

Federal Labor Relations Authority
Quarterly Digest Report: April 1, 2019 - June 30, 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.

CASE DIGEST: *AFGE, Nat'l Joint Council of Food Inspection Locals, AFL-CIO, 71 FLRA 69 (2019) (Member Abbott concurring)*

This case concerned whether a provision in the parties' collective-bargaining agreement excused the Union's refusal to bargain with the Agency over a new agreement. A reopener provision in the parties' agreement provided that the parties would renegotiate if either party timely served its demand to bargain along with initial written proposals. Citing that provision, the Union refused to bargain because the Agency had submitted only ground rules proposals with its bargaining demand. An FLRA Regional Director issued a complaint alleging that the Union violated § 7116(b)(1) and (5) of the Federal Service Labor-Management Relations Statute (Statute) by refusing to bargain. An FLRA Administrative Law Judge (the Judge) found that the cited provision did not require submitting substantive proposals. As such, the Judge found that the Union could not refuse to bargain on the basis that the Agency submitted only ground-rules proposals. The Union filed exceptions to the Judge's recommended decision and argued that the Judge misinterpreted the contract provision. The Authority found that the Judge's interpretation was consistent with the record and the standards and principles that arbitrators and federal courts apply when interpreting collective-bargaining agreements. Therefore, the Authority denied the Union's exceptions and found that the Union violated § 7116(b)(1) and (5) of the Statute.

Member Abbott concurred. Although he agreed that the record supported the Judge's conclusions, Member Abbott would have applied the more deferential substantial-evidence standard to review the Judge's findings, and he called upon the majority to reconsider its stance of giving a higher deference to arbitrators and regional directors than accorded to the Authority's administrative law judges.

CASE DIGEST: *U.S. Dep't of the Air Force, Air Force Materiel Command, 66 Air Base Grp., Hanscom Air Base, Mass.*, 71 FLRA 81 (2019) (Member DuBester concurring)

The Union filed a petition asking to clarify the bargaining-unit status of four employees occupying two positions. The Regional Director (RD) found that the employees are confidential employees under 5 U.S.C. § 7103(a)(13) and should be excluded from the Union's bargaining unit. The Union filed an application for review of the RD's decision.

In assessing whether an employee "acts in a confidential capacity with respect to an individual who formulates or effectuates labor-management policies," the Authority stated that the employee need not actually participate in contract negotiations or grievances. Instead, the Authority will consider whether the employee obtains advance information about those matters through the normal performance of his or her duties. As the record established that the four employees obtained such advanced information through meetings and emails, the Authority denied the application for review.

CASE DIGEST: *U.S. Dep't of VA, Malcolm Randall VA Med. Ctr., Gainesville, Fla.*, 71 FLRA 103 (2019)

In this case, the grievance alleged that the Agency failed to comply with certain provisions of the parties' collective bargaining agreement that required the Agency to provide employees with copies of hearing recordings and transcripts and investigation-related materials.

The Arbitrator found that the Agency violated the agreement by not providing the information and, as a remedy, ordered the Agency to provide the employees with the materials set out in the agreement. On exceptions, the Agency raised essence and exceeds-authority arguments on the same grounds, and argued that the award was impossible to implement. The Authority found that the Arbitrator's interpretation and remedy comported with the plain language of the parties' agreement. The Authority also found that the award was not impossible to implement because it was clearly prospective. Accordingly, the Authority denied all of the Agency's exceptions.

