 11 (quoting National Agreement Art. 13, pt. A, § 3(A)(6)).

result, after bidding, the Agency assigned more than 80% of the affected employees to 5-4/9 schedules.

The Union filed a grievance alleging violations of the Work Schedules Act, the Statute, the national agreement, and the MOU. The Agency denied the grievance, and the parties proceeded to arbitration on stipulated issues, including whether the Agency violated "relevant law," the national agreement, or the MOU "when it failed to give proper notice and bargain changes to alternative work schedules," and, if so, what an appropriate remedy would be.[5]

First, the Arbitrator addressed the Work Schedules Act, under which he found the Agency's bargaining obligations were "limited to the 'establishment' or 'termination' of a . . . compressed work schedule."[6] On that point, the Arbitrator found that the Agency did not terminate the 4/10 schedule option, and the Work Schedules Act did not require the Agency to bargain merely because more employees desired 4/10 schedules than the Port Director made available. Further, the Arbitrator determined that the Port Director's decision about how many 4/10 and 5-4/9 schedules to announce "falls outside the protections" of the Work Schedules Act.[7] Therefore, the Arbitrator concluded that the Agency did not violate the Work Schedules Act.

Next, the Arbitrator examined the Agency's contractual obligations. He began with Article 13, Part A of the national agreement (Article 13), which concerns "[b]id, [r]otation[,] and [p]lacement."[8] He found that Section 2 requires the Agency to engage in "consultation (not bargaining) with the Union" when making certain changes outside the annual bid process.[9] He also analyzed Section 3, which he described as "defin[ing] the procedures and timing applied by the Agency" during the annual bid process, "including the role of the Port Director."[10] In particular, the Arbitrator focused on Section 3(A)(6), which pertinently states: "During the bid process, employees will be permitted to bid to a . . . schedule that [is], consistent with the terms of this [a]greement, determined to be available by the Port Director."[11] The Arbitrator found this wording "determinative as to certain [m]anagement [r]ights during" the bid process[12] – in particular, the Port Director's right to decide how many 4/10 and 5-4/9 schedules to make available. As such, the Arbitrator concluded that Article 13 "does not create a bargaining obligation . . . when the Agency reduces biddable 4/10 schedules."[13]

Turning to Article 14 of the national agreement (Article 14), which concerns "[a]lternat[iv]e [w]ork [s]chedules,"[14] the Arbitrator noted that it requires local parties to negotiate their own agreement on alternative work schedules before employees in that locality may participate in such schedules, consistent with Article 14. Further, the Arbitrator noted that Section 7(A) allows "either party" to initiate local negotiations over the modification or termination of an "existing practice or local agreement" concerning alternative work schedules.[15] However, he found Section 7(A) inapplicable because neither party sought modification or termination of the MOU, and neither party argued that "prior 4/10 schedule[s] constituted a longstanding and binding past practice."[16] To the contrary, the Arbitrator observed that when the parties first adopted the MOU, the Agency did not offer 4/10 schedules at all, and the parties did not conduct additional negotiations before the Agency first offered 4/10 schedules. The Arbitrator also found Section 8 pertinent because it requires alternative work schedules to "reasonably align to staffing and workload requirements[,] and []not adversely impact operations" – which he stated "supports the discretion of the Port Director."[17] The Arbitrator noted that Section 11 outlines a process for modifying or terminating an alternative work schedule due to an adverse Agency impact, but he found that process inapplicable to the Port Director's exercise of contractual discretion to reduce the number of biddable 4/10 schedules. Having reviewed numerous sections of Article 14, the Arbitrator concluded that it "does not create a bargaining obligation when the Agency reduces biddable 4/10 schedules during an annual" bid process.[18]

Then, the Arbitrator assessed Article 26 of the national agreement, which he found sets forth the parties' agreed-upon policies for engaging in bargaining. He noted that Section 4 guarantees the Union the right to initiate "mid-term bargaining over proposed changes in conditions of employment with the *exception* of . . . [m]atters

[5] *Id.* at 1.
[6] *Id.* at 10; *see also* 5 U.S.C. §§ 6130(a)(1) ("[T]he establishment and termination of [a flexible or compressed work] schedule, shall be subject to . . . the terms of a collective[-]bargaining agreement between the agency and the [union]."), 6131(c)(3)(A) ("If an agency and a[union] have entered into a collective[-]bargaining agreement providing for use of a flexible or compressed schedule . . . and the . . . agency determines . . . to terminate a flexible or compressed schedule [due to an adverse agency impact], the agency may reopen the agreement to seek termination of the schedule involved.").
[7] Award at 10.
[8] *Id.* at 3 (italics omitted).
[9] *Id.* at 11 (citing National Agreement Art. 13, § 2(K), (L)).
[10] *Id.*
[11] *Id.* (quoting National Agreement Art. 13, § 3(A)(6)) (internal quotation marks omitted).
[12] *Id.*
[13] *Id.*
[14] *Id.* at 3 (italics omitted).
[15] *Id.* at 12.
[16] *Id.*
[17] *Id.*
[18] *Id.*

specifically addressed in this [a]greement or another negotiated agreement."[19] The Arbitrator found that Section 4's "exception to [the] duty to bargain . . . directly implicates Article 13 and 14, as matters plainly addressed in the [national agreement]."[20]

