Federal Labor Relations Authority
Quarterly Digest Report: July 1, 2021 – September 30, 2021

The following case digests are summaries of decisions/orders issued by the Federal Labor Relations Authority, with a short description of the issues and facts of each case. Descriptions contained in these case digests are for informational purposes only, do not constitute legal precedent, and are not intended to be a substitute for the opinion of the Authority.

CASE DIGEST: *DOD, Domestic Dependent Elementary & Secondary Schs., Fort Buchanan, P.R.*, 72 FLRA 414 (2021) (Chairman DuBester concurring; Member Abbott dissenting)

This case concerned a remand from the U.S. Court of Appeals for the District of Columbia Circuit (the court). The Union had petitioned the court to review the Authority's original decision in *DOD, Domestic Dependent Elementary & Secondary Schools, Fort Buchanan, P.R.*, 71 FLRA 127 (2019) (Member DuBester dissenting). The court denied the Union's appeal in all but one respect. Specifically, the court found that the Authority had incorrectly held that a contract provision concerning the workday of bargaining-unit employees was nonnegotiable. The court remanded the case to the Authority. On remand, the Authority vacated its previous negotiability determination but concluded that it need not render another determination at this time. The Authority noted that the Union could avail itself of the negotiability-appeals process if the Union desired a further negotiability determination.

Chairman DuBester concurred in the decision to vacate the previous negotiability determination and not render another negotiability determination.

Member Abbott dissented from the majority's decision to vacate the Authority's earlier decision and send this back to the parties.

CASE DIGEST: *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 72 FLRA 419 (2021)

The Union requested that the Authority reconsider its decision in *U.S. Department of VA, John J. Pershing VA Medical Center, Poplar Bluff, Missouri* (*VA*), 72 FLRA 200 (2021) (Member Abbott concurring). In *VA*, the Authority held that because the grievance concerned the termination of a probationary employee, the Arbitrator did not have jurisdiction to resolve the grievance. In its motion for reconsideration (motion), the Union argued that the Authority erred in reaching its decision. Because the motion relied on arguments raised for the first time on reconsideration that could have been raised in *VA*, arguments rejected in *VA*, and findings that the Authority did not make, the Authority found that the motion did not establish extraordinary circumstances warranting reconsideration.

CASE DIGEST: *AFGE, Loc. 918*, 72 FLRA 421 (2021)

This case concerned the negotiability of one proposal that reinstated the terms of the parties' expired collective-bargaining agreement (CBA) – both permissive and mandatory subjects – until a new CBA goes into effect. The Agency argued that the proposal was non-negotiable because it is a permissive subject of bargaining that is negotiable only at the election of the Agency. The Authority reaffirmed that, once an agreement expires, agencies have a unilateral right under the Federal Service Labor-Management Relations Statute (the Statute) to terminate permissive subjects of bargaining negotiable only at the agency's election under section 7106(b)(1) of the Statute. Additionally, the Authority held that a party cannot be forced to waive its statutory rights and a proposal requiring such a waiver constitutes a permissive subject of bargaining. Therefore, because the Union conceded that the proposal concerns a permissive subject of bargaining and the Agency elected not to bargain, the Authority found the proposal to be outside the duty to bargain.

CASE DIGEST: *NTEU*, 72 FLRA 423 (2021) (Member Abbott concurring; Chairman DuBester dissenting)

The Union filed an unfair-labor-practice (ULP) charge alleging that the Agency bargained in bad faith by disapproving the ground rules for a new term agreement. While the parties negotiated that term agreement, the Union filed four grievances, each alleging that the Agency committed a ULP by bargaining in bad faith. Four arbitration awards were issued, and exceptions were filed as to each of the awards.

The Authority consolidated the four cases given the similarities in facts and arguments. Because the Union's earlier-filed ULP charge and the grievances all arose while the parties were bargaining the same term agreement, and the ULP and the grievances advance substantially similar legal theories, the Authority found that § 7116(d) of the Federal Service Labor-Management Relations Statute (the Statute) barred the Union's grievances.

Member Abbott concurred, agreeing with the outcome of this matter, but had difficulty reconciling this matter with the majority's holding in *NLRB*.

Chairman DuBester dissented. In his view, the four grievances vacated by the majority's decision neither arose from the same set of factual circumstances, nor advanced substantially similar legal theories, as the Union's earlier-filed ULP charge. As such, the majority's application of § 7116(d) of the Statute to bar the grievances finds no support in either the plain language or the legislative purpose of this provision.

