

Federal Labor Relations Authority
Quarterly Digest Report: April 1, 2020 – June 30, 2020



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: *U.S. Small Bus. Admin.*, 71 FLRA 655 (2020) (Member DuBester dissenting)

In this case, the Arbitrator reduced the grievant's fourteen-day suspension for disrespectful behavior in the workplace to a five-day suspension because she found that the Agency unfairly relied on prior misconduct that, in her view, involved procedural errors and was unproven. The Agency excepted to the Arbitrator's award, arguing nonfact and that she exceeded her authority by resolving an issue not submitted to arbitration. The Authority found clear error but for which the fourteen-day suspension would have been upheld. In addition, the Authority found that because the Arbitrator decided the merits of the prior misconduct, which was an issue not before her, she exceeded her authority. The Authority set aside the award.

Member DuBester dissented. He found that the Arbitrator did not exceed her authority by considering the grievant's prior discipline under the factors set forth in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305 (1981). He also found that, because the Arbitrator relied on other factors in mitigating the penalty, her findings regarding the prior discipline were not a central fact underlying the award.

CASE DIGEST: *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Miami, Fla. & AFGE, Local 3960, Council of Prison Locals, C-33*, 71 FLRA 660 (2020) (Member Abbott concurring; Member DuBester dissenting)

This case concerned a grievance about the assignment of non-custody employees to fill in at short-staffed custody posts, thus avoiding paying overtime to custody employees. The Arbitrator found that an "unwritten contractual right" came into being in the parties current

Collective Bargaining Agreement (CBA) by the Agency's practice of not augmenting custody posts with non-custody employees prior to 2016. The Arbitrator concluded that the Agency's actions were a violation of Articles 3, 4, 5, 18 and 27 of the CBA and the parties' Ground Rules for Supplemental Agreements and Memorandum of Understanding Meetings. On exceptions, the Agency argued that the Arbitrator's award failed to its essence from the CBA. The Authority found that the Arbitrator ignored the clear language of Article 18 of the CBA, which gives the Agency broad discretion to assign and reassign employees. The Authority found that the Arbitrator's award failed to draw its essence from the CBA because the Arbitrator improperly found that a past practice created a new provision in the CBA. Accordingly, the Authority vacated the award.

Member Abbott concurred emphasizing that deference to an arbitrator's interpretation of an agreement is not unlimited. He found, consistent with multiple federal court and state court decisions, that the *Steelworkers* Trilogy cases were made in the context of private-sector labor disputes, and a narrower scope of deference should apply to public-sector labor disputes.

Member DuBester dissented, concluding that the award drew its essence from the parties' agreement. He found that the majority identified no "clear language" with which the award conflicted, and the judicial decisions relied on by the majority did not support overturning the Arbitrator's finding of a past practice. Member DuBester also disagreed that the deference to arbitral awards outlined in the *Steelworkers* Trilogy should no longer be applied by the Authority in reviewing essence exceptions. He noted that the Authority's application of the *Steelworkers* principles is consistent with the language and legislative history of the Statute as well as court decisions addressing this question.

CASE DIGEST: *U.S. Dep't of HHS, Office of Medicare Hearings & Appeals, 71 FLRA 678 (2020) (Member Abbott concurring; Chairman Kiko dissenting)*

In this case, the Arbitrator determined that the Agency acted arbitrarily and in violation of the parties' collective bargaining agreement when it denied the grievants' requests for a fourth day of telework. The Agency filed exceptions arguing that the Arbitrator's award failed to draw its essence from the parties' agreement, was based on a nonfact, and was contrary to law because it excessively interfered with management's rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute. The Authority held that the Arbitrator's award was a plausible interpretation of the parties' agreement, that the Agency failed to put forth an argument providing a basis for finding the award based on a nonfact, and that the Arbitrator's award was not contrary to law, and denied the Agency's exceptions.

Member Abbott concurred with the decision that the award is not contrary to law, and stated that he would have clarified that the frequency of telework is inherent to management's right to assign work.