The Arbitrator also considered the MOU. He observed that Section 3 refers to the compressed work schedules available to employees – 4/10 and 5-4/9 – but that the MOU contains "no . . . commitment by the Agency to any proportion of schedules offered" in the annual bid process.[21] Section 5, according to the Arbitrator, was "at the heart of the dispute."[22] The Arbitrator found that section

> provides an open season for "yearly" realignments, as provided in the judgment of the Port Director. The Port Director "makes known" (informs) which work positions are available for the [alternative work schedules]. Alternative [work] schedules are assigned through the [bid] process and do not require bargaining because they are covered by Section 5[] of the MOU.[23]

Next, the Arbitrator noted that the MOU, like the national agreement, includes provisions for the modification or termination of alternative work schedules, including where the Agency alleges an adverse impact from the schedules. However, he concluded those MOU provisions were inapplicable for the same reason that similar provisions of the national agreement were inapplicable: The Agency did not modify or terminate the 4/10 schedule option.

Last, the Arbitrator noted that the MOU states it is not "intended . . . as a waiver of [Agency] rights or [Union] bargaining rights."[24] He found the waiver protections irrelevant to this dispute because the Union did not possess a right to bargain over the reduction of 4/10 schedules and, consequently, could not waive such a right. Instead, he determined that the "establishment of (annual) individual schedules to accomplish [the Agency's] mission remains management's right[, and t]he Union's bargaining rights are limited to the establishment or termination of" a schedule.[25]

For all the reasons above, the Arbitrator concluded that neither the national agreement nor the MOU gave the Union a right to bargain over reductions to 4/10 schedules. The Union argued that such a conclusion would effectively waive the Union's bargaining rights. The Arbitrator disagreed, finding the Union had exercised its bargaining rights by agreeing – in the national agreement and MOU – to recognize the Port Director's discretion over the schedules to make available during the annual bid process. The Arbitrator held the reduction of 4/10 schedules "is plainly covered by" the national agreement and the MOU, so "the question of waiver is not relevant."[26]

Although the Arbitrator did not devote a separate section of the award to analyzing ULP allegations, he identified the wording of § 7116(a)(5)[27] as the "relevant part" of the Statute.[28] Discussing that section, he wrote, "The [S]tatute provides that it shall be a[ULP] for an agency to refuse to consult or negotiate in good faith

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[19] *Id.* at 13 (quoting National Agreement Art. 26, § 4(A) (emphasis added in Award)).
[20] *Id.*
[21] *Id.*
[22] *Id.* at 14.
[23] *Id.*; *see* Opp'n, Attach. 2, MOU § 5(a). MOU Section 5's title, and Section 5(a)'s text, are:

> *Section 5: Procedures for Requesting, Changing*[,] *or Terminating* [*Alternative Work*] *Schedules or* [*Regular Days Off*]
> a. An open season to participate in an alternative work schedule will take place once a year along with Bid, Rotation[,] & Placement (BR&P). In conjunction with the yearly BR&P process contained in Article 13 of the [national agreement], management will make known which work positions are available for an alternative work schedule and the type of [alternative work schedule] being offered. Employees will then be assigned to those [alternative-work-schedule]-eligible positions through the BR&P process.

Opp'n, Attach. 2, MOU § 5(a) at 2.

[24] Award at 14 (omission in original) (quoting MOU § 7(b)).
[25] *Id.* at 15.
[26] *Id.*
[27] 5 U.S.C. § 7116(a)(5).
[28] Award at 3.

with a [union] as required by [the Statute]."[29] When analyzing Article 14, the Arbitrator had noted that some of its provisions require the negotiation and implementation of alternative work schedules to comply with the law in various ways.[30] Specifically, he noted that one section states the "[e]stablishment and termination of . . . scheduling options is subject to applicable law";[31] and another section states that, "[i]f the [U]nion invokes negotiations either at its own initiative or in response to an [Agency] proposal to terminate an existing local agreement or practice, changes will not be implemented until the 'bargaining obligations of law' are met."[32] The Arbitrator found that Article 14, alone and "in combination with other sources[,] does not create a bargaining obligation" in this case.[33] As previously mentioned, he found the disputed issues covered by the national agreement and the MOU. Moreover, the penultimate section of the award summarized that the Union had "lost the failure[-]to[-]bargain element" of its case.[34]

The Arbitrator concluded that, "[a]t all times, the two established [compressed-work-schedule] options remain[ed] available in the" bargaining unit.[35] The Arbitrator denied the grievance. The Union filed exceptions to the award on June 3, 2024, and the Agency filed an opposition on July 3, 2024.

