

CASE DIGEST: *AFGE, Loc. 3369*, 72 FLRA 619 (2022) (Chairman DuBester concurring)

In the initial award, the Arbitrator found that the Agency did not have just cause to remove the grievant, and ordered the grievant be reinstated. Thereafter, the Arbitrator issued a clarification award, finding that the grievant was not eligible for the within-grade increases that would have accrued from the date of termination to the date of reinstatement. The Union filed exceptions to the clarification award. The Authority held that it lacked jurisdiction because the clarification award ultimately resolved the grievant's removal, a matter described in § 7121(f) of the Federal Service Labor-Management Relations Statute, excluded from the Authority's jurisdiction.

Chairman DuBester concurred in the decision to dismiss the exceptions.

CASE DIGEST: *U.S. DOJ, Exec. Off. of Immigr. Rev.*, 72 FLRA 622 (2022) (Member Kiko concurring; Chairman DuBester dissenting)

This case concerns the Union's motion for reconsideration (motion) of the Authority's decision in *U.S. DOJ, Executive Office of Immigration Review*, 71 FLRA 1046 (2020) (*EOIR 2020*) (then-Member DuBester dissenting). In *EOIR 2020*, the Authority found that *U.S. DOJ, Executive Office of Immigration Review, Office of the Chief Immigration Judge*, 56 FLRA 616 (2000) (*EOIR 2000*) was incorrectly decided. As such, the Authority overruled *EOIR 2000* and found that immigration judges are management officials, and therefore, excluded from being members of the bargaining unit pursuant to the Federal Service Labor-Management Relations Statute. In its motion, the Union argued that the Authority erred in its legal conclusions and factual findings. The Association of Administrative Law Judges and the American Federation of Government Employees, AFL-CIO, after the Authority granted permission, filed amicus curiae briefs. Because the Union failed to demonstrate extraordinary circumstances warranting reconsideration, the Authority denied the motion.

Member Kiko concurred, emphasizing certain plain and compelling circumstances that supported the decision in *EOIR 2020* to re-examine the appropriateness of the unit of immigration judges and find that the judges were management officials.

Chairman DuBester dissented, concluding that the Union demonstrated extraordinary circumstances warranting reconsideration of *EOIR 2020*.

CASE DIGEST: *U.S. Dep't of the Army, U.S. Army Corps of Eng'r Dist., St. Paul, Minn.*, 72 FLRA 634 (2022)

The Arbitrator found that the Agency violated the parties' collective-bargaining agreement and a memorandum of understanding when a supervisor covered vacant shifts because the supervisor's action denied bargaining-unit employees opportunities to work overtime. Because the award was not consistent with the parties' agreements, the Authority granted the Agency's essence exception and set aside the award.

CASE DIGEST: *U.S. DOJ, Fed. BOP Fed. Corr. Inst., Guaynabo, P.R.*, 72 FLRA 636 (2022) (Member Abbott dissenting)

In this case, the parties selected the successor Arbitrator to assume the full arbitral authority of a previous arbitrator. The Authority found that the successor Arbitrator's consideration of Fair Labor Standards Act allegations against the Agency was consistent with the previous arbitrator's retention of jurisdiction. Accordingly, the Authority denied the Agency's exceptions arguing that the successor Arbitrator was *functus officio*.

Member Abbott dissented, arguing the Arbitrator exceeded their authority, and would have granted the Agency's exception.

CASE DIGEST: *U.S. Dep't of the Air Force, Air Force Materiel Command*, 72 FLRA 640 (2022)

In this case, the Arbitrator determined that the parties' agreement barred any claims that occurred more than thirty days prior to the filing of the Union's grievance. However, the Arbitrator also found that the Union's remaining claims were timely as a possible continuing violation. On review, the Authority found that the Agency's nonfact exception failed because it did not demonstrate that any of the Arbitrator's findings are clearly erroneous. The Authority dismissed those arguments the Agency failed to raise before the Arbitrator, and denied the remaining exceptions.

Chairman DuBester dissented, finding that the interlocutory exceptions should be dismissed because they failed to raise a plausible jurisdictional defect.

