

**BEFORE THE ARBITRATOR
WILLIAM E. PERSINA**

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NATIONAL TREASURY EMPLOYEES UNION,)	
CHAPTER 245,)	
Union)	
and)	FMCS Case No. 201209-02062
)	
DEPARTMENT OF COMMERCE,)	
UNITED STATES PATENT AND)	
TRADEMARK OFFICE,)	
Agency)	
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DECISION AND AWARD

I. Overview and Procedural History

The parties agreed to submit the above-referenced case to the Arbitrator for decision based on written submissions. They submitted opening briefs to the undersigned on July 20, 2020, and reply briefs on August 28, 2020. The record evidence, the legal authorities cited, and the parties' contentions and arguments have been fully considered in the preparation and issuance of this Decision and Award.

The grievant is the National Treasury Employees Union, Chapter 245 (Union), which filed the subject institutional grievance on behalf of all affected bargaining unit employees. The bargaining unit the Union represents consists of all professional Trademark Attorneys and Examiners within the framework of the Trademark Examining Operation of the Patent and Trademark Office and Interlocutory Attorneys within the Trademark Trial and Appeal Board of the U.S. Department of Commerce, Patent and Trademark Office (Agency). The Union and the

Agency were governed by a collective bargaining agreement (Agreement) they negotiated, covering all unit employees, at all times relevant to this case.

The Union filed the subject grievance with the Agency on November 5, 2019. As discussed in more detail below, the grievance alleges that the Agency violated various provisions of the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §§ 7101 *et seq.* and the parties' Agreement when the Agency, on October 7, 2019, announced its intention to implement immediately Executive Orders (EOs) 13,836 and 13,837. These EOs respectively dealt with federal sector collective bargaining practices, including bargaining on permissive matters under section 7106(b)(1) of the Statute; and official time use by union representatives.¹ The Agency denied the grievance on November 18, 2019. The Union then invoked arbitration pursuant to the Agreement. The undersigned was notified by the Federal Mediation and Conciliation Service that he was appointed to serve as arbitrator in this case.

II. Statement of the Issues

The parties jointly agreed to the following issues in the case:

1. Whether the Agency violated the Federal Service Labor-Management Relations Statute, 5 U.S.C. Ch. 71, when implementing Executive Orders 13836, § 6, and 13837, §§ 4(a), 4(b), and 5(b); and
2. If so, what shall be the remedy?

¹ "Official time" refers to time made available to federal employee union representatives to engage in union activities such as grievance processing and collective bargaining negotiations during working hours. Such time is authorized in section 7131 of the Statute. Section 7131(d) allows for unions and federal agencies to negotiate the amount of official time that will be made available to union representatives to perform representational activities other than engaging in bargaining and appearing at FLRA proceedings (which are covered under section 7131(a) and (c)) "in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest."

III. Relevant Provisions of Statute, Executive Order and Collective Bargaining Agreement

A. The Agreement

Article 21 – Duration

Section 1

This Agreement shall be approved by the head of the agency within 30 days after it is executed by the parties. It shall be effective on the date it is approved by the head of the agency or, absent approval or disapproval, on the 31st day after execution. It shall remain in full force and effect for three (3) years after the effective date. Thereafter, the Agreement shall be automatically renewed annually unless either party gives written notice of intent to terminate to the other. Such notice of intent to terminate shall be given not sooner than 180 days before the termination date and not less than 120 days before the termination date. Once such notice is given, the moving party must submit its proposal(s) to the other party not less than 120 calendar days before the termination date. The party receiving the proposals may submit counterproposals and/or proposals to the other party during the next 45 day period. The parties shall begin negotiations no later than 30 days prior to the termination date. This Agreement will remain in effect for four months after expiration to permit conclusion of negotiations.

Article 5 – Management Rights

* * * * *

Section 2

The Office specifically retains the right to make decisions concerning the numbers, types and grades of employees or positions assigned to any organizational subdivision, work project or tour of duty, or on the technology, methods and means of performing work. However, nothing in this section shall preclude the Office, at its election, from negotiating with the Union over the foregoing.

B. The Statute

5 U.S.C. § 7106 – Management Rights

* * * * *

b) Nothing in this section shall preclude any agency and any labor organization from negotiating-

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

5 U.S.C. § 7116(a) – Unfair Labor Practices

For the purpose of this chapter, it shall be an unfair labor practice for an agency-

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

* * * * *

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

* * * * *

(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

5 U.S.C. § 7117(a)(1)

Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

5 U.S.C. § 7131 – Official Time

(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official

time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

(b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a non-duty status.

(c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.

(d) Except as provided in the preceding subsections of this section-

(1) any employee representing an exclusive representative, or

(2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative, 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.

C. The Executive Orders

EO 13,837

Sec. 4. Employee Conduct with Regard to Agency Time and Resources.

(a) To ensure that Federal resources are used effectively and efficiently and in a manner consistent with both the public interest and section 8 of this order, all employees shall adhere to the following requirements:

(i) Employees may not engage in lobbying activities during paid time, except in their official capacities as an employee.

(ii) (1) Except as provided in subparagraph (2) of this subsection, employees shall spend at least three-quarters of their paid time, measured each fiscal year, performing agency business or attending necessary training (as required by their agency), in order to ensure that they develop and maintain the skills necessary to perform their agency duties efficiently and effectively.

(2) Employees who have spent one-quarter of their paid time in any fiscal year on non-agency business may continue to use taxpayer-funded union time in that fiscal year for purposes covered by sections 7131(a) or 7131(c) of title 5, United States Code.

(3) Any time in excess of one-quarter of an employee's paid time used to perform non-agency business in a fiscal year shall count toward the limitation set forth in subparagraph (1) of this subsection in subsequent fiscal years.

(iii) No employee, when acting on behalf of a Federal labor organization, may be permitted the free or discounted use of government property or any other agency resources if such free or discounted use is not generally available for non-agency business by employees when acting on behalf of non-Federal organizations. Such property and resources include office or meeting space, reserved parking spaces, phones, computers, and computer systems.

(iv) Employees may not be permitted reimbursement for expenses incurred performing non-agency business, unless required by law or regulation.

(v) (1) Employees may not use taxpayer-funded union time to prepare or pursue grievances (including arbitration of grievances) brought against an agency under procedures negotiated pursuant to section 7121 of title 5, United States Code, except where such use is otherwise authorized by law or regulation.

(2) The prohibition in subparagraph (1) of this subsection does not apply to:

(A) an employee using taxpayer-funded union time to prepare for, confer with an exclusive representative regarding, or present a grievance brought on the employee's own behalf; or to appear as a witness in any grievance proceeding; or

(B) an employee using taxpayer-funded union time to challenge an adverse personnel action taken against the employee in retaliation for engaging in federally protected whistleblower activity, including for engaging in activity protected under section 2302(b)(8) of title 5, United States Code, under section 78u-6(h)(1) of title 15, United States Code, under section 3730(h) of title 31, United States Code, or under any other similar whistleblower law.

(b) Employees may not use taxpayer-funded union time without advance written authorization from their agency, except where obtaining prior approval is deemed impracticable under regulations or guidance adopted pursuant to subsection (c) of this section.

Sec. 5 - Preventing Unlawful or Unauthorized Expenditures.

* * * * *

(b) As soon as practicable, but not later than 180 days from the date of this order, to the extent permitted by law, each agency shall develop and implement a procedure governing the authorization of taxpayer-funded union time under section 4(b) of this order. Such procedure shall, at a minimum, require a requesting employee to specify the number of taxpayer-funded union time hours to be used and the specific purposes for which such time will be used, providing sufficient detail to identify the tasks the employee will undertake. That procedure shall also allow the authorizing official to assess whether it is reasonable and

necessary to grant such amount of time to accomplish such tasks. For continuing or ongoing requests, each agency shall require requests for authorization renewals to be submitted not less than once per pay period. Each agency shall further require separate advance authorization for any use of taxpayer-funded union time in excess of previously authorized hours or for purposes for which such time was not previously authorized.

EO 13,836

Sec. 6 - Permissive Bargaining.

The heads of agencies subject to the provisions of chapter 71 of title 5, United States Code, may not negotiate over the substance of the subjects set forth in section 7106(b)(1) of title 5, United States Code, and shall instruct subordinate officials that they may not negotiate over those same subjects.

IV. Statement of the Facts

The parties stipulated to the following statement of facts in the case.