III. Analysis and Conclusions

A. The Arbitrator did not exceed his authority by failing to address a ULP issue.

The Union argues that, to the extent the Arbitrator addressed a ULP issue, his analysis of that issue is contrary to law.[36] However, the Union also argues that, to the extent the Arbitrator did *not* address a ULP issue, he exceeded his authority by failing to address a stipulated issue.[37] As relevant here, arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration.[38]

As noted above, the Arbitrator did not devote a specific section of his award to the question of whether the Agency committed a ULP. He also did not expressly state that his findings about the Agency's bargaining obligations resolved a ULP issue. However, "[w]hen evaluating exceptions to an arbitration award, the Authority considers the award . . . as a whole."[39]

Initially, the Arbitrator identified the wording of § 7116(a)(5) of the Statute as the "relevant part" of the Statute for purposes of this case.[40] Section 7116(a)(5) makes it a ULP for an agency "to refuse to consult or negotiate in good faith with a [union],"[41] and the Arbitrator correctly summarized that rule at the beginning of the award.[42] In addition, the Arbitrator discussed the portions of Article 14 that require the Agency to satisfy the "bargaining obligations of law," as they relate to alternative work schedules.[43] Then, the Arbitrator held that Article 14 "*in combination with other sources*" did not require the Agency to negotiate the reduction of 4/10 schedules.[44] The only other "sources" the Arbitrator addressed in that section were the MOU and bargaining obligations under law, some of which are set forth in the Statute.[45] Thus, we infer that the Arbitrator's conclusion about Article 14 "in combination with other sources" addresses the Agency's bargaining obligations under law, including the Statute.[46]

Further, the Arbitrator found the Port Director's "right of discretion" to change 4/10 schedules was "covered by" the national agreement and the MOU.[47] As noted previously, the covered-by doctrine is an affirmative defense to an alleged failure-to-bargain ULP, under § 7116(a)(5) of the Statute.[48] As such, the Arbitrator's covered-by findings suggest that he determined the

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[29] *Id.*
[30] *See id.* at 11-12.
[31] *Id.* at 11 (quoting National Agreement Art. 14, § 1).
[32] *Id.* at 12 (quoting National Agreement Art. 14, § 13 (internal quotation marks added in Award)).
[33] *Id.*
[34] *Id.* at 16.
[35] *Id.*
[36] We address the Union's contrary-to-law arguments later in Part III.B.
[37] Exceptions Br. at 47.
[38] *E.g.*, *SPORT Air Traffic Controllers Org.*, 66 FLRA 547, 551 (2012).
[39] *U.S. DHS, U.S. CBP*, 69 FLRA 1, 3 (2015) (*DHS*); *see U.S. Dep't of VA, James A. Haley Veterans Hosp. & Clinics*, 73 FLRA 880, 884 (2024) (Member Kiko concurring on other grounds) (citing *U.S. Dep't of the Interior, Nat'l Park Serv.*, 73 FLRA 418, 420 (2023)).
[40] Award at 3.
[41] 5 U.S.C. § 7116(a)(5).
[42] Award at 3.
[43] *Id.* at 12 (quoting National Agreement Art. 14, § 13) (internal quotation marks omitted); *see also id.* at 11 ("Establishment and termination of such scheduling options is subject to applicable law." (quoting National Agreement Art. 14, § 1) (internal quotation mark omitted)).
[44] *Id.* at 12 (emphasis added).
[45] *Id.*
[46] *Id.*
[47] *Id.* at 15.
[48] *See, e.g.*, *U.S. Dep't of the Treasury, IRS*, 63 FLRA 616, 617 (2009) (*Treasury*) ("The 'covered[-]by' doctrine is a defense to a claim that an agency failed to provide a union with notice and an opportunity to bargain over changes in conditions of employment. In this regard, the 'covered[-]by' doctrine excuses parties from bargaining when they have already bargained and reached agreement concerning the matter at issue." (citation and footnote omitted)).

Agency did not commit a ULP under § 7116(a)(5). Moreover, the Arbitrator stated that the Union "lost the failure[-]to[-]bargain element" of its case,[49] and the Union had argued that the Agency committed a failure-to-bargain ULP.[50]

Reading the award as a whole, we find that the Arbitrator resolved a § 7116(a)(5) issue and that he concluded the Agency did not commit a ULP under that section.[51] As such, the Arbitrator did not fail to resolve a submitted issue, and we deny the exceeded-authority exception.

B. The award is consistent with law.

The Union argues the award is contrary to the Work Schedules Act, the Statute, and the covered-by doctrine. The Authority reviews questions of law raised by exceptions de novo.[52] In applying the standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[53] In making that assessment, the Authority defers to the arbitrator's underlying factual findings, unless the excepting party establishes they are based on nonfacts.[54]

1. The award is consistent with the Work Schedules Act.

The Union argues the award is contrary to §§ 6130 and 6131 of the Work Schedules Act.[55] As relevant here, § 6130 provides that "any . . . compressed work schedule, and the establishment and termination of any such schedule, shall be subject to . . . [the Work Schedules Act] and the terms of a collective[-]bargaining agreement between the agency and the [union]."[56] As pertinent here, § 6131 specifies that if parties "have entered into a collective[-]bargaining agreement providing for use of a . . . compressed schedule . . . and . . . the agency determines . . . to terminate a . . . compressed schedule [due to an adverse agency impact], the agency may reopen the agreement to seek termination of the schedule involved."[57]