CASE DIGEST: *NLRB*, 72 FLRA 644 (2022) (Chairman DuBester concurring; Member Abbott concurring)

In this case, the Authority affirmed that § 7116(d) of the Federal Service Labor-Management Relations Statute is applied on an issue-by-issue basis.

Chairman DuBester concurred. He agreed that interlocutory review was appropriate and that the Agency's contrary-to-law and essence exceptions should be denied.

Member Abbott concurred, emphasizing portions of the record that distinguished this case from previous Authority decisions applying § 7116(d).

CASE DIGEST: *AFGE, Loc. 3917*, 72 FLRA 651 (2022) (Chairman DuBester concurring)

The Arbitrator found a grievance substantively nonarbitrable because it involved classification under § 7121(c)(5) of the Federal Service Labor-Management Relations Statute, and the Authority dismissed, in part, and denied, in part, Union-filed exceptions that challenged that finding.

Chairman DuBester concurred to dismiss, in part, and deny, in part, the Union's exceptions.

CASE DIGEST: *U.S. Dep't of VA, John J. Pershing VA Med. Ctr.*, 72 FLRA 656 (2021) (Member Abbott concurring; Chairman DuBester dissenting in part)

In a discipline case, the Arbitrator exceeded his authority by considering charges that were not sustained by the Agency and the grievant's Whistleblower Protection Act (WPA) claim, when both were outside of the stipulated issue.

Member Abbott concurred in the decision, but wrote separately to highlight that the Authority's Regulations do not universally demand that a party's exception be automatically dismissed for failing to raise the specific argument below. Additionally, he noted that arbitrators should be hesitant to disturb discipline when a chosen penalty falls within the range established by an agency's table of penalties.

Chairman DuBester dissented in part, finding that the Arbitrator did not exceed his authority by addressing whether the Agency's disciplinary action violated the WPA.

CASE DIGEST: *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 72 FLRA 662 (2022) (Chairman DuBester concurring)

The Authority held that § 7121(d) of the Federal Service Labor-Management Relations Statute barred the grievance because it concerned the same matter raised in an earlier-filed equal employment opportunity (EEO) complaint.

Chairman DuBester concurred. He noted that although the grievance concerned additional matters not included in the EEO complaint, the Arbitrator limited his review to a matter that was clearly covered by the EEO complaint.

CASE DIGEST: *AFGE, Loc. 3703*, 72 FLRA No. 666 (2022) (Chairman DuBester concurring)

The Union filed a grievance following the Agency's denial of the grievants' official time request. The Arbitrator denied the grievance finding it untimely and non-arbitrable. The Union argued that the arbitrability finding failed to draw its essence from the parties' agreement. Because the Union's essence argument disagreed with the weight the Arbitrator gave to evidence and failed to demonstrate that the Arbitrator's interpretation of the agreement was implausible, irrational, or unfounded, the Authority denied the exception.

Chairman DuBester concurred in the decision to deny the Union's exception.

CASE DIGEST: *AFGE, Loc. 2119*, 72 FLRA 669 (2022) (Chairman DuBester concurring)

When the Agency stopped regularly scheduling certain employees for weekend overtime, the Union argued that the Agency failed to give contractually required notice for changing overtime-assignment procedures. Because the Agency merely stopped assigning as much overtime, the Arbitrator found this was not a change to overtime-assignment procedures requiring notice. The Authority found that the Union failed to demonstrate that the award was deficient and denied the Union's nonfact and essence exceptions.

Chairman DuBester concurred in the decision to deny the Union's exceptions.

CASE DIGEST: *U.S. Dep't of the Army, U.S. Army Dental Activity, Fort Jackson, S.C.*, 72 FLRA 672 (2022) (Chairman DuBester dissenting)

In this case, the Authority reaffirmed that parties may agree to exclude matters from the scope of their negotiated grievance procedure, and the Authority will enforce such exclusions.

Chairman DuBester dissented. In his view, granting interlocutory review was inappropriate and the Arbitrator's arbitrability determination did not fail to draw its essence from the parties' collective-bargaining agreement.