The USPTO–NTEU 245 Collective Bargaining Agreement

1. NTEU 245’s bargaining-unit employees are all professional Trademark Attorneys and Examiners within Trademark Operations and Interlocutory Attorneys within the Trademark Trial and Appeal Board employed by the Agency.
2. NTEU 245 and the USPTO entered into a Collective Bargaining Agreement, effective January 19, 2001 (“CBA”). See Exhibit A.
3. The initial three-year term of the CBA ended on January 18, 2004.
4. Article 21 of the CBA provides that, following the initial three-year term, the agreement “shall be automatically renewed annually unless either party gives written notice of intent to terminate to the other.”
5. The CBA automatically renewed as of January 19, 2019 for a one-year term.
6. The Agency gave timely notice of its intent to terminate the CBA on September 3, 2019.
7. Pursuant to Article 21, the CBA automatically renewed as of January 19 every year until the last “rollover term” concluded on January 18, 2020.
8. Article 21 also provides that at the conclusion of the last rollover term, the CBA “will remain in effect for four months after expiration to permit conclusion of negotiations.”

The Executive Orders

9. On May 25, 2018, President Trump issued Executive Orders 13836, 13837, and 13839 (the “Executive Orders”). See Exhibits B.1-B.3. All three Executive Orders relate to federal labor-management relations and collective bargaining in the federal sector.

10. On July 5, 2018, the Office of Personnel Management (“OPM”) issued guidance related to the Executive Orders. See Exhibit C.
11. On August 24, 2018, Judge Ketanji Jackson of the United States District Court for the District of Columbia declared that Sections 5(a), 5(e), and 6 of Executive Order 13836; Sections 3(a), 4(a), and 4(b) of Executive Order 13837; and Sections 3, 4(a), and 4(c) of Executive Order 13839 were invalid and issued an injunction preventing them from going into effect.
12. The government appealed Judge Jackson’s ruling to the United States Court of Appeals for the District of Columbia Circuit.
13. On July 16, 2019, the Court of Appeals issued an opinion reversing Judge Jackson’s decision on jurisdictional grounds. Accordingly, the court vacated her ruling on the merits.
14. The Court of Appeals mandate issued on October 3, 2019, lifting the previous court-ordered stay on enforcement of the Executive Orders.
15. On October 11, 2019, President Trump issued a “Presidential Memorandum on Executive Orders 13836, 13837, and 13839.” See Exhibit D. USPTO’s Notice of Immediate Implementation
16. On October 7, 2019, the USPTO sent a notice to NTEU 245, indicating that the Agency intended to immediately implement certain provisions of the Executive Orders (“the Notice”). See Exhibit E.2.
17. The Notice specified three provisions as those requiring “immediate action by USPTO and/or NTEU 245 to conform to government-wide rule”:
- EO 13,836 § 6, which prohibits agencies from negotiating ‘over the substance of the subjects set forth in [5 U.S.C. §] 7106(b)(1).’
 - EO 13,837 §4(a), which places caps on individuals’ use of official time, and prohibits, among other things, the use of official time to ‘prepare or pursue’ most grievances.
 - EO 13,837 § 4(b), as implemented in § 5(b), which requires:
 - official time to be requested in writing in advance,
 - specification in those requests of “the number of ... hours to be used and the specific purposes for which such time will be used ... providing sufficient detail to identify the tasks the employee will undertake,”
 - advance written approval before the official time may be used, and
 - that non-compliance with these requirements be treated as absence without leave (AWOL).
18. The Notice further informed the Union that the Office of Human Resources had developed a SharePoint site “for requesting and approving official time in advance.”
19. Following the Agency’s October 7, 2019 Notice, the Union submitted proposals for post-implementation bargaining over the Executive Orders on October 17, 2019. On February 28, 2020, the Union withdrew its request for post-implementation bargaining. NTEU’s Grievance.

20. On November 5, 2019, the Union filed an institutional grievance alleging that in issuing the Notice and implementing the Executive Orders, the Agency committed several unfair labor practices (“ULPs”), violated various statutory provisions, and violated Article 33, Section 2 of the CBA by failing to commence negotiations over the implementation of the Executive Orders. See Exhibits E.1-E.4.

21. The Agency denied the grievance and the remedies requested therein on November 18, 2019. See Exhibit F.

22. The Union timely invoked arbitration pursuant to Article 11 of the CBA on November 19, 2019.

23. The Union has now withdrawn its claim that the Agency violated Article 33, Section 2 of the CBA.

Use of Official Time by NTEU 245 Chapter Leaders

24. ██████████ has been the Chapter President of NTEU 245 since January 1, 2019.

25. ██████████ claimed 331.5 hours of official time between October 1, 2019, and February 29, 2020.

26. ██████████ claimed 1752.5 hours of official time in FY2019 (October 1, 2018 through September 30, 2019) and 1190.75 hours of official time for FY2018 (October 1, 2017 through September 30, 2018).

27. ██████████ has been the Executive Vice President of NTEU 245 for approximately 15 years.

28. ██████████ requested 8 hours of annual leave on October 9, 2019, 6 hours of annual leave on October 10, 2019, and 6 hours of annual leave on October 11, 2019. Her request for annual leave was granted.

29. On October 8, 2019, ██████████ requested 2 hours of official time for a meeting requested by management officials. This request was approved on October 9, 2019.

30. On the morning of October 17, 2019, ██████████ requested 1.5 hours of official time. This request was approved on October 21, 2019. ██████████ was paid for 1.5 hours of official time on October 17, 2019.

31. At no point between the Agency’s implementation of the Executive Orders and the filing of the Union’s instant grievance did the Agency deny any requests by ██████████ for official time to prepare NTEU 245’s bargaining proposals in response to the Notice.

32. ██████████ claimed 476 hours of official time in FY2019 (October 1, 2018 through September 30, 2019) and 510 hours of official time for FY2018 (October 1, 2017 through September 30, 2018).

33. Since the implementation of the Executive Orders, NTEU 245 members must request official time in advance, through SharePoint.

34. NTEU 245 members who claim official time that has not been approved run the risk of being considered AWOL or facing disciplinary action.

V. Positions of the Parties²

A. The Union

The Union first argues that the Agency committed ULPs under section 7116(a)(7) of the Statute because it enforced the EOs while the Agreement was in effect. The Union asserts that the EOs constitute government-wide regulations within the meaning of section 7116(a)(7) that contained provisions that conflict with provisions of the parties' Agreement. The Union rejects the Agency's argument that, but for the district court's injunction against implementation of certain provisions of EOs 13,836 and 13,837, issued on August 24, 2018, the Agency would have been able to implement the EOs upon termination of the Agreement under Article 21 on January 19, 2019.³ The Union argues further that the Agency's action was contrary to the EOs themselves, which directed agencies to continue to observe the terms of agreements in effect when the EOs were issued.

The Union goes on to argue that the Agency's implementation of the EOs was a ULP under section 7116(a)(8) of the Statute because the challenged provisions of the EOs are themselves contrary to the Statute. More specifically, the Union asserts that EO 13,837, sections 4(a) and (b) and section 5(b) are contrary to section 7131 of the Statute; and that EO 13,836, section 6, is contrary to section 7106 of the Statute. The Union claims that the Arbitrator has the authority to find provisions of the EOs to be contrary to law. It also goes on to argue that the

² The parties' positions are summarized here, as they will be addressed in greater detail in the Discussion part of this Decision.

³ As relevant here, the specific provisions the court enjoined were EO 13,836 § 6; and EO 13837 §§ 4(a), 4(b), and 5(b).

Agency's implementation of these invalid EO provisions cumulatively violates the broader statutory scheme Congress created in the Statute. The Union claims, contrary to the Agency's argument, that section 7117 of the Statute does not authorize the President to issue EOs that conflict with the Statute.

The Union seeks as relief, among other things, a status quo ante remedy; make-whole relief for a Union representative who used annual leave to perform representational duties due to the Agency's implementation of EO 13,837; and a notice posting.

The Agency

The Agency first argues that the Arbitrator lacks the authority to determine whether the EOs violate the Statute. The Agency also argues that section 7117(a)(1) of the Statute provides the President with the authority to issue the EOs, which can limit collective bargaining. In any event, the Agency asserts, the EOs do not violate the Statute.

The Agency next argues that the EOs have the force and effect of law, and thus must be implemented immediately regardless of the status of an existing CBA. Accordingly, once the D.C. Circuit issued its mandate in *AFGE v. Trump* on October 3, 2019, and the executive branch was no longer enjoined from enforcing certain provisions of the Executive Orders, neither the parties' Agreement nor the Statute permitted the Agency to delay their implementation.