The Union contends that the Authority has held "there is a duty to bargain *all aspects* of a compressed work schedule" under § 6130, so the Arbitrator erred when he held that the Agency did not have an obligation to bargain the reduction of 4/10 schedules.[58] In particular, the Union challenges the Arbitrator's finding that the Agency is obligated to bargain over only the establishment or termination of an alternative work schedule.[59] In addition, the Union asserts that the Agency modified the 4/10 schedule option by making it less available, and, consequently, § 6131 required the Agency to reopen the MOU or bargain over those modifications.[60]

To support its arguments about §§ 6130 and 6131, the Union relies on Authority precedent stating that the "Work Schedules Act is intended to include within the collective[-]bargaining process 'the institution, implementation, administration[,] and termination of alternative work schedules.'"[61] Further, the Union emphasizes precedent stating that "nothing in [§ 6130] . . . limits bargaining to [the] establishment and termination of schedules."[62] The Union asserts that this precedent directly undermines the Arbitrator's determinations about how the Work Schedules Act applies in this case.

Although the Union excepts to an *arbitrator's* application of the Work Schedules Act to the parties' dispute, most of the precedent on which the Union relies involves *negotiability* disputes.[63] In *that* context, where a union has offered wording to include in an alternative-work-schedules agreement, the Authority has repeatedly emphasized that agencies must bargain over the "institution, implementation, administration[,] and

[49] Award at 16.
[50] *See id.* at 6-7 (recording the Union's observation that "a grievance can allege both a statutory [ULP] violation and a contractual violation," and then summarizing the Union's arguments in favor of finding both types of violations).
[51] *See DHS*, 69 FLRA at 3 (considering award as a whole).
[52] *NFFE, Loc. 1953*, 72 FLRA 306, 306 (2021) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995)).
[53] *Id.* at 306-07 (citing *NFFE, Loc. 1437*, 53 FLRA 1703, 1710 (1998)).
[54] *Id.* at 307 (citing *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014)).
[55] *See* Exceptions Br. at 28-34; *see id.* at 28 (citing 5 U.S.C. § 6130), 33-34 (citing 5 U.S.C. § 6131).
[56] 5 U.S.C. § 6130(a)(1).
[57] *Id.* § 6131(c)(3)(A).
[58] Exceptions Br. at 29.
[59] *Id.* at 32.
[60] *Id.* at 33-34.
[61] *Id.* at 29-30 (quoting *AFGE, AFL-CIO, Loc. 2361*, 57 FLRA 766, 767 (2002) (*Loc. 2361*) (Chairman Cabaniss concurring) (quoting *NTEU*, 52 FLRA 1265, 1293 (1997) (quoting S. Rep. No. 97-365, at 14-15 (1982), *reprinted in* 1982 U.S.C.C.A.N. at 565, 576-77))).
[62] *Id.* at 30 (quoting *U.S. DOL, Wash., D.C.*, 59 FLRA 131, 135 (2003) (*DOL*) (Chairman Cabaniss concurring)).
[63] *Id.* (citing *Loc. 2631*, 57 FLRA at 767 (reviewing the negotiability of compressed-work-schedule proposal)); *see id.* at 30-31 (citing *Bureau of Land Mgmt., Lakeview Dist. Off., Lakeview, Or. v. FLRA*, 864 F.2d 89, 92 (9th Cir. 1988) (reviewing negotiability of alternative-work-schedules proposal); *NTEU*, 52 FLRA at 1293 (reviewing agency-head disapproval of provision specifying the bases for restricting or denying alternative work schedules)), 32-33 (citing *NFFE, Loc. 1998, IAMAW, Fed. Dist. 1*, 60 FLRA 141, 143-45 (2004) (*NFFE*) (Chairman Cabaniss dissenting) (reviewing negotiability of alternative-work-schedules proposal)).

termination of alternative work schedules."[64] In this case, however, the Arbitrator found that the parties had *already bargained* over the institution, implementation, administration, and termination of alternative work schedules; and their bargaining resulted in provisions of the national agreement and the MOU.[65] As a result, the Arbitrator found the Agency had no further obligation to bargain in this situation. Thus, the negotiability precedent on which the Union relies is inapposite here. Moreover, we note that reopening the MOU could have compelled the Agency to engage in further negotiations over the institution, implementation, administration, and termination of alternative work schedules, including 4/10 schedules; but the Arbitrator found that the Union expressly declined to reopen the MOU.[66]

Additionally, the Union argues that the Arbitrator's decision to focus on whether 4/10 schedules remained available to the bargaining unit as a whole, rather than available to individual employees, was legally erroneous.[67] The Union cites *NFFE, Local 1998, IAMAW, Federal District 1* (*NFFE*),[68] which the Union characterizes as requiring an agency to bargain before "terminat[ing] a negotiated work schedule for only three" employees.[69] In *NFFE*, the parties had negotiated eight work schedules, and the Agency completely eliminated three of them.[70] In other words, the Agency terminated three distinct *schedule options*, not three *individual employees' schedules*.[71] As such, *NFFE* does not support the notion that the Arbitrator was required to focus on whether 4/10 schedules were available to individual employees.[72] Consequently, the Union's argument lacks merit.

