Federal Labor Relations Authority
Quarterly Digest Report: July 1, 2023 – September 30, 2023

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: *AFGE, Loc. 2092*, 73 FLRA 596 (2023)

The Arbitrator determined that an Agency change to the grievant's work schedule did not violate the parties' collective-bargaining agreement because the Agency provided the Union with notice and an opportunity to bargain before implementing the change. The Union filed exceptions on essence and exceeded-authority grounds. The Authority denied the exceptions because they did not establish any deficiencies in the award.

CASE DIGEST: *IFPTE, Loc. 1*, 73 FLRA 600 (2023) (Chairman Grundmann concurring)

The Arbitrator determined that the Union's grievance was not procedurally arbitrable because the Union failed to comply with a provision in the parties' collective-bargaining agreement governing the selection of an arbitrator. The Union filed an exception to the award on essence grounds. The Authority denied the exception because it did not establish any deficiency in the award. Chairman Grundmann concurred.

CASE DIGEST: *AFGE, Loc. 12*, 73 FLRA 603 (2023)

The Union filed a petition for review of two proposals related to the Agency's change to performance standards for bargaining-unit employees. Relying on precedent holding that the establishment of performance standards is an exercise of the management rights to direct employees and assign work, the Authority found that both proposals were outside the duty to bargain and dismissed the petition.

CASE DIGEST: *U.S. Dep't of VA, Marion Veterans Admin. Med. Ctr., Marion, Ill.*, 73 FLRA 610 (2023)

The Arbitrator found that the Agency violated the parties' collective-bargaining agreement by failing to pay the grievants environmental-differential pay due to their exposure to a high-degree hazard consisting of micro-organisms. The Authority denied the Agency's exceptions contending that the award was contrary to law and government-wide regulations because the Agency failed to establish that the award was inconsistent with either the Occupational Safety and Health Act of 1970, as amended, or the Office of Personnel Management's regulations about environmental-differential pay for exposure to a high-degree hazard consisting of micro-organisms.

CASE DIGEST: *NTEU, Chapter 14*, 73 FLRA 613 (2023)

The Arbitrator sustained the Union's performance-evaluation grievance and directed the Agency to pay the grievant a performance award. The Union then requested attorney fees. The Arbitrator found that the Union was not entitled to the fees because performance awards were discretionary under the parties' collective-bargaining agreement and so did not constitute pay under the Back Pay Act. The Union excepted, arguing that the Arbitrator used the wrong legal standard to determine whether the parties' agreement required the Agency to pay performance awards. The Authority found that the Union's arguments concerned the Arbitrator's interpretation of the parties' agreement and failed to establish any legal error. Accordingly, the Authority denied the Union's contrary-to-law exception. Chairman Grundmann concurred.

CASE DIGEST: *U.S. Dep't of the Army, Ariz. Dep't of Emergency & Mil. Affs., Ariz. Army Nat'l Guard & Ass'n of Civilian Technicians, Chapter 61*, 73 FLRA 617 (2023)

The Arbitrator found the Agency violated the parties' agreement and the Federal Service Labor-Management Relations Statute by rescinding a policy without bargaining. The Agency filed exceptions to the award on contrary-to-law grounds. Because the rescinded policy was contrary to 32 U.S.C. § 709, and thus the Agency's rescission of the policy was merely enforcing a statutory requirement, the Authority vacated the award as contrary to law.

CASE DIGEST: *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Yazoo City, Miss.,* 73 FLRA 620 (2023)

After an employee reported a supervisor for harassment, the Agency issued the employee a cease-and-desist notice. The Union grieved the issuance of the notice, and the Arbitrator found that the action constituted retaliation against the employee in violation of Title VII of the Civil Rights Act of 1964. The Agency filed exceptions arguing that the award was contrary to law and that the grievance was procedurally inarbitrable under the parties' collective-bargaining agreement. Because the Agency could have raised its contrary-to-law argument before the Arbitrator, but did not, the Authority dismissed this exception. And because the Agency failed to establish a deficiency in the Arbitrator's interpretation of the parties' agreement, the Authority denied the Agency's essence exception.