Chairman Kiko dissented because she would have found that the award failed to draw its essence from the plain wording of the parties' agreement.

CASE DIGEST: *NAIL, Local 5*, 71 FLRA 684 (2020) (Member DuBester concurring)

Arbitrator Angela D. McKee found that the Agency had just cause to suspend the grievant for two days because the parties' collective-bargaining agreement did not give the grievant an absolute right to use annual leave after she had exhausted her sick leave. The Union argued that the award fails to draw its essence from the parties' agreement. The Authority found that the Arbitrator's interpretation is consistent with the plain wording of the agreement and denied the Union's exceptions.

Member DuBester concurred, noting the majority's omission from the articulation of the essence standard the principle that the Authority applies the deferential standard of review that federal courts use when reviewing arbitration awards in the private sector.

CASE DIGEST: *SSA, Office of Hearings Operations & Ass'n of Admin. Law Judges, IFPTE*, 71 FLRA 687 (2020) (Member DuBester dissenting)

This is the fifth case between the same parties involving the application of the same telework provision in the parties' agreement. The Authority, once again, concluded that the remedy—limiting the Agency's ability to premise telework approval on the scheduling of a minimum number of hearings per month—excessively interfered with management's right to direct employees and assign work.

Member DuBester dissented, finding that the remedy was not contrary to law.

CASE DIGEST: *AGFE, Local 2342*, 71 FLRA 692 (2020) (Member Abbott concurring)

This case concerned an arbitrator's premature denial of attorney fees. The Authority found that the Arbitrator's denial of attorney fees was contrary to law because the Union had not yet submitted a petition for fees. 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.

Member Abbott concurred in the decision but dissented to the modification of the award. Member Abbott would have remanded the matter of attorney fees to the arbitrator to reconsider in light of more recent Authority decisions regarding that subject.

CASE DIGEST: *U.S. DOT, FAA*, 71 FLRA 694 (2020) (Member Abbott concurring in part and dissenting in part)

In this case, the Arbitrator interpreted a provision of the parties' agreement as requiring the Agency to notify the Union whenever a substance tester is on-site, even when the employee to be tested is a patient under a management-referred treatment plan. The Agency filed exceptions arguing that the award was contrary to 42 C.F.R. Part 2, the Rehabilitation Act, and

the Privacy Act, and that the Arbitrator exceeded his authority by directing notice for substance testing conducted under self-referred treatment plans.

Because the notice provision involved a generalized statement that did not identify any employee, the Authority found that the Arbitrator's enforcement of that provision was not contrary to laws and regulations that protect the privacy of employee substance-abuse and medical records. However, the Authority found that the Arbitrator exceeded his authority to the extent that his award concerned self-referred treatment, which is covered by a different provision of the parties' agreement. Accordingly, the Authority modified the remedy to clarify that it did not pertain to substance testing under self-referred treatment plans.

Member Abbott concurred with the denial of the Agency's exceptions but wrote separately to assert that the Privacy Act issues are not conditions of employment which may be grievable and subsequently appealable to the Authority.

CASE DIGEST: *U.S. Dep't of VA, James A. Haley Veterans Hosp.*, 71 FLRA 699 (2020)
(Member DuBester dissenting)

The Authority reaffirmed that an award's remedy must comport with the parties' agreement when that agreement defines the actions an agency can take in disciplinary matters. Therefore, because the Arbitrator's remedy was not defined in the parties' agreement, the award's remedy was set aside.

Member DuBester dissented, finding that the award's remedy essentially reduced the grievant's suspension to an admonishment, which constitutes a form of discipline under the parties' agreement and is consistent with the Arbitrator's finding that the Agency sustained only one of the specifications against the grievant.