Further, where parties seek to apply or enforce an existing alternative-work-schedules agreement, the Authority has upheld arbitration awards that hold parties to their bargains, as the Arbitrator did here. For example, in *AFGE, Local 1709* (*Local 1709*), the arbitrator found an agency's disapproval of an employee's alternative-work-schedule request was consistent with the parties' agreement.[73] The union filed an exception based on § 6131 of the Work Schedules Act.[74] The Authority held: "[*B*]*y its terms, § 6131 applies to actions establishing and discontinuing schedules.* Nothing in § 6131 supports a conclusion that it applies to a situation . . . where a[] . . . schedule itself is not discontinued but, instead, its applicability to [an] employee is at issue."[75] Here, like in *Local 1709*, the Agency changed the availability of 4/10 schedules but did not discontinue them.[76] *Local 1709* supports the Arbitrator's conclusion that § 6131 does not mandate bargaining under such circumstances.

Relatedly, in *NTEU, Chapter 66* (*Chapter 66*), the agency moved a group of employees from one negotiated alternative work schedule to another.[77] The union argued the agency had "eliminated" a schedule for that group,[78] but the arbitrator found that the parties' agreement allowed schedule adjustments based on "the needs of the [a]gency to provide services."[79] Noting again that § 6131, "by its terms, applies to actions establishing and discontinuing schedules,"[80] the Authority found the arbitrator's award consistent with the Work Schedules Act because the agency did not discontinue a schedule. *Chapter 66* demonstrates that, just as the Arbitrator found in this case, changing the schedules of a group of employees does not, by itself, constitute the termination of a schedule.[81]

As a final point, the Union contends the Arbitrator erroneously held that the Agency's management rights limited negotiations over alternative work schedules, despite Authority precedent stating that management rights under § 7106 of the Statute do not limit such negotiations.[82] However, the Arbitrator repeatedly

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[64] *Loc. 2361*, 57 FLRA at 767 (quoting *NTEU*, 52 FLRA at 1293 (quoting S. Rep. No. 97-365, at 14-15 (1982), *reprinted in* 1982 U.S.C.C.A.N. at 565, 576-77)); *NTEU, Atlanta, Ga.*, 32 FLRA 879, 881 (1988) (quoting same legislative history); *AFSCME, Loc. 2027*, 28 FLRA 621, 623 (1987) (quoting same legislative history).

[65] Award at 12 ("[T]his dispute does not involve the establishment, implementation, or termination of the MOU, which still exists."); *see id.* at 13 (finding compressed work schedules covered by Articles 13 and 14), 14 (finding compressed work schedules covered by MOU Section 5).

[66] *Id.* at 6; *see also id.* at 15 ("Unlike other cases, there are no open negotiations here. . . . The MOU continues as normal.").

[67] Exceptions Br. at 32.

[68] *NFFE*, 60 FLRA 141.

[69] Exceptions Br. at 32.

[70] *NFFE*, 60 FLRA at 141 ("The proposals were submitted in response to the [a]gency's decision to terminate three of eight . . . schedules.").

[71] *Id.* ("The Agency terminated the three schedules that had the earliest possible start times.").

[72] *See* Award at 10 (finding the Work Schedules Act's bargaining obligation "is limited to the 'establishment' or 'termination' of a . . . work schedule"), 15 ("No [compressed work schedule] was terminated.").

[73] 57 FLRA 711, 711 (2002).

[74] *Id.* at 712.

[75] *Id.*

[76] *See* Award at 14 ("[A] compressed schedule is still very much a scheduling option, but the availability of the two options is determined by operational needs . . . .").

[77] 63 FLRA 512, 512-13 (2009).

[78] *Id.* (internal quotation marks omitted).

[79] *Id.* at 513.

[80] *Id.* at 514.

[81] *See* Award at 15 ("No [compressed work schedule] was terminated.").

[82] Exceptions Br. at 29-30 (citing *Loc. 2631*, 57 FLRA at 767; *DOL*, 59 FLRA at 135).

stated that the "management right" to which he referred was the Port Director's *contractual* "right of discretion" to vary the number of 4/10 schedules.[83] In other words, these management-right references were part of the Arbitrator's application and enforcement of the parties' agreements, not § 7106 of the Statute.[84] Section 6130 of the Work Schedules Act makes "any . . . compressed work schedule . . . subject to . . . the terms of [the parties'] collective[-]bargaining agreement[s],"[85] so the Arbitrator's application and enforcement of those agreements does not violate the Work Schedules Act.

Consequently, we find the award consistent with §§ 6130 and 6131 of the Work Schedules Act, and we reject the Union's arguments to the contrary.