CASE DIGEST: *U.S. DHS, U.S. CBP, U.S. Border Patrol, Laredo Sector, Laredo, Tex.*, 71 FLRA 106 (2019) (Member DuBester dissenting)

This case concerned an Agency ethics official's determination that the grievant's employment during his off-duty time as an emergency medical technician (EMT) would create an appearance of a conflict of interest with his duties as a border patrol agent. The Arbitrator found the Agency's determination was "arbitrary and capricious" and that the grievant would not violate his duty as an EMT to maintain patient confidentiality by adhering to his obligation, as a border patrol agent, to report a patient's undocumented immigration status to the Agency. On exceptions, the Agency argued that the award failed to draw its essence from the collective bargaining agreement because it reasonably denied the off-duty work request because of a potential conflict of interest between the grievant's border patrol duties and his duties as an EMT. The Authority found the Arbitrator analyzed whether the grievant's duties as an EMT would create an actual conflict of interest but disregarded the Agency's contractual authority to avoid even the appearance of a conflict of interest. Accordingly, the Authority concluded that the Agency's determination that the grievant's outside employment would create the appearance of a conflict of interest was neither arbitrary nor capricious, and vacated the award.

Member DuBester dissented, finding that the award reflects a plausible interpretation of the parties' agreement, and the Arbitrator properly considered whether the state law requiring patient confidentiality would bar the grievant from reporting someone's immigration status to the Agency. Member DuBester also noted that the Agency's prior conduct supporting the Arbitrator's finding that the Agency acted arbitrarily and capriciously.

CASE DIGEST: *U.S. Dep't of Energy, W. Area Power Admin.*, 71 FLRA 111 (2019) (Member DuBester dissenting)

The Union filed a grievance on behalf of a group of dispatchers who alleged that they were not receiving the prevailing rate of premium pay for holiday work. The Arbitrator found the grievance arbitrable and concluded that the Agency should have paid the dispatchers a higher pay rate. On exceptions, the Authority noted that federal law granted the Agency with sole and exclusive discretion to establish a compensation system for dispatchers, and the Agency had exercised that discretion by establishing a rate of holiday premium pay. By filing a grievance contesting the individual *application* of that pay rate, the Union obtained an award that directed the Agency to change its rate of holiday pay – effectively overriding the Agency's statutorily provided pay-setting discretion. Accordingly, the Authority overruled precedent that distinguished between establishing and applying compensation systems in the context of sole and exclusive discretion. And, applying that rule, the Authority set aside the award as contrary to law.

Member DuBester dissented, relying on the precedent that the majority overturned, and finding that the Federal Service Labor-Management Relations Statute's

wording, legislative history, and purpose supported the grievability of the Union's allegation. He reasoned that this authority did not intend to remove misapplication of a law establishing pay rates from the scope of the negotiated grievance procedure. Therefore, he would not have set aside the award.

CASE DIGEST: *AFGE, Nat'l Citizenship & Immigration Servs. Council, Local 2076*, 71 FLRA 115 (2019) (Member DuBester concurring)

This case concerned the Agency's issuance of memoranda to notify employees of misconduct investigations and to suspend certain workplace privileges during those investigations. The Union's grievance alleged that the memoranda violated an Agency regulation that purportedly restricted the Agency to three types of corrective letters, and that the investigations were longer than the parties' collective-bargaining agreement permitted. The Arbitrator denied the grievance. On exceptions, the Union argued that the award was contrary to the Agency regulation and failed to draw its essence from the agreement. The Authority found that, although the regulation mentioned three types of corrective letters, neither the regulation nor the agreement expressly prohibited other types. Further, the Authority found that the Union failed to establish that the length of the investigations amounted to "harmful error" under the terms of the agreement. Therefore, the Authority denied the exceptions.

Member DuBester concurred, stating that he would defer to the Arbitrator's conclusions.

CASE DIGEST: *U.S. DHS, U.S. CBP*, 71 FLRA 119 (2019) (Member DuBester dissenting)

The Union president (grievant) requested sixty-four hours of official time for certain activities, but did not specify how much time he needed for each activity. The Agency asked the grievant to provide that information, he refused, and the Agency denied the request as excessive. The Arbitrator found that the parties' collective-bargaining agreement did not require the grievant to provide the additional information about his official-time request. Thus, the Arbitrator concluded that the Agency violated the agreement.

On exceptions, the Authority found that even when parties have agreed to procedures for requesting official time, those procedures must allow an agency to gather information necessary to make a reasoned determination as to whether the request is reasonable under 5 U.S.C. § 7131(d). Because the award prevented the Agency from determining how many hours of official time the grievant would use for each activity, the Agency could not determine whether the request was reasonable. Thus, the Authority set aside the award as contrary to § 7131(d).