CASE DIGEST: *U.S. Dep't of the Army, White Sands Missile Range*, 72 FLRA 435 (2021) (Chairman DuBester concurring)

The Authority determined that the Agency's exceptions were either untimely, interlocutory, or barred by the Authority's Regulations.

Chairman DuBester concurred. In his view, the Agency's interlocutory exceptions did not warrant review because none raised a plausible jurisdictional defect, the resolution of which would have advanced the ultimate disposition of the case.

CASE DIGEST: *U.S. Dep't of VA, VA Puget Sound Health Care Sys., Seattle, Wash.*, 72 FLRA 441 (2021) (Chairman DuBester concurring)

In this case, the Arbitrator granted environmental-differential pay (EDP) to housekeepers at the Agency's medical facility based on exposure to high-hazard microorganisms, but denied EDP for pipefitters. The Agency argued that the award was based on nonfacts, contrary to law, and incomplete, ambiguous, or contradictory. The Authority found that the Agency failed to establish that the award was deficient on any of these bases, and denied, in part, and dismissed, in part, the Agency's exceptions.

Chairman DuBester concurred, agreeing with the decision to deny, in part, and dismiss, in part, the Agency's exceptions.

CASE DIGEST: *U.S. Agency for Glob. Media*, 72 FLRA 447 (2021) (Chairman DuBester dissenting)

In this case, the Authority reaffirmed that when an agency is determining whether to grant a debt waiver under 5 U.S.C. § 5584, it has sole and exclusive discretion to determine whether there is fraud, misrepresentation, fault, or lack of good faith on the part of the employee requesting the waiver. Accordingly, after the Agency exercised its sole and exclusive discretion to find that employees were at fault for not informing the Agency of substantial overpayments, the Authority held that a dispute about the denial of debt-waiver requests was not grievable and that the Arbitrator did not have jurisdiction under § 5584 to grant a debt waiver.

Chairman DuBester dissented, noting his continued disagreement with the majority's conclusion that 5 U.S.C. § 5584 grants agencies the sole and exclusive discretion to determine whether an employee was at fault for purposes of granting or denying a debt-waiver request.

CASE DIGEST: *U.S. Dep't of HUD*, 72 FLRA 450 (2021) (Chairman DuBester dissenting)

An unambiguous contract provision does not become ambiguous simply because an Arbitrator finds that it is. Although the parties' agreement required a party to provide written notice in order to invoke arbitration, the Arbitrator relied on past practice and found that the Union properly invoked arbitration even though it bypassed the step requiring that it give notice to the Agency and instead submitted a form to the Federal Mediation and Conciliation Service. The Authority found that the Arbitrator ignored the plain wording of the provision when he found that the provision was ambiguous. Therefore, the Arbitrator could not rely on past practice to conclude that the Union properly invoked arbitration. Accordingly, the Authority granted the Agency's essence exception and set aside the award.

Chairman DuBester dissented, finding that the Arbitrator's determination that the provision at issue was ambiguous was supported by the record and unchallenged factual findings. Therefore, Chairman DuBester would have denied the Agency's essence exception.

CASE DIGEST: *U.S. Dep't of VA, Consol. Mail Outpatient Pharmacy, Leavenworth, Kan.*, 72 FLRA 455 (2021) (Chairman DuBester concurring)

The Arbitrator sustained the Union's grievance alleging that the Agency violated the training provisions of the parties' agreement. As a remedy, the Arbitrator awarded backpay to each of the grievants. The Agency filed exceptions to only the backpay portion of the award on contrary-to-law, essence, and nonfact grounds. Because the Arbitrator did not find, and the record did not establish, that the grievants would have earned the awarded backpay if the Agency had met its contractual training obligations, the Authority found that remedy contrary to the Back Pay Act, and set aside that portion of the award.

Chairman DuBester concurred, finding that under the circumstances of this case, the award failed to satisfy the requirements of the Back Pay Act.

CASE DIGEST: *U.S. DHS, U.S. CBP*, 72 FLRA 463 (2021)

Because the Arbitrator failed to follow Authority precedent when applying the "interest of justice" factors required by 5 U.S.C. § 7701(g)(1), but found that attorney fees were warranted, the Authority granted the Agency's contrary-to-law exception and set aside the fee award in its entirety.

Chairman DuBester concurred in the decision to set aside the fee award, but noted his continued disagreement with the precedent on which the majority relied to reach that decision.