2. The award is consistent with § 7116(a)(1) and (5) of the Statute and the covered-by doctrine.

The Union argues the award is contrary to § 7116(a)(5) of the Statute and the covered-by doctrine.[86] When resolving a grievance that alleges a ULP under the Statute, an arbitrator must apply the same standards and burdens that an Authority administrative law judge applies in a ULP proceeding under § 7118 of the Statute.[87]

As mentioned in the exceeded-authority analysis earlier, the covered-by doctrine is an affirmative defense to an alleged failure-to-bargain ULP, under § 7116(a)(5) of the Statute.[88] Because the Union's arguments about § 7116(a)(5) and the covered-by doctrine are closely related, we address them together.

Initially, the Union contends the Agency waived its covered-by defense because, according to the Union, the Agency "never made this argument before it did so in its [post-hearing] brief."[89] However, the Union's contention is incorrect. As the Agency asserts in its opposition brief, and as the transcript establishes, the Agency raised its covered-by defense for the first time in its opening statement,[90] and cited specific negotiated provisions to support the defense.[91] Consequently, the Union's waiver argument is without merit.

Separately, the Union alleges the Arbitrator failed to properly apply the Authority's covered-by framework.[92] That framework has two prongs.[93] Under the first prong, the Authority considers whether the subject matter of a change is expressly contained in the parties' agreement.[94] If a matter is not expressly contained in an agreement, then, under the second prong, the Authority assesses whether the matter is inseparably bound up with a subject expressly covered by the agreement.[95] However, the framework has an additional caveat: The covered-by doctrine does not excuse a failure to bargain when an agreement "specifically contemplates" additional bargaining over the matter.[96]

The change in this case was the Port Director's reduction of 4/10 schedules, and the Arbitrator found it covered by several negotiated provisions,[97] including: (1) Article 13, Section 3(A)(6), which says that employees may bid to "schedule[s] that are, consistent with the terms of this [a]greement, determined to be available by the Port Director";[98] (2) Article 14, Section 8, providing that alternative work schedules must "reasonably align to staffing and workload requirements, and not adversely

[83] Award at 15; *see also id.* at 13 (finding Article 13, Section 3(A)(6) is "determinative as to certain [m]anagement [r]ights during the" bid process – specifically, the Port Director's right to determine which schedules are "available"), 15 (interpreting Article 13 and the MOU, and finding "[t]he establishment of (annual) individual schedules to accomplish its mission remains management's right").

[84] *Cf. Chapter 66*, 63 FLRA at 513-14 (where arbitrator interpreted parties' agreement to provide agency the right to adjust schedules based on agency's needs, and agency complied with that agreement, Authority found award consistent with Work Schedules Act).

[85] 5 U.S.C. § 6130(a)(1).

[86] *See* Exceptions Br. at 37-47.

[87] *AFGE, Loc. 3954*, 72 FLRA 403, 404 (2021) (Member Abbott concurring) (citing *U.S. Dep't of VA, Bd. of Veterans Appeals*, 68 FLRA 170, 174 (2015) (Member Pizzella dissenting on other grounds); *NTEU*, 61 FLRA 729, 732 (2006); *AFGE, Loc. 3529*, 57 FLRA 464, 465 (2001)).

[88] *See, e.g.*, *Treasury*, 63 FLRA at 617 & n.2.

[89] Exceptions Br. at 38-39 (citing *SSA, Region VII, Kan. City, Mo.*, 70 FLRA 106 (2016)).

[90] Opp'n Br. at 15 (arguing the premise of the Union's claim that the Agency waived its covered-by defense "is demonstrably false," as evidenced by the transcript); Opp'n, Attach. 3, Tr. at 30 (Agency representative begins opening statement by saying "the situation giving rise to this dispute is covered by the negotiated provisions of the [national agreement] . . . and the . . . MOU[] between the parties").

[91] Opp'n, Attach. 3, Tr. at 34 (explaining that "Article 14, . . . which governs [alternative work schedules, and the] MOU . . . [were] bargained and signed by the parties[, and t]his bargaining fulfilled the Agency's obligation to bargain").

[92] *See* Exceptions Br. at 41-47.

[93] *See Tyndall AFB*, 66 FLRA at 260.

[94] *See id.* (citing *U.S. Customs Serv., Customs Mgmt. Ctr., Mia., Fla.*, 56 FLRA 809, 813-14 (2000) (*Customs*)).

[95] *Id.* (citing *Customs*, 56 FLRA at 813-14).

[96] *See Ass'n of Admin. L. Judges, IFPTE*, 72 FLRA 302, 303 (2021) (Member Abbott concurring).

[97] *See* Award at 14 (finding the process for the Port Director to determine which schedules are available to employees was covered by Article 14 and the MOU), 15 (finding the Union did not waive bargaining rights, but rather already exercised them, because the reduction of biddable 4/10 schedules was covered by Articles 13 and 14, as well as the MOU).