CASE DIGEST: *NTEU and U.S. Dep't of Agric., Food & Nutrition Serv.*, 71 FLRA 703 (2020)
(Member DuBester dissenting)

This case concerned the negotiability of a proposal that would allow bargaining-unit employees to report to the office once per week and telework up to eight days per pay period. The issues before the Authority were whether the Telework Enhancement Act of 2010 vests the Agency with sole and exclusive discretion to establish telework frequency, and whether the proposal is contrary to management's rights to assign work and direct employees. The Authority found that the proposal affected management's right to assign work because the proposal would prevent management from determining when an eligible employee may perform his or her duties away from the duty station and when that eligible employee must report to the duty station. The Authority also found that the proposal impermissibly affected management's right to direct employees because it interfered with the Agency's right to choose the method that it deems "most appropriate" for supervising employee performance. The Union did not specifically argue that its proposal constituted a procedure or an appropriate arrangement under § 7106(b) of the

Statute. Accordingly, the Authority found that the proposal was outside the duty to bargain and dismissed the petition.

Member DuBester dissented, finding that the proposal did not affect the right to assign work because it merely established a framework under which otherwise eligible employees could request additional telework, while preserving management's discretion to deny such requests. He also found that the Agency failed to argue, or otherwise demonstrate, that the proposal affects management's right to direct employees.

CASE DIGEST: *U.S. Dep't of the Army, Army Corps of Eng'rs, Norfolk Dist. 71 FLRA 713 (2020)*

This case concerned the interlocutory appeal of an arbitrability award. The grievance contained several claims, based in law, regulation, and the parties' collective-bargaining agreement, and the Arbitrator found the grievance arbitrable. Before the Authority, the Agency's pertinent exceptions related to only one of the claims contained in the grievance. The Authority found that interlocutory review was not warranted because the exceptions, even if granted, would not obviate the need for further arbitral proceedings on the other claims.

Member DuBester concurred in the decision to dismiss the Agency's exceptions without prejudice.

CASE DIGEST: *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Aliceville, Ala. & AFGE, Local 573, Council of Prison Locals # 33, 71 FLRA 716 (2020) (Member DuBester dissenting)*

This case involved a grievance alleging that the Agency failed to provide notice and an opportunity to bargain when it began assigning supervisors to vacant posts instead of bargaining unit employees so that the Agency could avoid paying overtime. The Arbitrator sustained the grievance, finding a violation of Article 4 of the parties' agreement. The Agency argued that the award failed to draw its essence from Article 18 of the parties' agreement. The Authority found that the Arbitrator erroneously considered the parties' past practice to have modified the parties' agreement and found that the Agency's action of reassigning employees to cover vacant shifts was within the scope of Article 18. Consequently, there was no additional obligation to provide notice and an opportunity to bargain. Therefore, the Authority vacated the award for failure to draw its essence from the parties' agreement.

Member DuBester dissented. He found that the Arbitrator's award was consistent with the plain and unambiguous language of the parties' bargaining agreement, which requires the Agency to afford qualified bargaining unit employees with first consideration for overtime assignments in positions they normally fill, and to provide the union with notice and an opportunity to bargain over changes in the unit employees' working conditions. He noted that the majority had not identified plain and unambiguous contractual terms with which the award conflicted, and that the judicial decisions relied on by the majority did not support overturning the Arbitrator's finding of a past practice.

CASE DIGEST: *U.S. Dep't of HUD*, 71 FLRA 720 (2020) (Member DuBester concurring)

In this case, the Arbitrator found that the grievant was removed without just cause and that the removal was based on retaliation for protected activity. The Agency filed exceptions. The Authority concluded that it lacked jurisdiction under § 7122(a) of the Statute because the claims advanced at arbitration relate to a removal, which is a matter that is reviewable by the Merit Systems Protection Board or the United States Court of Appeals for the Federal Circuit. The Authority dismissed the exceptions.

Member DuBester concurred in the Decision to dismiss the Agency's exceptions.

CASE DIGEST: *AFGE, Local 2338*, 71 FLRA 723 (2020) (Member Abbott concurring)

The Union requested that the Authority reconsider its decision in *AFGE, Local 2338 (Local 2338)*.¹ In that case, the Authority found that the Arbitrator's denial of backpay was not contrary to the Back Pay Act,² and that the Union did not establish that the award failed to draw its essence from the parties' agreement. The Authority found that the Union's motion for reconsideration raised the same arguments the Authority considered and rejected in *Local 2338*, and did not otherwise establish extraordinary circumstances. Accordingly, the Authority denied the Union's motion.