However, the Agency contends, even if the EOs are not considered as laws, they nonetheless constitute government-wide regulations that were properly implemented following the automatic renewal of the Agreement. The Agency points to the initial issuance of the EOs in May 2018. The Agreement expired in January 2019 and was automatically renewed that same month under Article 21. The Agency thus properly implemented the EOs in October 2019, after

the Agreement expired and was renewed, because but for the district court's injunction, it would have implemented the EOs when the Agreement expired in January 2019. Thus, it did not commit ULPs under sections 7116(a)(7) and (8) when it implemented the EOs.

The Agency next claims that it did not commit a ULP under section 7116(a)(7) by implementing section 6 of EO 13,836 because that EO provision does not conflict with any provision of the Agreement. Rather, it only directs agencies not to bargain on permissive bargaining subjects under 5 U.S.C. § 7106(b)(1).

Finally, the Agency asserts that even assuming a finding of a ULP, the Union has not advanced any basis for establishing harm to an employee that would warrant the Arbitrator granting a remedy. First, the Agency says that it gave the Union the opportunity to engage in impact and implementation bargaining concerning the EOs, but the Union failed to engage in such negotiations. Thus, the Union waived its right to bargain. Second, granting a status quo ante remedy would require the Agency to act unlawfully, as the EOs are law that must be followed. Third, the Agency argues that a status quo ante remedy is not supported by FLRA precedent on the issue.⁴ Finally, the Agency argues that as to the Union's request for "any other appropriate remedy," any harm caused by the Agency's implementation of the EOs during the term of the Agreement would be limited to the period between when the enjoined provisions became effective again (October 7, 2019) and the end of the term (January 18, 2020). However, according to the Agency, the Union has not identified any specific harm caused by the Agency's alleged violations during that time period.

⁴ The Agency cites to *Fed. Corr. Inst. and AFGE, Local 2052*, 8 F.L.R.A. 604, 606 (1982) for support on this point.

VI. Discussion

As the party alleging that the Agency committed ULPs in implementing the Executive Orders, the Union has the burden to prove all the elements of its claims by a preponderance of the evidence. *See AFGE Local 940 and Dep't of Veterans Affairs Phila., Pa.*, 52 F.L.R.A. 1429, 1439 (1997). For the following reasons, the Arbitrator finds that the Union has satisfied its burden of proof as to its claims that the Agency violated the Statute when it implemented EOs 13,836, section 6; and 13,837, sections 4(a), 4(b), and 5(b), and therefore committed ULPs under 5 U.S.C. § 7116(a)(1), (7) and (8).

A. Whether the Arbitrator is Authorized to Determine Whether the Challenged EO Provisions Violate the Statute

The Union argues that the Arbitrator is authorized to determine whether the disputed provisions of the EOs conflict with the Statute. It says it does not seek a ruling that the EOs are invalid. Rather, it requests only that the Arbitrator decide whether the Agency's actions implementing certain provisions of the EOs are ULPs under section 7116(a)(1) and (8) of the Statute because those EO provisions are contrary to the Statute. The Agency opposes this claim, arguing that the Union in fact seeks a ruling from the Arbitrator that the disputed EO provisions are invalid. The Agency states that under applicable case law the Arbitrator is not authorized to make such a finding.⁵

⁵ The Agency's argument concerning section 7117(a)(1) is without merit. It argues in effect (Agency Brief at pp. 4, 11) that the section forecloses inquiry as to whether a government-wide regulation like an EO is contrary to statutory law. However, as the Union correctly argues (Reply Brief at p. 8), section 7117(a)(1) cannot be read to allow for government-wide regulations like EOs to contravene statutory provisions. *Marks v. CIA*, 590 F.2d 997, 1003 (D.C. Cir. 1978) (“[A]n executive order cannot supersede a statute.”) Thus, while EOs or other government-wide regulations that are unquestionably consistent with statutory law may well limit the scope of bargaining on particular proposals, that is not the situation presented in the present case. The Union has put in question whether certain EO

The Agency argues that the Union claims that it does not seek a ruling on the EOs' validity, and this amounts to an assertion that the Arbitrator should simply disregard the EOs and determine only whether the Agency's actions in implementing the EOs directly violate the Statute. Urging such disregard, the Agency suggests, could be said to be tantamount to finding that the EOs are invalid, as they would play no role in assessing the lawfulness of the Agency's actions. Thus, the Agency says, the Union seeks an invalidity determination whether it says so explicitly or not. Further, FLRA case law in a related area could arguably support the Agency's position. In *NTEU and Internal Revenue Service*, 60 FLRA 782 (2005), the FLRA held that "it is long and well-established" that neither it nor an arbitrator has the authority to determine the validity of an Office of Personnel Management government-wide regulation.

Whatever merit that argument may have standing on its own, the D.C. Circuit's decision in *AFGE v. Trump*, 929 F.3d 748 (2019), refutes it for the purposes of this case. In *AFGE v. Trump*, several federal sector unions sued in district court to enjoin implementation of the EOs. The district court enjoined implementation of, among others, several provisions in EO 13,836 (section 6) and 13,837 (section 4 (a) and (b) and section 5(b)) that are in dispute in this case. *AFGE v. Trump*, 318 F. Supp. 3d 370 (2018).

The court of appeals reversed the district court ruling for lack of jurisdiction. The court held that the specific statutory scheme established by the Statute for federal sector labor relations precludes an action in district court. Among other things, the appeals court said that the Statute provides the unions with several "administrative options" for challenging the EOs before the FLRA, and then on appeal to a court of appeals. 929 F.3d at 757. In particular, the court pointed

provisions are contrary to the Statute. For the reasons stated in the text, the Arbitrator finds that he has the authority to resolve that issue.

to a ULP proceeding before the FLRA based on bad-faith bargaining if an agency implemented the EOs while bargaining with the union. The court also said that if an agency failed to negotiate on a bargaining subject it deemed permissive under section 7106(b)(1), the union could obtain review of the agency's action before the FLRA.

The appeals court rejected the unions' argument that the FLRA could not address all the claims that the unions advanced in the district court suit, such as the EOs constituting an *ultra vires* action by the President. The court said this claim did not make FLRA review any less meaningful than district court review. It said further that the unions could obtain an order from the FLRA enjoining the President's subordinates from implementing the EOs, just as they had sought in the district court suit. The court of appeals pointed in this regard to a comment by government counsel at argument in the case, that the FLRA would have the authority to resolve the unions' broad claims, including "those asserting that the executive orders are invalid or *ultra vires* under the Statute." 929 F.3d at 758.

Given this court of appeals ruling, the Arbitrator concludes that he is authorized to assess whether provisions of the EOs at issue here contrary to the Statute, and thus whether the Agency committed ULPs when it implemented those EO provisions. In this connection, it is important to note that while the court of appeals decision made no explicit mention of arbitration as one of the "administrative options" available to a union challenging the EOs in a proceeding under the Statute, its conclusions as to the availability of FLRA review are equally applicable to arbitration in a case such as the present one, involving solely statutory ULP issues. This conclusion is supported by section 7116(d) of the Statute, which gives an aggrieved party the option of alleging a statutory ULP under either the grievance procedure or as a ULP charge filed with the FLRA under section 7116.

B. Whether the Disputed EO Provisions Are Contrary to the Statute

1. EO 13,837, Sections 4(a), 4(b), and 5(b)

Section 4(a) imposes a series of requirements on the use of official time by federal employee union representatives. In particular, it states that union representatives can spend no more than 25% of their duty hours on official time in a fiscal year (subsection 4(a)(ii)); that with certain exceptions, union representatives cannot use official time to prepare and present grievances (subsection 4(a)(v)(1)). Section 4(b) requires that a union representative obtain advance written approval from an agency official to use official time. Section 5(b) required each agency to develop and implement a procedure to govern the authorization of official time use under section 4(b).⁶

a. The 25% cap - The Union argues that section 4(a)(ii)'s 25% cap on a union representative's official time use in a fiscal year is contrary to section 7131(d) of the Statute. That section calls for the parties to negotiate on how much official time should be available for union representatives for representational purposes not covered in subsections 7131(a) and (c). The Agency replies that the 25% limit is consistent with the Statute and FLRA case law. For the reasons that follow, the Arbitrator finds that section 4(a)(ii) is contrary to section 7131(d) of the Statute.