Member DuBester dissented, finding that the Arbitrator was simply enforcing the terms of the parties' agreement, and asserting that the Authority's decision disregarded those terms as well as the deference owed to an arbitrator's interpretation of official time agreements under § 7131(d).

CASE DIGEST: *SSA, Office of Hearings Operations*, 71 FLRA 123 (2019)
(Member DuBester dissenting)

This case concerned the Agency's procedure for assessing employees' performance. The grievance alleged an employee should have received an "outstanding" rather than "successful" rating. The Arbitrator found that the Agency failed to properly consider the grievant's self-assessment and rebuttal to the Agency's 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 allegedly erroneously found that the Agency's performance assessment system conflicted with government-wide regulations. The Authority found that the Agency's exceptions relied on a misinterpretation of the award, as the Arbitrator had determined that the Agency's appraisal process was a fair and appropriate procedure but found that 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 dissented. He found that the majority misapplied Authority precedent to improperly find that the EEO complaint and the grievance concerned the same matter.

CASE DIGEST: *DOD, Domestic Dependent Elementary & Secondary Sch., Fort Buchanan, P.R.*, 71 FLRA 127 (2019) (Member DuBester dissenting)

This case concerned an agency's refusal to implement a successor collective-bargaining agreement with the Charging Party (the Union), despite a decision from the Federal Service Impasses Panel (the Panel) directing the Agency to adopt that agreement. An FLRA Administrative Law Judge (the Judge) recommended finding that the Agency committed the unfair labor practices (ULPs) alleged in the complaint because the Panel's decision was lawful and the Agency refused to obey it.

The Authority found, as an initial matter, that, in all future cases, the General Counsel must plead the negotiability of the matters in Panel decisions to avoid a procedural dismissal in these types of disputes under 5 U.S.C. § 7116(a)(6). Regarding a provision of the successor agreement that the Authority found prevented the Agency from deciding *when* employees performed one of the hours of their workday, the Authority found the provision unenforceable because it interfered with management's right to assign work under 5 U.S.C. § 7106(a)(2)(B). Consistent with the parties' requests, the Authority ordered further bargaining on work hours and compensation. In addition, the

Authority found that the Panel exceeded its jurisdiction – and, thus, acted unlawfully – when it ordered the parties to incorporate into their successor agreement all of the tentative agreements that they had reached before the Union filed its request for Panel assistance. Nevertheless, the Authority found that the deficiencies in some portions of the Panel’s decision did not excuse the Agency from complying with all of the Panel’s decision. Accordingly, the Authority ordered the Agency to comply with the lawful portions of the Panel’s decision, to resume negotiations with the Union, and to post and electronically distribute a notice acknowledging the ULPs. Therefore, the Authority granted the Agency’s exceptions, in part, and denied them, in part; and the Authority denied the Union’s exceptions regarding attorney fees and interest on backpay.

Member DuBester dissented, finding that the Judge correctly concluded that a provision of the successor agreement did not preclude the Agency from deciding *when* employees performed one of the hours of their workday, and was enforceable because it did not prevent the Agency from assigning work under § 7106(a)(2)(B). Further, finding that the Judge properly relied on record evidence of the parties’ intent that the Panel resolve all matters encompassing the successor agreement when resolving the impasse, Member DuBester determined that the Judge correctly concluded that the Agency failed and refused to comply with the Panel’s Decision and Order to implement the successor agreement, including all tentative agreements. Additionally, Member DuBester found that the Authority’s pleading standards in future § 7116(a)(6) disputes should remain unchanged. Further, he would have granted a Union exception to amend the remedial order to include interest on backpay.

