

**Federal Labor Relations Authority**  
**Quarterly Digest Report: January 1, 2019 - March 31, 2019**



*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.*

***U.S. Dep't of VA, St. Petersburg Reg'l Benefit Office, 71 FLRA 1 (2019)***  
**(Member DuBester dissenting)**

The Union filed a motion for reconsideration of *U.S. Department of VA, St. Petersburg Regional Benefit Office (VA II)*, 70 FLRA 586 (2018) (Member DuBester dissenting), where the Authority found that the Arbitrator failed to grant an appropriate remedy on remand. In its motion for reconsideration, the Union argued that the Authority did not defer to the Arbitrator's various factual findings, and violated the Administrative Procedure Act by setting aside the remand award rather than remanding the case yet again for resubmission to the Arbitrator to fashion an appropriate remedy.

The Authority found it was under no obligation to defer to the Arbitrator's determinations in areas beyond the Arbitrator's authority. The Authority also found it not appropriate to remand a case a second time where an arbitrator has already failed to grant an appropriate remedy upon remand.

Member DuBester dissented, finding that the majority erroneously rejected the Arbitrator's findings and conclusion. He would have granted the motion for reconsideration. Member DuBester also found that the majority's failure to remand the case to the parties was inconsistent with Authority precedent and violated the Administrative Procedure Act.

***Fraternal Order of Police, Lodge NO. 1, 71 FLRA 6 (2019)***

This case concerned an arbitrator's premature denial of attorney fees. The Union filed a grievance challenging the grievant's fourteen-day suspension. The Arbitrator issued an award sustaining the Union's grievance and reversing the grievant's fourteen-day suspension. However, in response to the Union's statement that it sought attorney fees, the Arbitrator denied the Union attorney fees because the Union made no attempt to demonstrate a statutory entitlement to the fees before he issued the merits award. The Authority found that the Arbitrator's denial of attorney fees is contrary to law because the Arbitrator denied the request for attorney fees before the Union had an opportunity to submit a petition for fees, and before the Agency had an opportunity to respond to a petition. Accordingly, the Authority modified the award to strike the denial of attorney fees, without prejudice to the Union's right to file a petition for attorney fees with the Arbitrator.

***U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Englewood, Colo., 71 FLRA 8 (2019)***  
**(Chairman Kiko and Member Abbott concurring)**

This case concerned an arbitrator's award of liquidated damages under the Fair Labor Standards Act (FLSA). The grievance alleged that the Agency violated the FLSA by untimely paying grievants overtime. Finding that the Agency violated the FLSA, the Arbitrator awarded liquidated damages. On exception, the Agency argued that the award of liquidated damages is contrary to the FLSA because there was no unpaid overtime. The Authority noted that the Agency did not dispute that it violated the FLSA by failing to pay overtime in a timely manner, nor did it challenge the Arbitrator's conclusion that the Agency failed to meet its substantial burden of demonstrating that liquidated damages were not warranted. Accordingly, the Authority concluded that the Agency failed to demonstrate that the award is contrary to law, and denied the Agency's exception.

Chairman Kiko concurred, noting that a Department of Labor regulation allows delayed overtime compensation when the correct amount of overtime cannot be determined until after the regular pay period. However, the Arbitrator found that regulation inapplicable and the Agency did not provide a basis for reversing that determination.

Member Abbott also concurred, agreeing with Chairman Kiko's concurrence, and noting that the Agency conceded that it committed a technical violation of the FLSA.

***U.S. Dep't of State, Passport Servs., 71 FLRA 12 (2019)***

This case concerned whether the Agency failed to comply with a settlement agreement, which required the Agency to notify employees, "generally" within two hours, of an Agency computer outage so that employees would know what production quotas applied on the day of the outage. The Arbitrator found that the Agency violated the agreement by failing, on numerous occasions, to provide notification within the

two-hour period. As a remedy, the Arbitrator directed the Agency to stop violating the agreement.

On exceptions, the Agency raised nonfact and essence arguments. The Authority denied the nonfact exception because it challenged the Arbitrator's interpretation of the agreement, not a factual matter. As to the essence exception, the Authority found that the Arbitrator's interpretation and application of the term "generally" was consistent with both the dictionary definition of the term and the agreement's notification requirement. The Authority further found that the Agency failed to demonstrate that the Arbitrator lacked the contractual authority to direct the Agency to comply with the agreement. Accordingly, the Authority denied the essence exception.

***U.S. Dep't of HUD, 71 FLRA 17 (2019) (Member DuBester dissenting)***

The Union filed a motion asking the Authority to reconsider *U.S. Dep't of HUD, 70 FLRA 122 (2018) (HUD VIII)* (Member DuBester dissenting). In *HUD VIII*, the Authority vacated *HUD I* through *HUD VII* and the Arbitrator's awards and written summaries after finding that the original grievance concerned classification and that the Arbitrator always lacked jurisdiction over the grievance.