CASE DIGEST: *U.S. Dep't of VA, VA Hosp. Med. Ctr.*, 72 FLRA 677 (2022)

In this case, the Authority reaffirmed that, if an agency does not—or fails to—demonstrate that an award of attorney fees is not in the interest of justice, an arbitrator's award of fees is not contrary to the Back Pay Act.

CASE DIGEST: *U.S. DOJ Fed. BOP, Fed. Corr. Inst., Ashland, Ky.*, 72 FLRA 681 (2022)

In a merits award, the Arbitrator found that the Agency violated the Fair Labor Standards Act and the parties' collective-bargaining agreement; retained jurisdiction indefinitely to resolve implementation issues, including the amount of attorney fees; and set a deadline for an attorney fee petition (petition). In a fee award, the Arbitrator excused the Union's late petition – filed one day after the deadline – and awarded all the attorney fees requested. The Agency filed exceptions to the fee award on contrary-to-law grounds. The Authority found that the Arbitrator was not functus officio, but that the fee award was deficient because it lacked specific findings to support the awarded fees.

CASE DIGEST: *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 72 FLRA 684 (2022) (Chairman DuBester concurring)

The Agency filed an exception to an Arbitrator's letter declining to rule on its motion to dismiss. Because the Arbitrator postponed determination of the issue until the hearing, the letter was neither an award nor a ruling to which an exception could be filed, and the Authority dismissed the Agency's interlocutory exception.

Chairman DuBester concurred in the decision to dismiss the Agency's exception.

CASE DIGEST: *U.S. Dep't of the Treasury, IRS*, 72 FLRA 687 (2022)
(Chairman DuBester concurring)

The Arbitrator sustained the Union's grievance alleging that the Agency violated the parties' agreement and committed an unfair labor practice pursuant to §§ 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute when it unilaterally implemented changes to the annual leave procedures for certain bargaining unit employees. The Authority denied the Agency's exception because it did not establish that the award failed to draw its essence from the parties' agreement.

Chairman DuBester concurred in the decision to deny the Agency's exception.

CASE DIGEST: *U.S. Dep't of the Air Force, 11th Wing Joint Base, Andrews, Md.*,
72 FLRA 691 (2022)

The Arbitrator found that the Agency's failure to bargain in good faith when implementing a new uniform requirement resulted in the grievants spending their own money to acquire uniforms, and awarded backpay. The Agency filed exceptions on the ground that the award was contrary to the Back Pay Act (Act). The Authority found that the Agency failed to demonstrate that the award was contrary to the Act and denied the exceptions.

CASE DIGEST: *Int'l Bhd. of Boilermakers, Loc. 290, Bremerton Metal Trades Council*,
72 FLRA 694 (2022)

The Arbitrator found that the Agency did not violate the parties' collective-bargaining agreement and a memorandum of understanding by not selecting the grievant for a weekend overtime assignment. The Union filed exceptions to the award on bias, essence, and nonfact grounds. The Authority found that the Union failed to demonstrate that the award was deficient on any of these grounds and denied the exceptions.

CASE DIGEST: *U.S. DHS, CPB, San Diego, Cal.*, 72 FLRA 698 (2022) (Member Abbott concurring; Chairman DuBester dissenting)

After the Agency temporarily revoked, and then restored, the grievant's authorization to carry a firearm, the Union filed a grievance challenging the Agency's actions. The Arbitrator found that the Union's grievance was timely, in part. Because the Union did not file the grievance until the deadline in the parties' collective-bargaining agreement had elapsed, the Authority held that the Arbitrator's procedural-arbitrability determination failed to draw its essence from the parties' agreement.

Member Abbott concurred, agreeing the grievance was untimely to avoid an impasse, but wrote separately to express his opinion that any question concerning authorization to carry a firearm in an official capacity is a matter of internal security and is left to the sole discretion of the Agency.

Chairman DuBester dissented. In his view, the Arbitrator's conclusion that the restoration of the grievant's firearm was timely grieved was a plausible interpretation of the parties' agreement.