The inconsistency of EO section 4(a)(ii) with section 7131(d) of the Statute is plain. Section 7131(d) states in relevant part that, apart from time spent in bargaining or participating in an FLRA proceeding (official time for which is covered under section 7131(a) and (c)), a union

⁶ The Union does not challenge the validity of section 4(a)(i) of the EO, dealing with union representative lobbying on official time. It also does not provide argument for why section 4(a)(iii), dealing with union free or discounted use of government property, is contrary to the Statute. Accordingly, these issues will not be discussed in this Decision.

representative “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.” Placing a 25% ceiling on the amount of official time a union representative may use in a fiscal year is clearly at odds with section 7131(d), which does not specify any limit on the amount of official time to which the parties can agree. As the district court noted in *AFGE v. Trump*, 318 F. Supp. 3d at 425, the Supreme Court has held that the Statute establishes that the use of agency resources, including official time, to support union activities is within the scope of bargaining.⁷

The Agency offers several reasons for why EO section 4(a)(ii) is not contrary to the Statute. None of them has merit. As to the 25% cap on official time, the Agency first argues that section 7131(d) of the Statute does not guarantee any amount of official time for a particular union representative, a union as a whole, or for any specific purpose. Thus, because under section 7131(a) and (c) of the Statute, union representatives can under the EO use as much official time as is necessary for participating in collective bargaining and FLRA proceedings, the 25% cap is allowable and therefore not contrary to section 7131(d). However, this argument is directly contradicted by the plain language and structure of section 7131. Section 7131 taken as a whole does not link subsections (a) and (c) on the one hand with subsection (d) on the other, as the Agency claims. That is, the time a union representative spends on subsection (a) and (c) matters is clearly not intended to compel as a matter of law a reduction in the amount of official time on which the parties can negotiate under section 7131(d).

The Agency next argues that imposing by EO a limit on the amount of official time is consistent with FLRA case law. It cites to *United Power Trades Organization and Army Corps*

⁷ The district court cited to *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 107 (1983) (financial support to union members is negotiable during collective bargaining).

of Engineers, 64 FLRA 440 (2010). In that case, a dispute arose as to whether a union representative was improperly denied official time under the parties' negotiated agreement. The union there argued that the agreement could not be read to limit the representative's ability to receive official time because this would conflict with the union's right to designate its representatives under the Statute. The FLRA held that any limit on any entitlement to official time "must be based in the parties' agreement." 64 FLRA at 442. This is precisely the Union's point in the present case – any limitations on the amount of official time available for union representatives under section 7131(d) must be agreed to by the parties at the bargaining table. This case is, if anything, contrary to the Agency's position.

The Agency next argues that it has "wide latitude" (Ag. Br. at p. 6) to negotiate on official time under section 7131. Thus, it can seek to bargain on the amount of official time made available to the Union as a whole while limiting the amount of official time any individual union representative may use in a fiscal year. This proposition is accurate so far as it goes. The Agency presumably could engage in negotiations with the Union to create a bank of official time hours available for union representatives in a fiscal year. *See Dep't of the Treasury, Internal Revenue Serv. and NTEU Chapter 66*, 59 FLRA 34 (2003) (discussing such a "bank time" arrangement). But again, the point is that under section 7131(d) of the Statute, such an arrangement must result from negotiations. It cannot be imposed by EO.

Further, the Agency fails to explain how its approach of capping each individual union representative's official time use at 25% for a fiscal year does not necessarily result in capping the amount of bank time the parties could agree on to 25% per fiscal year as well. This is again inconsistent with the Statute's direction that the amount of official time available under section 7131(d) be determined by collective bargaining, not administrative fiat in the form of an EO. In

fact, nothing is more revealing of the Agency's failure to understand this distinction than its statement (Ag. Br. at p. 6) that "an Executive Order instructing agencies on permissible contract terms is not innately contrary § 7131(d)." The two ideas are mutually exclusive.

b. Prohibition on use of official time for grievance processing - Under subsection 4(a)(v)(1) of EO 13,837, employees "may not" use official time "to prepare or pursue grievances (including arbitration of grievances) brought against an agency under procedures negotiated pursuant to [section 7121 of the Statute], except where such use is otherwise authorized by law or regulation." Subsection 4(a)(v)(2) creates exceptions for employees presenting their own grievance or raising a whistleblower charge.

Similar to its argument on the 25% cap on official time, the Union argues that subsection 4(a)(v) violates the Statute because it imposes a mandatory prohibition on a matter that is otherwise negotiable under section 7131(d) of the Statute. The Agency responds that the Statute does not contain an explicit entitlement to official time for grievance preparation and presentation, and that subsection 4(a)(v) does not bar Union representatives from working on grievances on their own personal time.

For much the same reasons as set out above on the 25% cap, the Arbitrator finds that EO subsection 4(a)(v) also violates section 7131(d) of the Statute. That Statute provision is broadly worded: "any employee representing an exclusive representative . . . 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." A union representative preparing and pursuing grievances under section 7121 of the Statute is unquestionably the kind of activity a representative could engage in on official time, provided the parties had negotiated an official time provision in an agreement that included that purpose.

The Agency's arguments to the contrary are without merit. It again mistakenly asserts that the Union is arguing that it is entitled to official time for pursuing grievances under section 7121 as a matter of statutory right. The Union's point is not that. Rather, the Union argues only that the parties must under section 7131(d) negotiate on any restrictions on the availability of official time for its representatives to engage in activities related to the rights and obligations arising under the Statute. Such limitations cannot be imposed by administrative fiat in an EO.

The Agency also erroneously argues that subsection 4(a)(v) does not violate the Statute because employee Union representatives could pursue grievances on their own personal time, or paid non-employee counsel could represent an employee, or an employee could process his/her own grievance. This is hardly the point. The official time provision in section 7131 of the Statute clearly recognizes on its face that employee union representatives are, to the extent agreed to by the parties in negotiations, entitled to use official time to engage in various activities such as grievance processing. The idea that in order to prepare and pursue grievances under section 7121 of the Statute, federal sector unions should have to resort to the alternatives the Agency suggests is flatly contrary to section 7131(d).

c. Prior Agency Approval for Use of Official Time – Section 4(b) of EO 13,837 requires that union representatives obtain “advance written authorization from their agency,” unless prior approval is deemed “impracticable” under guidance to be issued by the Office of Personnel Management. EO section 5(b) provides that agencies are required to develop and implement a procedure for governing this prior approval process. The procedure has to require at a minimum that a union representative specify how many hours of official time are being requested, and the “specific purposes for which such time will be used.”

The Union argues that sections 4(b) and 5(b) violate section 7131(d) because it places in the hands of agency management the sole and exclusive ability to determine how much official time is “reasonable, necessary, and in the public interest” under section 7131(d) to accomplish a particular representational task. Again, the Union argues that any such approval system must be the product of negotiations under section 7131(d).

The Agency argues that the EO provisions do not bar union representatives from performing their duties on their own time, nor does it bar the Union from bargaining on an approval process “within the confines of the EO.” It also argues that the Union can grieve any denial of official time under the approval system the Agency implemented.⁸ Accordingly, the Agency asserts that EO sections 4(b) and 5(b) are not inconsistent with the Statute.

As mentioned above, section 7131(d) specifies that a union representative “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.” This language expressly recognizes that determination of the amount of official time to be granted to a union representative shall be the product of bilateral negotiation. Therefore, any system for securing approval of an official time request that leaves the approval determination exclusively in the hands of an agency official must necessarily be contrary to section 7131(d). It would mean little, if anything, for the parties to agree to an amount of official time to be allowed for union representation activities in a fiscal year if an agency could deny specific requests at will. In other words, the approval system for requests is an indispensable part of section 7131(d). The ability to grieve and arbitrate a management denial of official time under section 4(b) in any given case does not alter that fact.

⁸ The Agency created a SharePoint web site for Union representatives to use in seeking approval for an official time request. Statement of Facts, para. 18.

None of this is to say that the SharePoint system the Agency has implemented for addressing official time requests is either a good or a bad system for handling the matter. The efficacy of the system is not the point. Rather, the point is that whatever system is to be used must be the product of bargaining by the parties. Again, it is the EO's unilateral imposition of an approval system that makes sections 4(b) and 5(b) contrary to section 7131(d).