CASE DIGEST: *U.S. DOJ, U.S. BOP, Fed. Corr. Complex, Victorville, Cal.*, 73 FLRA 624 (2023)

The Arbitrator found the Agency violated the parties' collective-bargaining agreement by failing to timely complete investigations, thereby denying two grievants overtime opportunities. As a remedy, the Arbitrator awarded the grievants backpay. The Agency filed exceptions on nonfact, essence, and contrary-to-law grounds. The Authority dismissed the nonfact exception and essence exception, in part because the Agency could have, but did not, raise the arguments in those exceptions to the Arbitrator. The Authority denied the remaining essence exception and the contrary-to-law exception because the Agency failed to establish that the award was deficient on either ground.

CASE DIGEST: *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 73 FLRA 628 (2023)

The Agency filed a motion for reconsideration of the Authority's decision in *Department of VA, John J. Pershing VA Medical Center, Poplar Bluff, Missouri*, 73 FLRA 498 (2023) (*Poplar Bluff*). The Authority found the motion did not establish extraordinary circumstances warranting reconsideration, because it relied on evidence that came into existence after the arbitration proceeding and it merely attempted to relitigate the Authority's conclusions in *Poplar Bluff*. Therefore, the Authority denied the motion.

CASE DIGEST: *U.S. Dep't of State, Passport Servs.*, 73 FLRA 631 (2023)

The Agency failed to timely remove discipline from the grievant's electronic official personnel file (eOPF) in violation of the parties' collective-bargaining agreement and a settlement agreement. As remedies, the Arbitrator directed the Agency to pay the grievant $2000 and establish a monitoring system to verify the removal of discipline from eOPFs. The Authority found no statutory basis for the monetary remedy and set it aside as violating sovereign immunity. The Authority found that the monitoring-system remedy exceeded the Arbitrator's authority, because it was not limited to the grievant, and modified it accordingly.

CASE DIGEST: *IFPTE, Loc. 4*, 73 FLRA 635 (2023)

This case concerned the negotiability of one proposal which would allow the Union to take photographs in Union-controlled spaces at the Agency's facility and disseminate those photographs without the Agency's prior approval. The Authority assumed, without deciding, that the proposal affected the Agency's right to determine internal-security practices. However, the Authority found the Agency conceded the proposal was negotiable as a procedure under 5 U.S.C. § 7106(b)(2). Accordingly, the Authority concluded that the proposal was within the duty to bargain.

CASE DIGEST: *NAGE, Loc. R1-134*, 73 FLRA 637 (2023)

These cases were before the Authority on three negotiability appeals (petitions) filed by the Union under § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute. The petitions concerned the negotiability of seven proposals related to a successor agreement on bargaining-unit-employees' personnel system. Under the circumstances, the Authority found it appropriate to consolidate the cases. The Authority found that Proposals 1, 2, and 7 affected management's right to determine budget and Proposal 5 affected management's rights to direct and assign work; the Union did not show that these proposals were negotiable as exceptions to the respective affected management rights; and, therefore, these proposals were outside the duty to bargain. Further, because Proposal 3 was inextricably intertwined with Proposals 1 and 2, the Authority found it also was outside the duty to bargain. In addition, the Authority found that Proposal 4 did not affect management's rights to direct and assign work and Proposal 6 did not affect management's right to determine budget, and the Agency did not demonstrate that the proposals were otherwise contrary to law. Thus, the Authority found that Proposals 4 and 6 were within the Agency's duty to bargain.

CASE DIGEST: *NTEU, Chapter 46*, 73 FLRA 654 (2023)

The Arbitrator issued an award finding the Agency did not violate the Rehabilitation Act or the parties' collective-bargaining agreement when the Agency denied the grievant's request for advanced annual leave. The Union filed exceptions to the award on nonfact, essence, and contrary-to-law grounds. The Authority denied the exceptions because the Union failed to demonstrate the award was deficient.

CASE DIGEST: *U.S. Dep't of VA*, 73 FLRA 660 (2023)

The Arbitrator issued an award finding the Union's grievance procedurally arbitrable and granted the grievance on the merits. The Agency filed exceptions to the Arbitrator's arbitrability determination on essence and nonfact grounds, and to the awarded remedy on contrary-to-law grounds. The Authority dismissed certain of the Agency's exceptions because the Agency failed to raise its arguments to the Arbitrator. Because the Agency's remaining exceptions challenged an arbitrability determination supported by a separate and independent ground, they did not establish that the award was deficient, and the Authority denied them.