[98] *Id.* at 11 (quoting National Agreement Art. 13, § 3(A)(6)).

impact operations";[99] and (3) MOU Section 5, which the Arbitrator found to authorize "'yearly' realignments, as provided in the judgment of the Port Director" – who must then "'make[] known' . . . which positions are available" for alternative work schedules.[100]

The Union argues that the caveat to the covered-by defense applies in this case because the national agreement specifically contemplates additional local bargaining over alternative work schedules.[101] Indeed, the Arbitrator found Article 14 contemplates additional bargaining.[102] However, the Arbitrator also found the parties already engaged in that additional bargaining and adopted the MOU. Thus, this case is unlike *U.S. DOJ, Federal BOP, Federal Correctional Institution Williamsburg, Salters, South Carolina* (*BOP*)[103] – on which the Union relies[104] – because the national agreement in *BOP* authorized local bargaining but the parties had *not* engaged in such bargaining.[105] Moreover, the Union does not establish that the MOU, as the Arbitrator interpreted and applied it, contemplates still further bargaining.[106] Thus, the caveat to the covered-by defense does not apply here.

All of the Union's other attempts to show that the Arbitrator did not properly apply the covered-by framework merely repeat arguments about the Work Schedules Act that we have already addressed.[107] For the same reasons we previously rejected them, these arguments do not establish that the Arbitrator misapplied the covered-by doctrine.

Because the Agency established its covered-by defense, there is no basis to conclude the Agency committed a failure-to-bargain ULP under § 7116(a)(5) of the Statute. Thus, the award is consistent with the covered-by doctrine and § 7116(a)(5). The Union also argues the award is contrary to § 7116(a)(1) of the Statute but offers no distinct arguments for finding a ULP under that section.[108] It appears the Union cites § 7116(a)(1) only to establish a derivative violation, in the event its § 7116(a)(5) claim is successful.[109] Therefore, because we find the award consistent with § 7116(a)(5), we likewise find it consistent with § 7116(a)(1).[110]

We deny the contrary-to-law exception accordingly.

C. The award draws its essence from the MOU and Articles 13 and 14.

The Union argues the Arbitrator's finding that the Agency did not violate the national agreement or the MOU fails to draw its essence from Articles 13 and 14, as well as the MOU.[111] The Authority will find that an arbitration award is deficient as failing to draw its essence from a collective-bargaining agreement when the excepting party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences

[99] *Id.* at 12 (citing National Agreement Art. 14, § 8).
[100] *Id.* at 14 (quoting MOU § 5(a)).
[101] *See* Exceptions Br. at 42.
[102] Award at 11 (quoting National Agreement Art. 14, § 1 ("[E]mployees covered by this [a]greement may participate in a flexible or compressed work schedule only to the extent expressly provided under a locally negotiated agreement.")); *see id.* at 3 ("Pursuant to Article 14 . . . , the parties negotiated a local MOU . . . .").
[103] 68 FLRA 580, 582-83 (2015) (Member Pizzella dissenting).
[104] Exceptions Br. at 44.
[105] *See BOP*, 68 FLRA at 582-83.
[106] *See* Award at 12 ("[T]his dispute does not involve the establishment, implementation, or termination of the MOU, which still exists."); *see id.* at 13 (finding compressed work schedules covered by Articles 13 and 14). We evaluate the Union's essence arguments later in Part III.C.
[107] *See* Exceptions Br. at 43-44 (arguing the Arbitrator's covered-by finding "incorrectly limits the broad bargaining mandate of the [Work Schedules Act]," and contending the Arbitrator's application of the Work Schedules Act was the "fatal flaw" in his covered-by analysis), 45 (arguing the Arbitrator failed to interpret Articles 13 and 14 "in light of the [Work Schedules Act] bargaining rights"), 46 (asserting the Arbitrator's application of MOU Section 5 is "premised . . . on his unfounded reading [of the Work Schedules Act]"), 47 ("The Arbitrator has conflated this covered-by analysis by not applying the [two]-prong test [and adopting] . . . the erroneous legal conclusion that the [Work Schedules Act] is not applicable . . . .").
[108] 5 U.S.C. § 7116(a)(1); *see* Exceptions Br. at 3, 34, 36-37.
[109] *See* Exceptions Br. at 37 ("The statutory duty to bargain is contained at 5 U.S.C. [§]7116(a)(1) and (5) . . . [,] and the Arbitrator was required to address it.").
[110] *See U.S. Dep't of VA, Wash. Reg'l Off.*, 58 FLRA 261, 261 (2002) (explaining that a violation of § 7116(a)(5) likewise supports finding a "derivative violation" of § 7116(a)(1), "that is, an interference with employee rights that flows from another violation under the Statute" (citing *U.S. DOD, Dep't of the Air Force, Headquarters 47th Flying Training Wing (ATC), Laughlin Air Force Base, Tex.* 18 FLRA 142, 167 (1985))).
[111] *See* Exceptions Br. at 47-55.

a manifest disregard of the agreement.[112] Disputes about an arbitrator's evaluation of evidence do not demonstrate that an award fails to draw its essence from an agreement.[113]