2. EO 13,836, Section 6

Section 7106(b)(1) of the Statute provides in relevant part that nothing in section 7106 (dealing with management rights) “shall preclude any agency and any labor organization from negotiating . . . at the election of the agency,” on the “numbers, types, and grades” of employees assigned to any agency component, or on the “technology, methods, and means of performing work.” Section 6 of EO 13,836 provides that the heads of agencies governed by the Statute “may not negotiate over the substance of the subjects” set forth in section 7106(b)(1), and the agency heads “shall instruct subordinate officials that they may not negotiate over these same subjects.”

The Union argues that section 6 of the EO violates the Statute because the blanket bargaining prohibition in section 6 is contrary to the mandate in section 7106(b)(1), that each individual agency shall have the choice, when engaging in bargaining with a union, to elect to negotiate on the permissive bargaining subjects set out in section 7106(b)(1). The Union cites to *NTEU v. Chertoff*, 452 F.3d 839 (D.C. Cir. 2006) (*Chertoff*) in support of its argument on this point.

The Agency responds that it could not have committed ULPs by carrying out section 6 of the EO because it retains the right under section 7106(b)(1) to decline to negotiate on the bargaining subjects identified in that section. Thus, the Agency could decline to bargain over

section 7106(b)(1) matters every time the Union would present them in bargaining, and it would not have committed any ULPs. In support it cites to *NAGE, Local R5-136 v. FLRA*, 363 F.3d 468 (D.C. Cir. 2004). It also argues that under Article II of the U.S. Constitution, the President properly can instruct agencies as to whether they can elect to bargain on the subjects mentioned in section 7106(b)(1). The Agency cites to *NAGE v. FLRA*, 179 F.3d 946 (D.C. Cir. 1999) (*NAGE*) on this point.

The Arbitrator finds that section 6 of the EO conflicts with section 7106(b)(1) of the Statute. The issue is not, as the Agency contends, whether it could elect in specific bargaining settings not to bargain on the matters mentioned in section 7106(b)(1). Unquestionably, it could.⁹ The issue is whether the President can by EO preemptively prohibit individual agencies from electing to bargain on section 7106(b)(1) matters in any and all situations, thus eliminating an agency's discretion to engage in such bargaining. Put another way, the issue is whether the President can by EO undermine Congress's specific statutory scheme for how collective bargaining should be conducted in the federal sector. This Arbitrator's answer is that he cannot. To answer otherwise would allow the President to effectively amend acts of Congress.

The D.C. Circuit's decision in *Chertoff* supports this conclusion. In that case, the Homeland Security Act of 2002 called for the Secretary of Homeland Security, along with OPM, to develop by regulation a "human resources management system." The Act said that the system developed must ensure collective bargaining rights for Homeland Security employees. However, the regulatory system that was created called for "eliminat[ing] all bargaining" over the matters covered in section 7106(b)(1).

⁹ The Agency's reliance on *NAGE, Local R5-136 v. FLRA*, 363 F.3d 468 (D.C. Cir. 2004), avails them nothing. It merely restates the undisputed principle that an agency can elect not to bargain on a section 7106(b)(1) matter.

The system was challenged in court. The court of appeals said that although the Act did not reference the Statute, the system “shrinks the scope of bargaining well below” what it is in the Statute. The court cited to, among other things, the disparity between section 7106(b)(1) of the Statute and the regulatory system’s blanket prohibition on bargaining on the matters contained in that section. Therefore, the court said, the regulatory system developed “render[ed] ‘collective bargaining’ meaningless,” and was contrary to the Act’s requirement to create meaningful collective bargaining rights. 452 F.3d at 861. *Chertoff* thus stands for the point adopted here, that a regulatory issuance like an EO cannot contravene a statutory command concerning the scope of bargaining on permissive bargaining subjects under section 7106(b)(1).¹⁰

The case most heavily relied on by the Agency, *NAGE*, does not contradict this conclusion. That case involved EO 12,871, which said that that agencies “shall ... negotiate over the subjects set forth” in section 7106(b)(1). A union claimed that the EO constituted an election to bargain over matters covered by section 7106(b)(1), so when an agency refused to bargain on a section 7106(b)(1) topic, the union filed a refusal to bargain ULP charge. The FLRA said that the EO did not constitute an enforceable election to bargain, and the court of appeals agreed with the FLRA.

The court based its holding on the idea that the EO was only a direction from the President to subordinate agency management officials in the Executive branch to negotiate on section 7106(b)(1) matters, and was not an enforceable election under that section for agencies to be required to bargain. The court said that the EO does not state that the President has elected to negotiate with labor unions. Thus, the EO amounted to an internal management directive to

¹⁰ The status of an EO as a government-wide regulation is discussed at pp. 26 to 28, below.

agency officials. The court pointed to section 3 of the EO, which said that it was intended only to “improve the internal management of the executive branch,” and was not intended to “create any right to administrative or judicial review, or any other right, substantive or procedural,” that would be enforceable by against a federal agency.

The issue of whether EO 12,871 was an invalid implementation of a statute was not at issue in *NAGE*, as it is in the present case. Further, EO 13,836 does not contain a comparable provision to section 3 of EO 12,871. Therefore, the D.C. Circuit’s decision in *Chertoff* is the relevant precedent to be considered in the present case. The fact that the court in *Chertoff* did not even cite to *NAGE* provides support for this conclusion.

C. Whether the Agency Committed ULPs Under 5 U.S.C. § 7116(a)(1) and (8) of the Statute

Having found that the Agency implemented sections of EOs 13,836 and 13,837 that are contrary to sections 7131(d) and 7106(b)(1) of the Statute, the issue now becomes whether the Agency’s action constitutes ULPs under section 7116(a)(1) and (8) of the Statute. The Arbitrator finds that it does.

Subsection 7116(a)(8), along with its derivative subsection (a)(1) violation, serves as the proper ULP finding when an agency violates a provision in the Statute that is not addressed in other ULP provisions. For example, in *U.S. Department of Justice, Federal Bureau of Prisons and AFGE, Council of Prison Locals*, 55 FLRA 388 (1999), the FLRA found that an agency violated section 7116(a)(1) and (8) of the Statute by failing to comply with section 7114(a)(2)(B) of the Statute, dealing with employee requests for union representation, when it improperly denied an employee request for such representation. Similarly, in the present case, the Agency failed to comply with sections 7131(d) and 7106(b)(1) of the Statute when it implemented the invalid provisions of the EOs.

The fact that the Agency here implemented EO provisions does not relieve it of ULP liability. As mentioned at pp. 15 to 16 above, the D.C. Circuit ruled in *AFGE v. Trump* that the FLRA's procedures under the Statute can provide the relief that the unions in that case sought in the district court. Thus, it would be effectively meaningless for the Arbitrator to find that the challenged EO provisions are contrary to sections 7106(b)(1) and 7131(d), but not then grant the very kind of ULP relief that the Statute provides when the Agency implements those provisions.

D. Whether the Agency Committed ULPs By Implementing the EOs During the Term of the Parties' Agreement

Even assuming that the challenged EO provisions are not inconsistent with sections 7131(d) and 7106(b)(1), the Union argues, the Agency's implementation of the challenged provisions constitutes ULPs under section 7116(a)(1) and (7). The Union bases this claim on the fact that the Agency implemented the EOs during the term of the parties' Agreement, and the challenged EO provisions are contrary to provisions in the Agreement.

1. The Status of EOs Under Section 7116(a)(7)

It is first necessary to determine the status of EOs under section 7116(a)(7) of the Statute. In relevant part, that section makes it a ULP for an agency to "enforce any rule or regulation . . . which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed." The Agency argues that the EOs are "laws" which must be implemented immediately upon issuance, even if such implementation is contrary to provisions of an existing CBA. The Union responds that an EO is considered under FLRA precedent to be a government-wide regulation that is covered under section 7116(a)(7), and thus cannot be implemented until an existing CBA expires. For the reasons that follow, the Arbitrator finds that EOs are government-wide regulations covered under section 7116(a)(7).

At p. 2 of the OPM July 5, 2018 memorandum, issued in connection with the initial promulgation of the EOs in May 2018, OPM specified that “EOs possess the force of government-wide rules.” Further, this characterization of the EOs as government-wide regulations was continued in the President’s October 11, 2019 memorandum to agency heads on implementation of the EOs. In addition, the EOs themselves describe their effect as being consistent with government-wide regulations. EO 13,837, section 8 says agencies shall implement the Order “to the extent permitted by law and consistent with their obligations under collective bargaining agreements in force on the date of this order.” EO 13,837, section 9 says that “Nothing in this order shall abrogate any collective bargaining agreement in effect on the date of this order.”