CASE DIGEST: *Consumer Fin. Prot. Bureau*; 73 FLRA 663 (2023)

The Arbitrator sustained the Union's grievance, in part, and reduced the grievant's two-day suspension to a letter of reprimand. The Authority denied the Agency's essence exception because it did not establish any deficiencies in the award.

CASE DIGEST: *U.S. Dep't of VA, S. Nev. Health Care Syst.*, 73 FLRA 666 (2023)

The Arbitrator found: (1) the grievant voluntarily accepted a reassignment to a lower-graded, but higher-paid, position, based on Agency misinformation; (2) the Agency later wrongfully reduced the grievant's pay; and (3) the pay reduction was an adverse action under 5 U.S.C. § 7512 because the grievant reasonably and detrimentally relied on the Agency misinformation when he accepted the reassignment to the lower-graded position. The Agency filed exceptions to the award on multiple grounds. Because the claim advanced at arbitration concerned an adverse action under § 7512, the Authority found it did not have jurisdiction, and dismissed the exceptions.

CASE DIGEST: *Consumer Fin. Prot. Bureau & NTEU, Chapter 335*, 73 FLRA 670 (2023)

The Arbitrator found the Agency issued the letter of reprimand without cause, in violation of the parties' agreement. The Agency filed exceptions to the award on exceeded-authority and essence grounds, and on the ground that the award was contrary to the Due Process Clause of the Fifth Amendment to the U.S. Constitution. The Authority denied those exceptions because the Agency failed to demonstrate how the award was deficient.

In addition, the Agency argued that the award was contrary to public policy and that it conflicted with management's right to discipline employees under § 7106(a)(2)(A) of the Federal Service Labor-Management Relations Statute. The Authority clarified its test, previously set forth in *U.S. DOJ, Federal BOP*, 70 FLRA 398, 405-06 (2018) (Member DuBester dissenting), for assessing management-rights exceptions to arbitration awards enforcing collective-bargaining agreements. The Authority reserved judgment on the management-rights exceptions to allow the parties to submit additional briefs addressing how the Authority should apply the clarified test in their case.

CASE DIGEST: *USDA, Food Safety & Inspection Serv.*, 73 FLRA 683 (2023)

The Arbitrator sustained a grievance concerning the Agency's failure to bargain with the Union over changes to its detailing practices and certain positions (inspectors). The Arbitrator directed the Agency to return to the status quo ante, engage in good-faith bargaining, cease and desist from detailing the inspectors involuntarily, and make affected inspectors whole. The Agency filed exceptions to the award on the bases that the Arbitrator exceeded his authority; and the award is contrary to law, based on a nonfact, and moot. The Authority dismissed the Agency's contrary-to-law exception, and denied the remaining exceptions.

CASE DIGEST: *Tidewater Region Mkt., Def. Health Agency, U.S. DOD*, 73 FLRA 687 (2023).

An FLRA Regional Director (the RD) issued a decision and order finding the Defense Health Agency, Tidewater Market is the successor employer of professional and non-professional employees – represented by three different unions – who organizationally transferred to Tidewater Market from various Department of Defense facilities. She also found an election was not necessary to determine which union would represent the employees, because the American Federation of Government Employees represented a sufficient number of the employees. However, she directed an election to allow the professional employees to decide whether they want to be included in a unit with non-professional employees.

The National Association of Independent Labor (NAIL), which represented some of the transferred employees, filed an application for review of the RD's decision. The Authority found NAIL did not demonstrate the RD failed to apply established law or committed clear and prejudicial errors concerning substantial factual matters. Therefore, the Authority denied the application for review.

CASE DIGEST: *U.S. Dep't of the Army, U.S. Army Garrison, Picatinny Arsenal, N.J.*, 73 FLRA 700

The Union grieved after the Agency closed of one of two fire stations, which reduced the number of staffed positions per shift. In an arbitrability award, the Arbitrator found that the Union timely filed the grievance. In a merits award, the Arbitrator sustained the grievance and directed the Agency to restore staffing "as it existed" prior to the station closure. The Authority dismissed and denied the Agency's essence exceptions to both awards, and partially denied the incomplete-or-ambiguous exception. However, because the Authority could not determine the precise meaning of the Arbitrator's staffing remedy, the Authority partially granted the incomplete-or-ambiguous exception and remanded the merits award for clarification of the remedy.