First, the Union challenges the Arbitrator's interpretation of Article 13, Section 3(A)(6),[114] which states, "During the bid process, employees will be permitted to bid to a . . . schedule that [is], consistent with the terms of this [a]greement, determined to be available by the Port Director."[115] According to the Union, the phrase "determined to be available by the Port Director" does not authorize the Port Director to reduce 4/10 schedules "without bargaining just because the Agency makes those changes at the same time as the annual" bid process.[116] The Union asserts the "Agency provided no evidence to support" this interpretation,[117] there are "no facts" to support it,[118] and the Arbitrator "ignore[d] evidence" from the Union about the section's meaning.[119] These assertions merely dispute the Arbitrator's evaluation of evidence, and they cannot support an essence challenge.[120]

Continuing its challenges concerning Section 3(A)(6), the Union argues the Arbitrator "failed to contend with" a Union argument about a purportedly related provision – Article 13, Section 2(L).[121] The Union asserts that if the Arbitrator had more closely examined Section 2(L) and other provisions of Article 13, that examination would have shown that Article 13, as a whole, is not about alternative work schedules.[122] For this reason, according to the Union, the Arbitrator should not have relied on Article 13's provisions to determine the Port Direction's authority over 4/10 schedules.[123] This argument elides an essential part of the Arbitrator's analysis: *Only Article 13 and the MOU lay out the bid process that applies to all schedules*, whether alternative or not.[124] Therefore, it was not irrational, unfounded, implausible, or in manifest disregard of Article 13, Section 3(A)(6) for the Arbitrator to find that its wording about the Port Director's discretion applies to the bid process for compressed work schedules.[125]

In addition, the Union contends the award fails to draw its essence from Article 14 and the MOU.[126] Some of the Union's arguments about Article 14 and the MOU are the same as its earlier arguments about the Work Schedules Act.[127] For the reasons we rejected them earlier, we likewise reject them as bases for granting the Union's essence exception.[128]

Finally, the Union asserts that the Arbitrator's interpretations of Article 13, Article 14, and the MOU effectively waive the Union's bargaining rights.[129] The Arbitrator addressed this assertion in the award. He found that the Union *exercised*, not waived, its bargaining rights by agreeing to recognize the Port Director's discretion over the schedules to make available during the annual bid process.[130] The Union has not shown that this finding is irrational, unfounded, implausible, or in manifest disregard of Article 13, Article 14, or the MOU.[131] Thus, the Union has not established that the award fails to draw its essence from the national agreement or the MOU.

Consistent with the foregoing analysis, we deny the essence exception.

IV. Decision

We deny the exceptions.

[112] *E.g., U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Yazoo City, Miss.*, 73 FLRA 620, 622 (2023) (*Yazoo City*) (citing *NTEU, Chapter 149*, 73 FLRA 413, 416 (2023)).
[113] *AFGE, Loc. 3601*, 73 FLRA 515, 518 (2023) (*Loc. 3601*) (citing *AFGE, Loc. 3911*, 69 FLRA 233, 236 (2016)); *U.S. Dep't of the Army, Mil. Dist. of Wash., Fort Myer, Va.*, 72 FLRA 772, 774 & n.21 (2022) (*Army*) (citing *AFGE, Loc. 2516*, 72 FLRA 567, 570 (2021)).
[114] Exceptions Br. at 49-50.
[115] Award at 11 (quoting National Agreement Art. 13, § 3(A)(6)).
[116] Exceptions Br. at 51.
[117] *Id.* at 50.
[118] *Id.*
[119] *Id.* at 50 n.5.
[120] *See Loc. 3601*, 73 FLRA at 518; *Army*, 72 FLRA at 774 & n.21.
[121] Exceptions Br. at 50-51.
[122] *Id.* at 49-51 (noting Section 2(L) cross-references Article 34, and Article 34 says it "do[es] not apply to alternative work schedules" (quoting National Agreement Art. 34, § 2)).
[123] *Id.* at 51 ("The only conclusion that could be drawn . . . is that the schedules referenced in Article 13 are not [alternative work] schedules . . . .").
[124] *See* Award at 11 (finding that Article 13, Section 3 "defines the procedures and timing applied by the Agency [during the bid process], including the role of the Port Director"), 15 (finding that, in Article 13 and MOU Section 5, "the Union negotiated the discretion of annual biddable 4/10 schedules to the Port Director, and the MOU did not modify or retract this right of discretion by the Port Director").
[125] *See Yazoo City*, 73 FLRA at 622.
[126] Exceptions Br. at 52-55.
[127] *Id.* at 52-53 (arguing the award fails to draw its essence from Article 14, Section 11 and MOU Section 6(b) because bargaining obligations under the Work Schedules Act are not limited to circumstances where a compressed work schedule is terminated), 54 (arguing the Arbitrator's interpretation of MOU Section 7(b) is deficient because it "is posited on his incorrect interpretation of the [Work Schedules Act]").
[128] *See Fed. Educ. Ass'n, Stateside Region*, 72 FLRA 724, 726-27 (2022) (denying an essence exception premised on a previously rejected contrary-to-law claim); *NFFE, Loc. 376*, 67 FLRA 134, 136 (2013) (same).
[129] Exceptions Br. at 51-52 (Article 13), 54-55 (Article 14 and MOU).
[130] Award at 15.
[131] *See Yazoo City*, 73 FLRA at 622.