Member Abbott concurred with the decision to deny reconsideration, and noted that beyond this simple conclusion, the otherwise belabored analysis was unnecessary.

CASE DIGEST: *U.S. DOL, Office of Workman's Comp. Programs*, 71 FLRA 726 (2020) (Member DuBester concurring)

In this case, it was undisputed that the Agency suspended the grievant for failure to follow instructions, but the Arbitrator found that the Agency failed to prove that the grievant was insubordinate, and sustained the grievance. The Authority concluded that the Arbitrator's consideration of the wrong charge was clearly erroneous, granted the Agency's nonfact exception, and set aside the award.

Member DuBester concurred in the Decision to grant the nonfact exception and set aside the award.

CASE DIGEST: *U.S. DOD, Def. Logistics Agency, Richmond, Va.* 71 FLRA 729 (2020)

This case concerned the Agency's failure to engage in the interactive process and denial of a reasonable accommodation to a qualified, disabled employee, in violation of the Rehabilitation Act. The Arbitrator directed the Agency to grant the employee a telework schedule as a reasonable accommodation, and to pay him \$30,000 in compensatory damages. The Agency filed an exception arguing that grievant contributed to the breakdown in the

¹ 71 FLRA 343 (2019).

² 5 U.S.C. § 5596.

interactive process and, consequently, the compensatory damages were inconsistent with the Rehabilitation Act.

The Authority found that the damages were a lawful remedy for the Agency's failure to make a good-faith effort to reasonably accommodate the grievant. Further, the Authority found that the Arbitrator adjusted the amount of damages to account for any delays attributable to the grievant, and the Agency's argument to the contrary reflected a misunderstanding of the award. Accordingly, the Authority denied the Agency's exception.

Member Abbott concurred in determining that the award is not contrary to law but would clearly state that the Agency is wrong in its assertion that the Arbitrator did not consider the grievant's actions, instead of stating the Agency's argument merely misunderstands the award.

CASE DIGEST: *U.S. Dep't of the Army, U.S. Army Aviation Ctr. of Excellence, Fort Rucker, Ala. 71 FLRA 734 (2020)*

Where the stipulated merits issues concerned only the Agency's compliance with the grievance procedure of the parties' collective-bargaining agreement, an Agency regulation, and a Department of Defense instruction, the Authority found that the Arbitrator exceeded his authority by finding that the Agency violated the Federal Service Labor-Management Relations Statute. Accordingly, the Authority modified the award to exclude the Arbitrator's findings, and remedy, related to the statutory violations.

Member DuBester dissented, finding that under the unique circumstances of this case, the Arbitrator did not exceed his authority.

CASE DIGEST: *NLRB Prof'l Ass'n., 71 FLRA 737 (2020)*

The Arbitrator found that the Union's grievance was not arbitrable because it had not been timely filed under the parties' collective-bargaining agreement. The Union challenged that determination on contrary-to-law, nonfact, and exceeded-authority grounds. The Authority found that the Union's exceptions failed to demonstrate that the Arbitrator's procedural-arbitrability determination was deficient.

CASE DIGEST: *AFGE, Nat'l Veterans Affairs, Council #53 & VA, 71 FLRA 741 (2020)* (Member DuBester concurring)

This case concerns the Agency's motion for reconsideration (motion) of the Authority's decision in *AFGE, Nat'l Veterans Affairs, Council #53 & VA, 71 FLRA 410 (2019)* (*AFGE*) (Member DuBester concurring). In *AFGE*, the Authority found that the award was contrary to law because the Agency had a duty to bargain under §§ 7106(b)(2) and (3) of the Federal Service Labor-Management Relations Statute. In its motion, the Agency argued that the Authority erred

in its legal conclusions and remedial order. Because the Agency failed to demonstrate that the Authority erred, the Authority denied the motion.