Member Abbott agreed that the Agency's contrary-to-law exception was properly granted. However, he wrote separately to emphasize that arbitrators who intend to hear and rule on disputes submitted between Federal unions and agencies need to be thoroughly familiar with Title V.

CASE DIGEST: *NTEU*; 72 FLRA 469 (2021) (Member Abbott concurring)

This negotiability appeal involved proposals related to the Agency's implementation of a peer coaching initiative. The Authority found that the Union filed a grievance alleging unfair labor practices under the parties' negotiated grievance procedure that concerns issues directly related the Union's petition for review. Accordingly, the Authority dismissed the petition without prejudice.

Member Abbott concurred, arguing that the Authority's regulations abdicate one of the Authority's central statutory duties to resolve issues relating to the duty to bargain in good faith.

CASE DIGEST: *U.S. Marine Corps, Marine Corps Air Ground Combat Ctr., Twentynine Palms*, 72 FLRA 473 (2021) (Chairman DuBester dissenting)

Where the parties' agreement required the Arbitrator to issue a written decision on arbitrability before proceeding to a merits hearing, the Authority found that an email finding the grievance arbitrable was an "award" for purposes of § 7122(a) of the Federal Service Labor--Management Relations Statute. However, the Authority remanded the award to the parties because the Arbitrator's conclusion was so unsupported by the record that the Authority could not determine if the award was deficient on the grounds raised by the Agency's exceptions.

Chairman DuBester dissented from the decision to grant interlocutory review, noting his continued disagreement with the majority's expanded interlocutory-review standard.

CASE DIGEST: *U.S. DOJ, Fed. BOP, Fed. Corr. Ctr., Petersburg, Va.*, 72 FLRA 477 (2021) (Chairman DuBester concurring; Member Abbott concurring)

In this case, the Authority affirmed that a violation of a governing agency regulation constitutes an unwarranted or unjustified personnel action under the Back Pay Act.

Chairman DuBester concurred, noting that while he continues to disagree with the test applied by the majority to determine whether arbitration awards are contrary to a management right, he agreed that this test did not need to be applied to resolve the Agency's management-rights exception.

Member Abbott concurred, arguing that the Arbitrator did not properly apply the requirements of the Rehabilitation Act. However, because the Agency did not challenge those findings, he was constrained to find that the Agency failed to establish that the award was contrary to law

CASE DIGEST: *U.S. Dep't of VA, Med. Ctr., Kan. City, Mo.*, 72 FLRA 483 (2021) (Chairman DuBester dissenting)

The Authority found that the Union's motion for reconsideration attempted to relitigate *U.S. Department of Veterans Affairs, Medical Center, Kansas City, Missouri*, 72 FLRA 243

(2021) (*VA*) (Chairman DuBester dissenting), misconstrued the Authority's findings in that case, and failed to address all the grounds for the Authority's decision. Because the Union failed to establish extraordinary circumstances warranting reconsideration, the Authority denied the motion.

Chairman DuBester dissented, noting his continued disagreement with the majority's decision in *VA*.

CASE DIGEST: *U.S. Dep't of the Treasury*, 72 FLRA 486 (2021) (Chairman DuBester dissenting)

The Union requested that the Authority reconsider its decision in *U.S. Department of the Treasury, IRS*, 72 FLRA 308 (2021) (*IRS*) (Member Abbott concurring; Chairman DuBester dissenting). Because the Union's motion did not establish extraordinary circumstances warranting reconsideration, the Authority denied it.

Chairman DuBester dissented, reiterating his view that the majority erred in *IRS* by finding that the Arbitrator lacked jurisdiction over the Union's grievance.

CASE DIGEST: *U.S. DOL, Off. of Workers' Comp.*, 72 FLRA 489 (2021) (Member Abbott concurring)

In an initial fee award, the Arbitrator awarded the Union costs and seventy-five percent of the requested attorney fees after it prevailed on a grievance concerning a disciplinary action. Subsequently, the Arbitrator issued a supplemental award granting the Union additional fees for time spent preparing a response to the Agency's opposition to its fee petition. The Authority denied the Agency's exceptions to the initial fee award, and found that the Arbitrator had the authority to issue the supplemental award. However, because the Arbitrator failed to determine the reasonableness of the number of hours the Union extended in preparing the response, the Authority found that the supplemental award was contrary to law in part, set it aside, and remanded the matter to the parties for resubmission to the Arbitrator.

Member Abbott concurred, writing separately to express his concerns with arbitrable review of the penalty determinations made by Agency deciding officials in disciplinary cases.