There are other indicia of the EOs’ status as government-wide regulations in the record: 1) the statement of government counsel in *AFGE v. Trump*, 318 F. Supp. 3d at 433, that the EOs have the status of government-wide regulations; and 2) the Agency’s own statement in the grievance process in this case, that an EO is a “government-wide regulation.” The oft-repeated recognition by the issuing authority of the EOs, namely, the President and his subordinate agency management officials, that the EOs are government-wide rules is simply too overwhelming to allow for a different conclusion.

The Agency tries to dispel the force of OPM’s statement by claiming that OPM in effect got it wrong in saying this, because it is contrary to FLRA case law. In particular, the Agency cites to two FLRA cases: *AFGE and Dep’t of the Navy Naval Weapons Station Concord, Cal.*, 32 FLRA 1023, 1067-68 (1988), *rev’d as to other matters sub nom. Dep’t of the Navy, Naval Weapons Station, Concord Cal. v. FLRA*, No. 88-7408/88-7470 (9th Cir. 1989) (*Naval Weapons Station*); and *AFGE and Dep’t of the Navy, Naval Air Station, Whidbey Island Oak Harbor,*

Wash., 41 FLRA 589, 613-14 (1991) (*Naval Air Station*). However, neither of these cases supports the Agency's argument.

Naval Weapons Station involved the negotiability of a union bargaining proposal involving a personnel assignment. In holding the proposal nonnegotiable as inconsistent with an EO, the FLRA said that EOs are "accorded the force and effect given to a law enacted by Congress." 32 FLRA at 1067. Similarly, in *Naval Air Station* the FLRA said, in finding a proposal nonnegotiable as contrary to an EO, that an EO "constitutes law under section 7117(a)(1) of the Statute."

Neither of these cases establish that an EO is outside the scope of section 7116(a)(7). Rather, they show that an EO has the force and effect of a law, but that does not establish that they are "laws" themselves in the formal meaning of the term. A "law" is defined as "a statute, ordinance, or regulation enacted by the legislative branch of a government and signed into law." Law.com, Legal Dictionary. In short, for present purposes, a "law" is a statute. A "regulation," on the other hand, is defined as "rules and administrative codes issued by governmental agencies"; and that they have the "force of law" because they are "adopted under authority granted by statutes." *Id.* An EO clearly fits under the definition of a "regulation," not a "law." The cited FLRA decisions signal nothing more than that. The Agency was therefore not compelled to implement the EOs immediately upon issuance of the D.C. Circuit's mandate.

2. Whether the Parties' Agreement Was In Effect When the Agency Implemented the EOs on October 7, 2019

Having established that the EOs are government-wide regulations covered in section 7116(a)(7), it is now necessary to determine whether, under that section, the parties' Agreement

was “in effect before the date the rule or regulation was prescribed.” For the reasons that follow, the Arbitrator finds that it was.

The starting point for this analysis is Article 21, Section 1 of the parties’ Agreement.

This provision states in relevant part that the Agreement:

shall remain in full force and effect for three (3) years after the effective date. Thereafter, the Agreement shall be automatically renewed annually unless either party gives written notice of intent to terminate to the other. Such notice of intent to terminate shall be given not sooner than 180 days before the termination date and not less than 120 days before the termination date.

The parties first entered into the Agreement effective January 19, 2001. Accordingly, the initial three year term of the Agreement ended on January 18, 2004. Pursuant to the “automatically renewed” provision in Section 1, the Agreement continued in effect each year until January 18, 2020, as a result of the Agency’s September 3, 2019 notice to the Union of its intent to terminate the Agreement.

Thus, both the original issuance of the EOs in May 2018 and the district court’s August 24, 2018 injunction against implementation of various provisions of the EOs (including those at issue in the present case) occurred during the automatic renewal period of the Agreement that ran from January 19, 2018 to January 18, 2019. Further, both the court of appeals’ October 3, 2019 issuance of its mandate in *AFGE v. Trump* and the Agency’s ensuing October 7, 2019 implementation of the EOs occurred during the during the automatic renewal period of the Agreement that ran from January 19, 2019 to January 18, 2020.

On the face of it, these facts would seem to show that both the initial Agency implementation of the EOs in 2018 and the second implementation in October 2019, occurred

while the Agreement was “in effect,” either under the January 2018 or January 2019 automatic renewal periods. However, the Agency argues that it is not that simple.

First, the Agency argues that when a contract is “rolled over” by an “automatically renewed” agreement provision, under FLRA case law the government-wide rule that issued during the agreement term comes immediately into effect for the new rolled-over agreement. The Agency contends that but for the district court’s August 2018 injunction, the EOs would have been automatically effective on January 19, 2019. The Agency argues further that the court of appeals’ October 3, 2019 mandate reversing the district court means that the challenged EO provisions here at issue “never should have been enjoined in the first place.” Agency Brief at p. 15. Therefore, it is appropriate to in effect “back date” the EO implementation to January 19, 2019.

The Agency cites in support *NTEU and U.S. Patent and Trademark Office*, 65 FLRA 817 (2011) (*PTO*). That case involved the same Agreement at issue in the present case. The parties’ Agreement had a provision dealing with how many hours of compensatory time off an employee could carry over from year to year. OPM issued a new government-wide regulation on the subject that was contrary to the Agreement, and the Agency applied the new regulation. The Union grieved. The arbitrator in the case found that the Agency was required to maintain the old policy set out in the agreement because the Agreement existed before the OPM regulation became effective. The arbitrator said that the Agency could have given notice to terminate the agreement, but did not do so. Thus, the Agreement expired but remained in effect under its “automatically renewed” provision, after the agency implemented the OPM regulation. The FLRA set aside the arbitrator’s holding, saying that the Agreement expired upon the annual roll-

over date, regardless of whether the Agency gave notice of its intent to terminate the Agreement. Thus, the agency was able to implement the new OPM regulation as of the roll-over date.

There is a key distinction between *PTO* and the present case, however, that renders *PTO* inapplicable to the present case, namely, there was no question about the legal validity of the government-wide regulation in *PTO* at the time the Agreement was automatically renewed under Article 21, Section 1. In the present case, there was an issue about the validity of the challenged EO provisions at the time the Agreement automatically renewed. It is important to note that the court of appeals in *AFGE v. Trump* did not reverse the district court's merits rulings on the invalidity of the EO provisions at issue in this case. Rather, the court of appeals only said that the district court was without jurisdiction to rule on the issue. The court of appeals further said that it was for the procedures created under the Statute, such as this arbitration proceeding, to address the merits of the validity issue. As set out at pp. 16 to 25, above, the Arbitrator finds the challenged provisions to be invalid as contrary to the Statute. Accordingly, it would be error to hold, as the Agency urges here, that the challenged EO provisions should be given retroactive effect to January 2019 despite the fact that the provisions are ultimately found to be invalid. *PTO* and other similar FLRA decisions certainly do not stand for the proposition that a challenged government-wide regulation provision found to be invalid should be retroactively applied.

There is another reason that the Agency's "back dating" argument fails: that it sows uncertainty in the administration of a CBA when there is a question about the validity of all or parts of a government-wide regulation when the CBA expires. In this case, for example, the Agreement expired on January 18, 2019, while the district court proceeding considering EO

validity was pending.¹¹ If the EO provisions were deemed to be applicable as of that date, but were later found to be invalid, the retroactive remedial process to undo their application would be unnecessarily disruptive of the parties' dealings with each other under the Agreement prior to the invalidity finding. Such a result cannot be countenanced.

The FLRA has extolled at some length on the benefits of automatic renewal provisions in *Kansas Army National Guard*, 47 FLRA 937 (1993) (*Kansas Guard*), stating that they preserve the time and resources that would be expended on renegotiations, and also contribute to the stability of employee-employer relations. The Agency's position would do serious harm to these interests.