Member DuBester concurred in the decision to deny the Agency's motion for reconsideration.

CASE DIGEST: *U.S. DHS, U.S. CBP, 71 FLRA 744 (2020)* (Member Abbott concurring; Member DuBester dissenting)

In this case, the Union alleged that the Agency violated a ground-rules agreement (GRA) when it ceased paying travel and per diem expenses for the Union's bargaining team during collective-bargaining-agreement negotiations. Section 2 of the GRA specifically provided that the Agency would pay the Union's travel and per diem expenses only through FY 2015. Nevertheless, the Arbitrator concluded that the GRA required the Agency to continue paying the Union's travel and per diem expenses beyond FY 2015, until the parties reached agreement on a new collective-bargaining agreement. The Authority found that, in reaching that conclusion, the Arbitrator impermissibly relied on extraneous considerations to interpret Section 2 in a manner incompatible with its plain and unambiguous wording. Accordingly, the Authority set aside the award as failing to draw its essence from the GRA.

Member Abbott agreed that the award fails to draw its essence from the parties' GRA but wrote separately to emphasize that contract negotiations which extend for years were neither imagined by Congress nor serve the American taxpayer who is left to pay the associated financial and performance costs for these protracted and minimally fruitful engagements.

Member DuBester dissented, finding that the Arbitrator reasonably concluded that the GRA's wording was not "plain and unambiguous," and that he properly considered evidence of the parties' intent in interpreting the GRA. Therefore, giving the appropriate deference to the Arbitrator, Member DuBester found that the award does not fail to draw its essence from the GRA. Member DuBester noted that Section 2 was designed to prevent the type of protracted bargaining that occurred in this case. He also expressed his view that the FLRA should not abandon its responsibility to assist parties in resolving their labor-management disputes through effective alternative dispute resolution procedures.

CASE DIGEST: *U.S. Dep't of VA, Gulf Coast Veterans Health Care Sys., 71 FLRA 752 (2020)* (Member DuBester concurring).

In this case, the Agency excepted to the Arbitrator's email stating that he would not issue an interim award on arbitrability. The Authority held that the Arbitrator's email was not an award and dismissed the Agency's interlocutory exceptions for failure to file an exception to an arbitrator's award pursuant to § 2425.2(a) of the Authority's Regulations.

Member DuBester concurred, finding that under the circumstances of this case, the Arbitrator's email was not an award.

CASE DIGEST: *U.S. Dep't of Transp., FAA, 71 FLRA 755 (2020)* (Member Abbott concurring)

The Arbitrator sustained a grievance alleging that the Agency incorrectly calculated overtime for air traffic controllers (the grievants) who were held over on duty for almost ninety hours. He ordered the Agency to pay the grievants at the overtime rate for all hours over eight in a day and for all hours after their first forty hours of work in the administrative workweek. The Authority granted the Agency's contrary-to-law exception because applicable federal regulations do not permit counting overtime hours over eight in a day toward the first-forty-hours requirement for overtime in an administrative workweek.

Member Abbott concurred in the decision but wrote separately to express dismay and disappointment at the length of time that the Authority took to render a decision. He notes that this was a straightforward case and there was no justifiable reason for exceeding the Authority's Strategic Goal of rendering a decision within 210 days of exceptions being filed.

CASE DIGEST: *U.S. Dep't of the Air Force, Warner Robins Air Logistics Ctr. & AFGE, Local 987, 71 FLRA 758 (2020)* (Member DuBester dissenting)

We remind the federal labor relations community that the Authority must apply a statutory bar to a grievance that implicates an arbitrator's jurisdiction whether or not the jurisdictional issue is raised by the parties. In this case the Union grieved a fourteen-day suspension for the grievant's "lack of candor" in statements she made in her formal Equal Employment Opportunity (EEO) complaint. The Arbitrator found that the Agency's suspension was not for just and sufficient cause because the Agency failed to prove the charge of lack of candor and the discipline was based on reprisal for EEO activity. We find that Section 7121(d) of the Federal Service Labor-Management Relations Statute bars the grievance because an earlier filed equal employment opportunity complaint concerns the same matter as the grievance.