CASE DIGEST: *Int’l Bhd of Elec. Workers, Local 121 & U.S. GPO*, 71 FLRA 161 (2019) (Member DuBester concurring)

This case concerned a grievant who had been suspended for fourteen days for lack of candor to an Inspector General investigator about his knowledge of, and providing supplies to, another employee who constructed a grill for his personal use out of Agency materials. The grievance alleged that the charges were not proven, the penalty was unreasonable, and the Agency unduly delayed corrective action. The Arbitrator found that the Agency proved the charges by a preponderance of the evidence but that the penalty was excessive because the mechanic who constructed the grill only received a seven-day suspension and the grievant’s actions were not “aggravated,” so the Arbitrator reduced the suspension to seven days. On exceptions, the Union argued that the Agency unlawfully considered the grievant’s denial of wrongdoing as an aggravating factor and that the Arbitrator exceeded his authority by not resolving whether the Agency unduly delayed corrective action. The Authority found that the Union’s cited caselaw did not apply, the Union mischaracterized the award, and as the Arbitrator found the grievant’s conduct properly subjected him to discipline, the Arbitrator effectively found that the Agency did not unduly delay corrective action. Therefore, the Authority denied the Union’s contrary-to-law and exceeds-authority exceptions.

Member DuBester concurred, agreeing with the decision to uphold the Arbitrator's award reducing the suspension from fourteen to seven days.

CASE DIGEST: *AFGE, Local 2198*, 71 FLRA 165 (2019)

This case concerned an arbitrator's premature denial of attorney fees. The Union's grievance challenged the grievant's five-day suspension imposed by the Agency. The Arbitrator issued an award reducing the grievant's five-day suspension to an admonishment, and awarded backpay. However, in response to the Union's preliminary request for attorney fees, the Arbitrator denied the Union attorney fees. The Union filed a contrary-to-law exception claiming that the denial of attorney fees was premature. The Authority found that 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, the Arbitrator's denial of attorney fees was contrary to law. Therefore, 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.

CASE DIGEST: *U.S. DHS, Citizenship & Immigration Services, Dist. 18*, 71 FLRA 167 (2019) (Member DuBester dissenting)

This case concerned a grievant who was suspended for fourteen days for a second misconduct offense. The Arbitrator reduced the grievant's fourteen-day suspension to a one-day suspension because he found that the misconduct was her first offense. The record demonstrated that the misconduct was her second offense. The Authority found that the Arbitrator's mitigation of the suspension was based on a nonfact and vacated the award.

Member DuBester dissented, finding that although the grievant's misconduct underlying the suspension was her second disciplinary offense, the Agency's progressive-discipline regulation does not definitively require a fourteen-day suspension for a second disciplinary offense. Therefore, he would have remanded the award to the parties for resubmission to the Arbitrator, absent settlement, to determine the appropriate remedy consistent with this decision.

CASE DIGEST: *U.S. Dep't of VA, Malcolm Randall VA Med. Ctr., Gainesville, Fla.*, 71 FLRA 170 (2019) (Member Abbott dissenting)

On multiple occasions, certain Union officials were unable to locate emails that they had stored within ".pst" files on the Agency's electronic records system. The Arbitrator did not determine why those officials were unable to locate the files, but he found that the Agency violated the parties' collective-bargaining agreement because the

records system did not permit Union officials to “retain[]” emails for later use. The Arbitrator also concluded, based on hearing testimony unrelated to the .pst files, that the Agency “appear[ed]” to violate the parties’ agreement by utilizing technology that allowed emails to expire.

On exceptions, the Agency alleged that both contractual violations were based on nonfacts. The Authority denied the nonfact exception challenging the first contract violation because, even assuming that the challenged finding was factual, the parties disputed that matter at arbitration. As for the second violation, it was undisputed that the relevant hearing testimony concerned *copies* of emails that were temporarily saved in a backup system. Accordingly, the Arbitrator’s conclusion that “live” emails had expired was based on an erroneous factual finding, and the Authority set aside that portion of the award.

Member Abbott dissented, asserting that it was time to reevaluate the Authority’s nonfact standard. He noted the prohibition on challenging factual findings that were disputed below was an added prong that has been applied with undefined and inconsistent elasticity. Further, he called for revising the standard to put more weight on whether the disputed fact was central to the result and whether it was “but for which” the arbitrator would have reached a different result.

