

71 FLRA No. 89

SOCIAL SECURITY ADMINISTRATION
(Agency)

and

ASSOCIATION OF
ADMINISTRATIVE LAW JUDGES
(Union)

0-AR-5449

—
DECISION

December 18, 2019

—
Before the Authority: Colleen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members
(Member DuBester dissenting in part)

I. Statement of the Case

In this case, we further define the circumstances in which an award excessively interferes with management's rights to direct employees and assign work under § 7106(a)(2) of the Federal Service Labor-Management Relations Statute (Statute).¹ This case involves an alleged violation of the telework provision in the parties' agreement. Arbitrator Ira Cure found that the Agency violated the parties' agreement when it denied the grievant's telework request. The Agency argues that the award is contrary to law, the Arbitrator exceeded his authority, and the award fails to draw its essence from the parties' agreement. Applying the standard adopted in *U.S. DOJ, Federal BOP (DOJ)*,² we find that the award is contrary to law, in part, because it excessively interferes with management's rights to direct employees and assign work.

II. Background and Arbitrator's Award

The parties' agreement contains a provision for telework. As relevant here, Article 15, section 7, provision L(3) provides:

If, the [Agency] determines that a Judge has not scheduled a reasonably attainable number of cases for hearing, then after advising the Judge of that determination and further advising the Judge that his or her ability to telework may be restricted, the [Agency] may limit the ability of the Judge to telework until a reasonably attainable number of cases are scheduled. The Parties agree that any dispute as to whether the [Agency] has properly restricted the ability to telework under this paragraph is to be resolved pursuant to the negotiated grievance and arbitration procedures.³

On February 18, 2014, the Agency issued a memorandum clarifying provision L(3), which stated "scheduling an average of at least fifty (50) cases for hearing per month will generally signify a reasonably attainable number for the purposes of this contractual provision."⁴ The Agency issued another memorandum on February 15, 2017, instructing supervisors that "[b]efore removing an [administrative law judge] from telework, please have a collegial conversation."⁵

The grievant submitted a telework request that included a schedule for an average of thirty-seven cases for hearing each month. The Agency informed the grievant that she had not scheduled a reasonably attainable number of cases for hearing as required by the parties' agreement. The grievant insisted that she could not schedule more than an average of thirty-seven cases because she would not have time to prepare for hearings, the case files were larger than those in her previous office, she was having issues with the Agency's computers and with the decision writers, and she would not be able to take her earned leave. The Agency subsequently denied the grievant's telework request, and asserted that the reasons provided by the grievant are common to all judges. The Union filed a grievance and invoked arbitration.

During the seven-day hearing before the Arbitrator, the parties presented in-depth statistical comparisons of judges' outputs from various regional

¹ 5 U.S.C. § 7106(a)(2).

² 70 FLRA 398, 405-06 (2018) (Member DuBester dissenting).

³ Exceptions, Ex. 3 at 66.

⁴ Exceptions, Ex. 4 at 2 (emphasis omitted).

⁵ Exceptions, Ex. 7 at 2.

offices of the Agency and expert testimony regarding work productivity within the Agency.

The Arbitrator found that the Agency violated the parties' agreement by failing to make an individualized determination on what was reasonably attainable for the grievant, and by denying the grievant's telework request without first having a collegial conversation with her. The Arbitrator also found that scheduling fifty cases for hearing was unreasonable, but thirty-seven cases were too few. In reaching this conclusion, the Arbitrator found that the Agency failed to justify the fifty-case requirement. The Arbitrator instructed the Agency to allow the grievant to telework from January 1, 2019 through September 30, 2019, provided she scheduled on average forty-five cases for hearing per month. The award instructed that after September 30, 2019, the grievant follow the guidance and schedule fifty cases for hearing, and the Agency make an individualized determination of the grievant's telework request. The award also instructed the Agency to follow the requirements of the February 2017 memorandum and engage in a collegial conversation with the grievant if she were not able to schedule fifty cases for hearing per month.⁶

On December 19, 2018, the Agency filed exceptions to the award. The Union filed its opposition to the exceptions on January 14, 2019.