CASE DIGEST: *AFGE, Loc. 2324*, 72 FLRA 703 (2022) (Chairman DuBester concurring)

Because the Arbitrator's award related to a removal, a matter described in § 7121(f) of the Federal Service Labor-Management Relations Statute, the Authority held that it lacked jurisdiction to review the Union's exceptions.

Chairman DuBester concurred in the decision to dismiss the Union's exceptions.

CASE DIGEST: *AFGE, Loc. 2119*, 72 FLRA 706 (2022) (Member Abbott concurring)

In this case, the Authority considered the negotiability of several provisions. As an initial matter, the Authority dismissed Provisions 1 and 4 through 11, without prejudice, for failing to meet the conditions governing review of negotiability appeals. Next, the Authority held that Provision 2, which restated an existing statutory right, was consistent with law. Consequently, the Authority ordered the Agency to rescind its disapproval of that provision. However, the Authority denied the petition as to Provisions 3 and 12 because those provisions affected management's right to assign work under § 7106(a)(2)(B) of the Federal Service Labor-Management Relations Statute, and the Union did not argue that the provisions were negotiable under an exception to management's rights.

Member Abbott concurred, expressing his viewpoint that no purpose is served when parties insert language into collective bargaining agreements that merely restate or reiterate statutory rights.

CASE DIGEST: *U.S. DOJ, Fed. BOP, Fed. Correctional Ctr., Terre Haute, Ind.*, 72 FLRA 711 (2022) (Chairman DuBester dissenting)

Because the Arbitrator identified no wording in the parties' agreement that permitted the Union's untimely grievance, the Authority granted the Agency's essence exception and vacated the award.

Chairman DuBester dissented, finding that the Arbitrator did not err by concluding that the grievance alleged a continuing violation and was therefore timely filed.

CASE DIGEST: *U.S. Dep't of the Air Force, Davis-Monthan Air Force Base*, 72 FLRA 716 (2022) (Chairman DuBester concurring)

After a district court enjoined an executive order, the parties negotiated a collective-bargaining agreement that conflicted with provisions of the executive order. When the United States Court of Appeals for the District of Columbia Circuit lifted the injunction, President Trump issued a Presidential Memorandum amending the executive order to exempt conflicting collective-bargaining agreements executed during the injunction period. Because the Presidential Memorandum amended the executive order, the Authority concluded that the

Arbitrator's consideration of the Presidential Memorandum was responsive to the parties' stipulated issues and denied the Agency's exceptions.

Chairman DuBester concurred with the decision to deny the Agency's exceptions.

CASE DIGEST: *DOD, Domestic Dependent Elementary & Secondary Schs., Fort Buchanan, P.R.*, 72 FLRA 720 (2022) (Chairman DuBester concurring; Member Abbott dissenting)

The Union filed a motion for reconsideration of the Authority's order to resume bargaining over work hours and compensation. Although the Union filed its motion within ten days of an Authority decision on remand from the U.S. Court of Appeals for the District of Columbia Circuit, the Authority found that the motion directly challenged the unchanged bargaining order from the Authority's decision two years earlier in *DOD, Domestic Dependent Elementary & Secondary Schools, Fort Buchanan, P.R.*, 71 FLRA 127 (2019) (*DOD*) (then-Member DuBester dissenting). Thus, the Authority dismissed the reconsideration motion as untimely.

Chairman DuBester concurred in the decision to dismiss the Union's motion but noted that he continues to disagree with the Authority's decision in *DOD*.

Member Abbott dissented, arguing the Union's motion presented extraordinary circumstances to the 2021 Order that warranted reconsideration.

CASE DIGEST: *Fed. Educ. Assoc., Stateside Region*, 72 FLRA 724 (2022)

The Arbitrator denied a grievance alleging that the Agency violated the parties' collective-bargaining agreement regarding reduction-in-force procedures and vacancy-notice requirements when the Agency reassigned employees. The Union filed exceptions on nonfact, contrary-to-law, and essence grounds. Because the Union failed to demonstrate that the award was deficient on any of those grounds, the Authority denied the exceptions.