The Authority found that although prior arbitration awards and written summaries were final and binding, it was appropriate to consider whether jurisdiction existed, and that its decision did not deprive the Union or the grievants of due process. Accordingly, the Authority denied the Union's motion because it failed to establish extraordinary circumstances warranting reconsideration of *HUD VIII*.

Member DuBester dissented and would have granted the motion because the Union's arguments raised extraordinary circumstances.

***U.S. DOD, Missile Def. Agency, Redstone Arsenal, Ala., 71 FLRA 22 (2019) (Member DuBester dissenting)***

The Agency filed a motion asking the Authority to reconsider *U.S. DOD, Missile Defense Agency, Redstone Arsenal, Alabama, 70 FLRA 611 (2018) (Redstone Arsenal)* (Member DuBester dissenting). In *Redstone Arsenal*, the Union filed an unfair-labor-practice charge against the Agency after it denied the Union's request to host "lunch and learns" on an Agency-controlled property. The Administrative Law Judge granted the FLRA General Counsel's motion for summary judgment, finding that the Agency discriminated against the Union in violation of 5 U.S.C. § 7116(a)(1) by denying the Union's request "while allowing visiting vendors to engage in commercial solicitation." The Authority remanded the matter to the judge for a hearing because there was insufficient evidence in the record to find whether the Agency had acted in a discriminatory manner.

In its motion, the Agency made several arguments about whether the Union requested to solicit anyone. Because the Agency's motion for reconsideration

(1) attempted to relitigate the Authority's conclusions in *Redstone Arsenal* and (2) was based on a misinterpretation of that decision, the Authority denied the motion, finding that it had not established extraordinary circumstances warranting reconsideration.

Member DuBester dissented, noting that although he would have also denied the Agency's motion, he did not believe the matter warranted remand to the Administrative Law Judge for the reasons he set forth in *Redstone Arsenal*.

***SPORT Air Traffic Controllers Org.*, 71 FLRA 25 (2019) (Member DuBester concurring)**

The Union filed a motion for reconsideration of *SPORT Air Traffic Controllers Organization (SPORT)*, 70 FLRA 554 (2018) (Member DuBester concurring). In *SPORT*, the Authority upheld the Judge's findings that the Union's refusal to recognize the Agency's bargaining representatives was an unfair labor practice. As the Union raised a new argument for the first time on its motion for reconsideration and otherwise attempted to relitigate arguments already rejected by the Authority in *SPORT*, the Authority denied the Union's motion for reconsideration because it failed to establish extraordinary circumstances.

Member DuBester concurred in the decision.

***U.S. Dep't of Transp., FAA*, 71 FLRA 28 (2019) (Member Abbott concurring; Member DuBester dissenting)**

The Agency filed an application for review of an FLRA Regional Director's (RD's) decision finding that certain employees are not confidential employees within the meaning of 5 U.S.C. § 7103(a)(13). The Authority noted that the employees were responsible for assisting their supervisor with responding to formal grievances and Union-filed unfair-labor-practice (ULP) charges. Although the employees had not yet had an opportunity to assist their supervisor with those matters, that did not end the inquiry as to whether they are confidential. To determine whether an employee is confidential, the Authority clarified that it will consider duties the employee may be called upon to perform, not just duties already performed.

Member Abbott concurred, noting that the FLRA RDs operate under delegated authority, and the Federal Service Labor-Management Relations Statute mandates that the Authority completely review any RD determination made pursuant to that delegated authority.

Member DuBester dissented, asserting that Authority precedent and the record supported the RD's decision. He also would not have rejected the parties' agreement to use representative witnesses. Thus, he would have found it unnecessary to remand the matter to the RD.

***U.S. DHS, U.S. CBP, El Paso, Tex., 71 FLRA 49 (2019) (Member DuBester dissenting)***

This case concerned the Union’s motion asking the Authority to reconsider its decision in *U.S. DHS, U.S. CBP, El Paso, Texas, 70 FLRA 501 (2018) (DHS I)* (Member DuBester dissenting). In *DHS I*, the Authority overturned precedent holding that there is no substantive difference between the terms “conditions of employment” and “working conditions,” as used in 5 U.S.C. § 7103(a)(14). Specifically, the Authority found that those different terms – one of which Congress used to define the other – cannot mean the same thing.

In the motion, the Union argued that the Authority misapplied the U.S. Supreme Court’s decision in *Fort Stewart Schools v. FLRA*, 495 U.S. 641 (1990) (*Fort Stewart*). However, the Authority stated that it based its conclusion in *DHS I* on the plain wording of § 7103(a)(14) – not *Fort Stewart*. Moreover, the Authority noted that in *Fort Stewart* the Court recognized that “conditions of employment” and “working conditions” are susceptible to distinct interpretations. Thus, the Union’s motion failed to establish extraordinary circumstances warranting reconsideration of *DHS I*, and the Authority denied it.