Member DuBester dissented, finding that the majority misapplied the § 7121(d) jurisdictional bar. Applying Authority precedent, Member DuBester would find that the EEO complaint and the grievance did not concern the same matter because each involved a different personnel action.

CASE DIGEST: *SSA and Ass'n of Admin. Law Judges, IFPTE, 71 FLRA 763 (2020)* (Member DuBester dissenting)

In *SSA and Ass'n of Admin. Law Judges, IFPTE, 71 FLRA 652 (2020)*, the Authority had denied the Union's request to stay the Federal Service Impasses Panel (the Panel) from asserting jurisdiction over a bargaining dispute with the Agency. After taking administrative notice that

the Union had filed a complaint in a federal district court, the Authority reconsidered its denial. Under the unusual circumstances of the case, the Authority found that implementation of the Panel's order would not advance the purposes of the Federal Service Labor-Management Relations Statute due to the pendency of parallel court proceedings and ordered the Panel's order to be stayed.

Member DuBester dissented, noting that neither party to this case requested reconsideration of the original decision. He further noted that the decision on reconsideration grants relief that was not specifically requested by the Union in its motion for stay. Moreover, the decision grants this relief for reasons that were never argued by the Union in support of its motion, based upon matters that are not part of the record in this case.

CASE DIGEST: *U.S. DOD Educ. Activity, Alexandria, Va.*, 71 FLRA 765 (2020) (Member DuBester dissenting).

The Agency notified the Union that it planned to implement a new performance appraisal system in one year. The Union grieved the anticipatory breach of the parties' agreement. The Arbitrator found that the grievance was timely as it related to the Agency's notification. The Agency excepted to the award as failing to draw its essence from the parties' agreement because the premature grievance was untimely. The Authority vacated the award because the award did not draw its essence from the parties' agreement. The agreement's plain terms required the triggering event to have occurred already.

Case Digest: *U.S. Dep't of VA, John J Pershing VA Med. Ctr.*, 71 FLRA 769 (2020) (Member DuBester dissenting)

In this case, the Union sought environmental or hazard pay differential for Registered Nurses (RNs), Licensed Practical Nurses (LPNs), and other employees. The Arbitrator found that the grievance was not arbitrable as to the RNs, but found it arbitrable as to the LPNs and awarded hazard pay. The Authority denied the Union's exceptions challenging the Arbitrator's conclusion as to the RNs because the Authority found that the Union failed to show how the Arbitrator's reading of the relevant statute was erroneous. The Agency argued that the Arbitrator's finding that the LPNs were entitled to a hazard pay differential was contrary to law, and the Authority granted this exception, finding that the Arbitrator had failed to make the necessary factual findings to support the award.

Member DuBester dissented. Consistent with Authority precedent and the plain language of 38 U.S.C. § 7422, he would find that the Arbitrator was not authorized to exclude the grievance under this provision absent a § 7422(d) determination that pertained to the grievance. Member DuBester would also have remanded the award to the parties for the Arbitrator to make the necessary factual findings to resolve whether the LPNs were entitled to hazard pay.

CASE DIGEST: *U.S. Dep't of the Treasury, IRS and NTEU, Chapter 97*, 71 FLRA 771 (2020) (Member DuBester dissenting)

This case concerns a non-arbitrable classification matter under § 7121(c)(5) of the Federal Service Labor-Management Relations Statute. The Arbitrator found that the GS-4 grievants performed GS-6 duties and granted retroactive temporary promotions. On exceptions, the Authority found that the grievance was a non-arbitrable classification matter because the assigned duties providing the basis for the claim were not different from the duties that the GS-4 grievants performed in their permanent positions. Accordingly, the Authority set aside the award as contrary to § 7121(c)(5).