CASE DIGEST: *U.S. DOD, U.S. Marine Corps Air Ground Combat Ctr., Twentynine Palms, Cal.*, 71 FLRA 173 (2019) (Member DuBester dissenting).

This case concerned an arbitrator’s jurisdiction to resolve a grievance seeking a promotion and backpay for the grievant’s performance of duties allegedly outside of her position description and of a higher grade. The arbitrator found that she could hear the merits of the grievance pertaining to a violation of the parties’ agreement though exclude issues pertaining to classification. The Authority found that the agency’s exceptions were interlocutory, but because the grievance raised a plausible jurisdictional defect, review was warranted. As demonstrated by the requested remedy, the essential nature of the grievance was classification. Therefore, the Authority found 5 U.S.C. § 7121(c)(5) barred the grievance and set aside the interim award.

Member DuBester dissented, finding that the grievance, when read in its entirety, did not concern a classification matter within the meaning of § 7121(c)(5) of the Statute. Because he found that the Agency’s interlocutory exceptions to the Arbitrator’s interim award did not demonstrate that the award had a plausible jurisdictional defect, he would have dismissed the Agency’s exceptions.

CASE DIGEST: *SSA, Office of Hearing Operations*, 71 FLRA 177 (2019)

This case concerned challenges to an arbitrator's findings that he did not actually make. The Union's grievance alleged a violation of an Agency policy, which allows temporary telework for medical reasons, after the Agency denied the grievant's request to telework following his back surgery. The Arbitrator found that the Agency violated the policy, and directed the Agency to restore the grievant's sick leave. On exceptions, the Agency argued that the award was based on nonfacts because the Arbitrator erroneously found that there was work available for the grievant to perform from home on particular dates. But the Arbitrator made no findings about those specific dates. Instead, he found that there was work the grievant could have performed at home at the time of his telework request. The Authority found that the Agency's nonfact exceptions challenged alleged findings that the Arbitrator did not make and, therefore, denied the exceptions.

CASE DIGEST: *U.S. Dep't of the Treasury, Office of the Comptroller of the Currency*, 71 FLRA 179 (2019) (Member DuBester dissenting)

This case concerned the procedural arbitrability of the grievance. The Arbitrator found that the parties' collective-bargaining agreement required arbitration to be scheduled within six months of the invocation of arbitration and that the Union, here, complied over seven months later. The Arbitrator ruled that the grievance was arbitrable because the hearing was not unduly delayed. The Authority found the procedural-arbitrability determination failed to draw its essence from the parties' agreement and set aside the award.

Member DuBester dissented, finding that the Arbitrator properly found the grievance procedurally arbitrable. He concluded that the Arbitrator correctly considered the parties' bargaining history, past practices, and the context in which the arbitrability dispute arose in interpreting an ambiguous provision of the parties' collective-bargaining agreement concerning scheduling arbitration hearings. Finding that the Arbitrator properly concluded that the Union complied with the provision, Member DuBester would have denied the Agency's challenge to the Arbitrator's procedural-arbitrability determination.

CASE DIGEST: *U.S DOJ, Fed. BOP, Fed. Corr. Inst., Dublin, Cal.*, 71 FLRA 183 (2019) (Member DuBester dissenting)

This case concerned the Agency's decision to vacate certain mission-critical posts in the absence of an emergency or other rare circumstance. The Arbitrator found that by vacating the posts, the Agency violated Article 27 of the parties' collective-bargaining agreement. Thus, she directed the Agency to cease and desist that practice. The Arbitrator further found that the Agency failed to comply with an earlier award addressing the same matter.

The Agency filed exceptions to the award. To the extent that the Agency's exceptions challenged the *earlier* award, the Authority dismissed them as untimely. However, the Authority addressed the Agency's argument that the more recent award conflicted with management's right to assign work under 5 U.S.C. § 7106(a)(2)(B). The Authority noted that the awarded cease-and-desist remedy precluded the Agency from vacating shifts except in emergency situations. Accordingly, consistent with Authority precedent, the Authority set aside the award as excessively interfering with the Agency's statutory right to assign work.