The Agency further argues that when it implemented the disputed EO provisions in October 2019, the Agreement was in "a new term" running from January 19, 2019 to January 18, 2020, and section 7116(a)(7) was therefore no longer in effect. (Ag. Br. at p. 15.). However, this argument seems predicated on the Agency's retroactive application theory discussed above. Whether the Agency's implementation of the EOs is deemed to have occurred in May 2018 (during the Agreement's January 2018 to January 2019 rollover term), or in October 2019 (during the Agreement's January 2019 to January 2020 rollover term), the important point is that

¹¹ The Arbitrator finds without merit the Union's alternative argument on expiration of the Agreement, that Article 21, Section 1 in effect creates a seamless continuity for the Agreement since its inception in January 2001 unless one of the parties gives notice of intent to terminate the Agreement. Article 21, Section 1 talks of an "automatically renewed" Agreement coming into effect if neither party gives notice of an intent to terminate. However, "renewal" is defined as "a change of something old for something new; as, the renewal of a note; the renewal of a lease." The Free Dictionary by Farlex. This clearly signals two separate entities. Thus, per Arbitrator Strongin's award in FMCS Case No. 19-01711, Article 21, Section 1 calls for the renewed Agreement beginning at 00:00:00 hours on January 19, 2019, and running through 24:00:00 hours on January 18, 2020. This Arbitrator therefore interprets the plain language of Article 21, Section 1 of the Agreement as calling for the expiration of the one year "automatically renewed" Agreement with the immediate creation, in the absence of a party's statement of intent to terminate, of a new "renewed" Agreement. This Arbitrator therefore disagrees with the arbitrator's interpretation of "automatically renewed" language in an agreement in *U.S. Department of the Army and AFGE Local 1920*, 40 FLRA 636 (1991).

either implementation occurred at a time when, under Article 21, Section 1 of the Agreement, it was “in effect” within the meaning of section 7116(a)(7). Therefore, section 7116(a)(7) applied regardless of when the EOs are viewed as having been implemented. Again, the Agency’s urging that EO provisions now found to be invalid should nonetheless be applied retroactively to the facts of this case is without merit.

Moreover, as the Union points out (Un. Br. at p. 10), the President’s October 11, 2019 memorandum explicitly directs agencies to “adhere to the terms of [CBAs] executed while the [district court] injunction was in effect.” The Agency argues that this language in the Memorandum is inapplicable to the present case because the rollover agreements established in Article 21, Section 1, are not “executed” agreements. Rather, an “executed” agreement refers only to a document signed by the parties. A rollover agreement, the Agency argues, is not signed and in fact requires no action from the parties at all.

The Agency’s argument has two problems. First, the parties did sign a negotiated agreement, that is, the original Agreement signed in 2001. In that Agreement, they agreed to automatically renew the Agreement annually unless one or both of the parties gave notice of an intent to terminate it. Thus, each annual renewal stems directly from the signed 2001 Agreement’s execution date. Further, the idea that the parties took no action regarding automatic renewals is not accurate. It certainly is true that the parties take no *overt* action to renew, but presumably both parties give active consideration each year as to whether to terminate. Thus, the parties’ joint yearly decision not to terminate is a conscious, willful action that results from their mutual concurrence that the Agreement satisfies their needs. This mutual concurrence therefore also satisfies the requirement for an “executed” agreement.

Second, the Agency's argument is contrary to FLRA case law. In *Kansas Guard*, the FLRA said that an automatically renewed agreement is subject to agency-head review under section 7114(c) of the Statute. 47 FLRA at 942. Section 7114(c)(2) in turn provides that agency head review is available for an "executed" negotiated agreement. Thus, case law recognizes that automatic renewal agreements are "executed," and the President's October 11, 2019 memorandum is therefore relevant to the present case.

3. Whether the Agency's Implementation of the EOs Conflicts With the Agreement

It seems clear that the Agency's enforcement of the disputed provisions of EO 13,837 conflicts, within the meaning of section 7116(a)(7) of the Statute, with several sections of Article 16 of the Agreement. For example, the 25% annual cap on official time for Union representatives in EO section 4(a)(2) conflicts with Article 16, Section 2, which establishes a different formula for determining the amount of official time available. Further, the EO's advance approval requirement in section 4(b) is contrary to Article 16, Section 9, which has a different process for Union representatives informing management of their intent to use official time without obtaining advance approval. Accordingly, the Arbitrator finds that the Agency's enforcement of EO 13,837 conflicts with Article 16 of the Agreement, and the Agency therefore committed a ULP under sections 7116(a)(1) and (7) of the Statute.¹²

As to EO 13,836, the Agency argues that the EO's implementation of Section 6 does not conflict with any Agreement provision, and thus cannot form the basis for a ULP finding under section 7116(a)(7) of the Statute. It asserts that the only Agreement provision even arguably

¹² The Union does not argue that section 4(a)(iii) of EO 13,837, barring union use of government resources at no or reduced cost is contrary to Article 17 of the Agreement, Union Facilities. Accordingly, the Arbitrator will not address that issue.

affected by the its enforcement of the EO is Article 5, Section 2, which restates management's right to elect to bargain over permissive subjects under section 7106(b)(1) of the Statute.

The Agency's argument on this point is substantively the same as the Agency's argument that Section 6 of the EO does not conflict with section 7106(b)(1) of the Statute. The Arbitrator rejected the Agency's argument on that point at pp. 22 to 25, above, and rejects it here for the same reason. The Agency's enforcement of the EO's section 6 conflicts with both the election that Congress conferred on agency management officials in section 7106(b)(1) itself, and the parties' Agreement language incorporating section 7106(b)(1) into the Agreement. In short, under the EO, Agency management officials no longer have the ability to exercise the election to bargain on permissive bargaining subjects that Congress intended them to have. The EO's section 6 took that election away.

Further, contrary to the Agency's argument, a section 7116(a)(7) ULP violation for implementation of EO 13,836 need not wait for a specific bargaining setting to be perfected. There is no doubt on the present record that the Agency will implement the EO when future bargaining may occur. Put another way, the Union here alleges a section 7116(a)(7) ULP, not a section 7116(a)(5) bad faith bargaining ULP. The enforcement of the EO for section 7116(a)(7) purposes took place on October 7, 2019, not at some future date. Accordingly, the Arbitrator finds that the Agency's enforcement of EO 13,836 conflicts with Article 5 of the Agreement, and the Agency therefore committed a ULP under sections 7116(a)(1) and (7) of the Statute.¹³

¹³ In light of the Arbitrator's ULP findings under section 7116(a)(1), (7) and (8) of the Statute, he does not find it necessary to address the Union's general claim that Agency's implementation of the EOs violates the broader statutory scheme Congress created in the Statute.

E. The Appropriate Remedy

The Union requests that the Arbitrator order the Agency to (1) rescind its October 7, 2019 implementation notice and restore the status quo ante; (2) restore, with interest, the annual leave [REDACTED] took to perform union-related work in October 2019; and (3) post a physical notice on all Agency bulletin boards and also send the notice to all bargaining-unit employees by email, acknowledging the Agency's statutory violations. The Union also requests that the Arbitrator retain jurisdiction over any disputes concerning implementation of the award, including, but not limited to, the Union's entitlement to attorney fees.

The Agency argues that the Union waived its right to bargain when it withdrew its post-implementation bargaining proposals concerning enforcement of the EOs. It also argues that a status quo ante remedy is inappropriate because ordering the Agency to withdraw its October 7, 2019 memorandum would require it to act unlawfully. The Agency goes on to argue that a status quo ante remedy is inappropriate under the factors set out in *Federal Correctional Institution and AFGE Local 2052*, 8 FLRA 604 (1982) (*FCI*), and that a notice posting requirement is not called for under the facts of this case. Finally, the Agency argues that the Union has not established any official time request from Union Executive Vice President [REDACTED] was denied, nor has the Union shown that the Agency refused to bargain over a permissive bargaining subject under EO 13,836, nor any other form of particularized harm warranting make-whole relief.

The Agency's assertion as to the Union's waiving its right to engage in post-implementation bargaining on the EOs is without merit, as the Union's ULP claim is not made under section 7116(a)(5) for bad faith bargaining. Rather, its ULP claim involves section 7116(a)(7) and (8). Accordingly, Union bargaining rights are not at issue in this case.

Nor does the Agency's argument that a status quo ante remedy would require it to act unlawfully because it would be in violation of Federal law, namely, the EOs, have merit. As discussed above, the challenged provisions of the EOs are contrary to the Statute. Thus, an order directing the Agency to refrain from enforcing those provisions and adhere to the Agreement would not compel the Agency to act unlawfully. To the contrary, it would bring the Agency into lawful compliance with the relevant provisions of the Statute.