Member DuBester dissented, explaining that the majority's test for classification conflates arbitrability and the merits of a temporary promotion claim. For the reasons set forth by the Arbitrator, Member DuBester would find that the Union's grievance did not concern classification and was not barred by § 7121(c)(5) of the Statute.

CASE DIGEST: *NAGE*, 71 FLRA 775 (2020)

Arbitrator John Paul Simpkins found that the Union's grievance was untimely. The Union filed exceptions to the award on contrary-to regulation, essence, nonfact, and fair-hearing grounds. The Authority found that the Union did not establish that the award was deficient on any of those grounds and denied the exceptions.

CASE DIGEST: *IBEW, Local 1002*, 71 FLRA 779 (2020)

This case concerned a petition for review containing Union proposals that were not substantively changed from ones that had previously been alleged to be nonnegotiable by the Agency. Because resubmitting proposals with only minor modifications from those previously declared nonnegotiable does not restart the timeline for filing a petition for review, the effect of the petition was to seek review of the previous allegation, and the Authority dismissed the petition as untimely.

Case Digest: *U.S. Dep't of the Air Force, 673rd Air Base Wing, Joint Base Elmendorf Richardson, Alaska*, 71 FLRA 781 (2020) (Member DuBester dissenting)

The Arbitrator found that a grievance was procedurally arbitrable, even though the Union did not comply with the requirements of the parties' negotiated grievance procedure pertaining to Step 3 grievances. Because arbitrators are not free to ignore such provisions, the Authority vacated the award as failing to draw its essence from the parties' agreement.

Member DuBester dissented, finding that the Agency did not make the essence argument on which the majority relied to vacate the award.

CASE DIGEST: *U.S. Dep't of the Navy, Naval Facilities Eng'g Command, Wash. D.C.*, 71 FLRA 825 (2020) (Member DuBester dissenting)

After the Arbitrator found that the Union improperly filed a group grievance as an institutional grievance, he remanded the grievance and granted the Union the right to refile at any time. The Authority concluded that the award failed to draw its essence from the procedural requirements of the parties' agreement and set aside the award.

Member DuBester dissented. Noting that the Arbitrator found that both parties failed to comply with their obligations under the parties' negotiated grievance procedure and that nothing in the parties' agreement precluded the awarded remedy, Member DuBester would deny the Agency's essence exception.

This case digest is a summary of a decision issued by the Federal Labor Relations Authority, with a short description of the issues and facts of the case. Descriptions contained in this case digest 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: *U.S. DOD, Ohio Nat'l Guard*, 71 FLRA 828 (2020) (Member Abbott concurring, in part; Chairman Kiko dissenting)

This case concerned allegations that the Ohio National Guard's communications to bargaining-unit employees (technicians) that the Agency was not bound by either the Federal Service Labor-Management Relations Statute (the Statute) or the parties' expired collective-bargaining agreement and subsequent actions violated the Statute. An FLRA Administrative Law Judge (the Judge) found that the Authority had jurisdiction over the Agency and that the Agency violated § 7116(a)(1), (5), and (8) of the Statute. On exceptions, the Agency argued that the Judge erred in various factual findings and legal conclusions. Finding that the exceptions did not establish that the Judge erred in his factual findings or legal conclusions, the Authority adopted the Judge's decision and order and denied the Agency's exceptions.

Member Abbott wrote separately to concur with the determination that the Authority had jurisdiction to enforce the Statute here; nonetheless, he observed that the Chairman's concerns regarding the exercise of Federal authority over a state officer such as the Adjutant General were well-founded.

Chairman Kiko dissented on the ground that the Ohio Adjutant General—a state officer—and his department are beyond the reach of the Authority's unfair-labor-practice jurisdiction. Because the Ohio Adjutant General is appointed by Ohio's governor, paid from Ohio's treasury, and obligated by the U.S. Code to perform his duties in accordance with the laws of Ohio, Chairman Kiko would have concluded that Congress did not intend for him to be treated as a federal agency under the Statute. She would have overruled previous Authority precedent to the contrary.