Member DuBester dissented, finding that matter at issue was solely a compliance action designed to enforce the earlier award. Accordingly, he would have dismissed the Agency's exceptions, in their entirety, as an improper collateral attack on the earlier award.

CASE DIGEST: *U.S. Dep't of the Air Force, Minot Air Force Base, N.D.*, 71 FLRA 188 (2019) (Member DuBester dissenting)

This case concerned the Union's motion asking the Authority to reconsider its decision in *U.S. Department of the Air Force, Minot Air Force Base, North Dakota*, 70 FLRA 867 (2018) (*Air Force*) (Member DuBester dissenting). In *Air Force*, the Union filed both an unfair-labor-practice (ULP) charge and a grievance over the Agency's decision to change its hazardous-duty-pay practices. The Arbitrator determined that 5 U.S.C. § 7116(d) did not bar the later-filed grievance. But the Authority found that the ULP charge and the grievance (1) arose from the same set of factual circumstances and (2) advanced substantially similar legal theories. Accordingly, the Authority concluded that § 7116(d) barred the grievance.

Because the Union's motion for reconsideration (1) attempted to relitigate the Authority's conclusions in *Air Force* and (2) failed to establish that the Authority erred in concluding that the earlier-filed ULP barred the grievance, the Authority held that the Union did not establish extraordinary circumstances warranting reconsideration. Therefore, the Authority denied the motion.

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

CASE DIGEST: *U.S. Dep't of the Treasury, IRS*, 71 FLRA 192 (2019) (Member DuBester dissenting)

This case concerned a Union-filed grievance alleging that the Agency, pursuant to a cost-shifting provision in the parties' collective-bargaining agreement, was liable for all of the costs for a particular factfinding recommendation. Before the Arbitrator, the Agency filed a motion to dismiss, arguing that the dispute did not constitute a "grievance" under the Federal Service Labor-Management Relations Statute (the Statute). The Arbitrator denied the motion. In an interlocutory exception, the Agency argued to

the Authority that the dispute was not a “grievance.” The Authority granted interlocutory review because the exception, if meritorious, would obviate the need for further arbitral proceedings. The Authority found that the dispute concerned “the effect or interpretation, or claim of breach, of a collective[-]bargaining agreement” – specifically, the cost-shifting provision – so it was a “grievance” under § 7103(a)(9)(C)(i) of the Statute. Therefore, the Authority denied the exception.

Member DuBester dissented, stating that he would have adhered to previous precedent that required a party to demonstrate a “plausible jurisdictional defect” as a matter of law in order to warrant interlocutory review. Applying that standard, he would have dismissed, without prejudice, the Agency’s interlocutory exception.

CASE DIGEST: *U.S. Dep’t of Commerce, Nat’l Inst. of Standards & Tech.*, 71 FLRA 199 (2019) (Member DuBester dissenting)

This case concerned a new senior corporal policy (policy) that entailed additional tasks for the most senior corporal when no supervisor was on shift. The Arbitrator sustained the grievance, finding that the Agency made a change to conditions of employment that was more than de minimis when it implemented the policy before properly notifying and bargaining with the Union. He determined that a status-quo-ante (SQA) remedy was appropriate. The Authority found that the Arbitrator did not properly apply the *FCI* factors and the SQA remedy would be a costly waste of government resources, and, as such, would disrupt and impair the efficiency and effectiveness of the Agency’s operations. Accordingly, the Authority concluded that an SQA remedy is not appropriate or necessary, and modified the award to eliminate the SQA remedy and ordered the Agency to engage in post-implementation bargaining.

Member DuBester dissented. He agreed that the Arbitrator should have articulated and applied the *FCI* factors, but would have applied them differently than the majority. Instead, he found there was sufficient record evidence to sustain the Arbitrator’s SQA remedy.