The Arbitrator also finds no merit in the Agency's claim that the Union's request for status quo ante relief is inappropriate here. To begin with, the Authority has held that when an agency unlawfully implements a change in conditions of employment, status quo ante relief is the most effective traditional remedy, and will be ordered barring special circumstances. *Fed'l Deposit Insurance Co. v. FLRA*, 977 F.2d 1493, 1498 (D.C. Cir. 1992) (court sustains FLRA status quo ante remedy without considering *FCI* factors); *see also Fed'l Bureau of Prisons and AFGE Local 171*, 55 FLRA 1250, 1256 (2000) (the purpose of a ULP remedy is to restore the status quo ante that would have existed if the agency had not violated the Statute). As the FLRA stated in *FCI*, the factors identified in that case apply to determining the appropriateness of status quo ante relief when the agency was required to bargain only on procedures and appropriate arrangements of the change, not its substance.

As has been noted several times above, the Union's ULP claims in this case do not include a refusal-to-bargain charge under section 7116(a)(5). Research does not disclose a case in which the FLRA has applied the *FCI* factors to section 7116(a)(7) and (8) ULP violations, as are found in this case.

In the present case, the ULP violations found are not in the nature of an agency refusal to bargain on procedures and appropriate arrangements. Looking to an analogy in section

7116(a)(5) cases, the violations are more akin to finding a repudiation of the Agreement, as the Agency's actions could be said to amount to a clear and patent breach of Agreement provisions that go to the heart of the Agreement. *E.g., Marine Corps Logistics Base, Barstow, Cal.*, 33 FLRA 626, 642 (1988).

While the Agency may have believed in good faith that it was required to implement the EOs, that does not change the fact that the Agency must bear the consequences of choosing to implement EOs that conflicted with Agreement provisions then in effect. The Agency is reasonably held to being aware of the fact that the validity of those provisions was still in question, notwithstanding the court of appeals' dismissal of the unions' law suit on jurisdictional grounds in *AFGE v. Trump*. Indeed, the Agency did not even wait for the President's October 11, 2019 memorandum, in which the President said that an agency may continue to follow CBAs executed between the date of the Executive Orders and the date of the court of appeals' mandate, notwithstanding the EOs.

Moreover, the Agency's claim that there is no showing that its implementation of the EOs caused harm to any bargaining unit employee, thus making a status quo ante remedy inappropriate, is also without merit. Union representatives became subject to the annual 25% cap on official time use. The parties stipulated to the fact (Undisputed Facts at paras. 25, 26 and 32) that Union representatives in the years preceding the implementation of the cap used official time at a rate substantially higher than 25% of their work hours. It is reasonable to conclude that the cap caused a substantial reduction in the amount of official time available to them. Further, under EO 13,837, Union representatives are prohibited from using any official time to assist unit employees in preparing or presenting grievances. There can be no reasonable debate that Union representatives engaged in such activities before implementation of the EO. These are sufficient

instances of harm from implementation of the EO. As for EO 13,836, the harm occurred when the Agency implemented it. The Agency's ability to bargain on permissive subjects ended at that time. There is no need to wait for the Union to seek to bargain on a permissive matter and have the Agency refuse based on the EO, as the Agency's position in that situation is known at this time.

In sum, the Arbitrator finds that there are no special circumstances mitigating against status quo ante relief, and that it is an appropriate remedy in this case. The Agency provides no basis to conclude that returning to the status quo ante will cause adverse consequences for Agency operations.

Turning to the Union's request for make-hole relief, such relief is designed to remedy harm an employee may have suffered when an agency acts unilaterally in violation of its obligations under the Statute. The harm may be nonmonetary. *Dep't of Justice, and AFGE Local 3425*, 55 FLRA 454, 457 (1999).

The Union's make-whole request in this case centers on Union Executive Vice President [REDACTED] being made whole for 20 hours of annual leave that she took on October 9 through 11, 2019. According to the Union's reply brief, the purpose of this annual leave was to "complete time-sensitive NTEU-related tasks due to due to the problems with the SharePoint advance approval system." (Un. Reply Br. at p. 21.) The Union also says that [REDACTED] put a request for official time for this time period into the SharePoint system, but did not get a timely response from an Agency management official. She therefore chose to take annual leave rather than risk being put on AWOL status. The Agency states in its reply brief (Ag. Reply Br. At p. 11) that [REDACTED] annual leave request was "pre-planned," and not a result of her official time

request being lost in the system. None of these allegations were included in the parties' statement of undisputed facts.

The facts concerning this issue that are included in the parties' Statement of Undisputed Facts are that ██████ made two official time requests during this time period, for two hours on October 8th and 1.5 hours on October 17th. Both of these requests were granted. Based on this record, even assuming the truth of the allegations in the Union's reply brief, the Arbitrator finds that the Union has not established that ██████ is entitled to make whole relief for her annual leave. The missing ingredient is that there is no indication in the record that the Union made any follow-up request to the Agency to convert ██████ annual leave to official time. In the absence of such a follow-up request and an accompanying Agency denial, the Arbitrator finds that make-whole relief is not warranted. The fact that the Agency granted the other two official time requests that ██████ made during this time period supports this finding.

Another aspect of appropriate make-whole relief is the number of official time hours Union representatives would have received for the period October 7, 2019 (when the Agency implemented the EOs) to January 18, 2020 (when the Agreement was terminated) had the 25% cap had not been imposed. The parties' Statement of Undisputed Facts indicates at ¶¶ 26 and 32 that in FY 2018 and 2019, Union President ██████ and Executive Vice President ██████ used official time at rates far exceeding the 25% cap the Agency imposed. It is reasonable to conclude from this that imposition of the cap resulted in lower amounts of official time being used by Union officials than would have been the case under Article 16 of the Agreement without the cap. This amount of official time is appropriately recovered in a make-whole remedy. *Dep't of the Navy, Naval Weapons Station, Yorktown, Va. and NAGE Local R4-1*, 55 FLRA 1112, 1114 (1999).

Finally, the Union requests that the Agency be directed to post a notice on appropriate Agency bulletin boards and distribute the notice by email to bargaining unit employees, acknowledging the Agency's statutory violations. The Agency argues that a posting requirement is not warranted because there is no indication that a large number of employees "witness[ed]" the statutory violation.

The Arbitrator finds that a physical and email notice posting throughout the Agency is an appropriate remedy. A posting is a traditional FLRA remedy for ULP violations that the FLRA orders in virtually every case. *F.E. Warren AFB and AFGE Local 2354*, 52 FLRA 149, 160 (1996). The FLRA has approved electronic notice posting as well, including by email or posting on an internet or intranet site. *Fed'l Bureau of Prisons, Okla. City and AFGE Local 171*, 67 FLRA 221 (2014). The Agency's citation to *PTO and POPA*, 45 FLRA 1090 (1992), is off point. In that case, the FLRA did in fact direct a posting, but declined to order the "extraordinary" remedy of requiring the Agency to distribute a physical copy of the notice to every bargaining unit employee.

VII. Award

For the reasons stated above, the Arbitrator finds that the Union has sustained its burden of establishing that the Agency committed ULPs under 5 U.S.C. §7116(a)(1), (7) and (8). As a remedy for these violations, the Arbitrator directs as follows:

1. The Agency is to rescind its October 7, 2019 notice of implementation of EOs 13,836 and 13,837 and restore the status quo ante. This would include, among other things, lifting the 25% cap on official time use, and removing the advance approval requirement before a Union representative could use official time.

2. The Agency will cease and desist in any future collective bargaining between the parties from relying on EO 13,836, section 6 as basis for declining to negotiate on a permissive bargaining proposal the Union may submit in bargaining.

3. The parties will confer for the purpose of reaching agreement on the number of official time hours improperly withheld from Union representatives during the period October 7, 2019 to January 18, 2020, due to the implementation of EO 13, 837. Once that number is agreed to, that amount of official time is to be added to the annual total hours of official time allocated to the Union for the current fiscal year.

4. The Agency is directed to post physical notices acknowledging its obligations under the Statute in places that are customarily used by the Agency to post such notices, as well as notices to be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Agency customarily communicates with employees by such means. The parties will meet and confer on the content of the notice and the electronic means used to distribute the notice to bargaining unit employees. The content of this notice shall be consistent with remedial notices as are directed by the FLRA in ULP cases.

5. The Arbitrator will retain jurisdiction over the case for 60 days from the date of this Decision and Award to address any disputes concerning implementation of the Award.

A handwritten signature in cursive script that reads "William E. Ferrina".

Arbitrator

Date: September 21, 2020