Member DuBester dissented, asserting that he would have granted the motion for the reasons expressed in his dissent in *DHS I*.

***U.S. Dep’t of the Army, Aberdeen Proving Ground, Research, Dev. & Admin., Aberdeen Proving Ground, Md., 71 FLRA 54 (2019) (Member DuBester dissenting)***

This case concerned the Arbitrator’s interpretation of the parties’ collective-bargaining agreement as requiring the Agency to follow certain procedures when interviewing job candidates. The Arbitrator found that the composition of an “interview panel” – used for evaluating job candidates on a referral certificate – did not comply with the agreement’s requirements for a “rating panel” – used for determining applicants’ eligibility for a position *before* the Agency receives a referral certificate. On exceptions, the Authority found that the parties’ agreement permitted the Agency to interview candidates on a referral certificate without any rating-panel restrictions. Thus, it was implausible for the Arbitrator to find that the rating-panel provision of the parties’ agreement also governed interview panels. Accordingly, the Authority set aside the award as failing to draw its essence from the parties’ agreement.

Member DuBester dissented, finding that the Arbitrator properly interpreted the parties’ agreement to require the Agency to apply the rating-panel requirements to panels at *all steps* of the candidate-evaluation process. Thus, he would have denied the essence exception.

**SSA, 71 FLRA 57 (2019) (Member DuBester concurring)**

This case concerned the Agency's procedure for assessing employees' performance. The grievance alleged an employee should have received an "outstanding" rating rather than the less favorable "successful" rating. The Arbitrator found the Agency failed to properly consider the grievant's self-assessment and rebuttal to its reasons for denying her the more favorable rating and that it erred when it relied on certain evidence in assigning her rating. On exceptions, the Agency argued that the award was contrary to law and Agency policy because the Arbitrator found the Agency's performance assessment system was "wrong," contrary to government-wide regulations concerning employee performance appraisal. The Authority found that the Agency's exceptions relied on a misinterpretation of the Arbitrator's award, as the Arbitrator determined that the Agency's appraisal process was a fair and appropriate procedure but found the Agency had not properly applied it to the grievant. Therefore, the Authority concluded that the Agency had not established that the award was contrary to law, and denied the Agency's exception.

Member DuBester concurred in the decision to deny the Agency's exceptions.

***Indep. Union of Pension Emps. for Democracy & Justice*, 71 FLRA 60 (2019)  
(Member DuBester concurring)**

The Union filed a motion for reconsideration of *Independent Union of Pension Employees for Democracy and Justice (IUPEDJI)*, 70 FLRA 820 (2018) (Member DuBester concurring). In *IUPEDJI*, the Authority found that the Chief Administrative Law Judge properly granted a motion for summary judgment, found that the Union committed an unfair labor practice by improperly attempting to dismantle a duly assembled arbitration panel, and modified the remedy to include an additional arbitrator. In its motion for reconsideration, the Union repeated arguments it had made in *IUPEDJI*, and also argued that the General Counsel did not request the modified remedy. Additionally, according to the Union, the Authority accused the Union of "not doing arbitrations for employees" and "blame[d] the Union for the proceedings." The Authority found that the Union's motion presented arguments that the Authority had already considered and rejected in *IUPEDJI*, mischaracterized *IUPEDJI*, or relied on dicta. Therefore, the Authority concluded that the Union failed to demonstrate extraordinary circumstances warranting reconsideration and denied the Union's motion. Member DuBester concurred in the decision.

Member DuBester concurred in the decision.

***USDA Animal & Plant Health Inspection Serv., Plant Prot. & Quarantine*, 71 FLRA 64 (2019) (Chairman Kiko dissenting)**

This case concerned the application of the U.S. Office of Personnel Management's add-on rule, which allows an agency to find that employees subject to inservice placement actions meet the minimum qualifications of a position. The Agency

reclassified the employees' positions within the General Schedule and ten years later, upon reexamining their qualifications, failed to promote the primary grievant and found several others unqualified for their jobs for failing to meet their positions' minimum education requirements. The Arbitrator found that the add-on rule applied because the employees had been "reassigned" and directed the Agency to promote the primary grievant and correct the personnel records of the other employees to reflect they were fully qualified for their positions.

On exceptions, the Agency argued that the add-on rule cannot waive minimum education requirements. The Authority found that the Arbitrator's award did not require the Agency to waive the minimum education requirements and noted that the affected employees had been performing successfully in their reclassified positions for the last ten years, consistent with the underlying purpose of minimum education requirements. Chairman Kiko dissented, finding the award contrary to the add-on rule because the grievants' positions had never changed.