III. Analysis and Conclusion

A. The award draws its essence from the parties' agreement, in part.⁷

The Agency argues that the Arbitrator's arbitrability determination fails to draw its essence from the parties' agreement because the parties' agreement does not allow a judge to grieve the Agency's determination of whether a judge has scheduled a reasonably attainable number of hearings.⁸ The Agency also argues that part of the award—requiring that the Agency engage in a collegial conversation with the grievant in the event she is unable to schedule the

requisite number of cases for hearing⁹—fails to draw its essence from the parties' agreement, because it cannot rationally be derived from the agreement, and therefore, is not a plausible interpretation of the agreement.¹⁰ In this regard, the Agency argues that the 2017 Memorandum that mentions "collegial" conversations "is not incorporated into" the parties' agreement.¹¹

The Agency's essence exception to the arbitrability of the grievance lacks merit. The Authority has held that an arbitrator's determination of substantive arbitrability under the terms of the parties' agreement is subject to deference.¹² The parties' agreement expressly provides for arbitration of disputes involving the telework provision.¹³ Therefore, the Agency has failed to show how the Arbitrator's determination, which is consistent with the plain language of the parties' agreement, fails to draw its essence from the parties' agreement.

The Agency's essence exception to the portion of the award that requires a collegial conversation also lacks merit. The Authority has held that an arbitrator has wide discretion to fashion a remedy.¹⁴ Therefore, we need not reach the question of whether the 2017 Memorandum is an "agreement" between the parties because we find the remedy—to have a "collegial conversation"—is not deficient.

As such, the Agency has failed to demonstrate how the arbitrability determination or the award are implausible interpretations of the parties' agreement. Accordingly, we deny the Agency's essence exceptions.

⁶ Award at 47.

⁷ The Authority will find an arbitration award is deficient as failing to draw its essence from a collective-bargaining agreement when the excepting party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *Library of Cong.*, 60 FLRA 715, 717 (2005) (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).

⁸ Exceptions Br. at 15-17.

⁹ Award at 48.

¹⁰ Exceptions Br. at 17-18.

¹¹ *Id.* at 18 n.2.

¹² *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Forrest City, Ark.*, 68 FLRA 672, 673 (2015).

¹³ Exceptions, Ex. 3 at 66 ("any dispute as to whether the [Agency] has properly restricted the ability to telework under this paragraph is to be resolved pursuant to the negotiated grievance and arbitration procedures"). See generally *IFPTE, Ass'n Admin. Law Judges*, 70 FLRA 316, 317 (2017) (denying essence exception to arbitrator's interpretation of 7.L.3 to provide that a judge "may only invoke the parties' negotiated grievance procedure 'after his or her telework is restricted'" (quoting arbitrator)).

¹⁴ *Dep't of the Air Force, Scott Air Force Base, Ill.*, 51 FLRA 675, 687 (1995) (citing *Steelworkers v. Enter. Wheel and Car Corp.*, 363 U.S. 593, 597 (1960)).

B. The award is contrary to law, in part.¹⁵

Therefore, the answer to the second question is yes.

The Agency argues that the remedy—defining an average of forty-five cases for hearing per month as reasonably attainable for the grievant¹⁶—is contrary to law because it excessively interferes with management’s rights to direct employees and assign work.¹⁷

Under the management rights analysis established in *DOJ*, in order to determine whether a remedy is contrary to a management right, the first question that must be answered is whether the arbitrator found a violation of the parties’ agreement.¹⁸ Here, the Arbitrator found that the Agency violated the parties’ agreement when it did not make an individualized determination of what constitutes a reasonably attainable number of hearings for the grievant prior to denying her telework request.¹⁹ Therefore, the answer to the first question is yes. The second question is whether the arbitrator’s remedy reasonably and proportionally relates to that violation.²⁰ Here, the remedy—that the Agency provide the grievant with an individualized determination and allow the grievant to telework from January 2019 to September 2019 provided she schedules an average of forty-five cases for hearing per month²¹—is reasonably and proportionally related to the found violation.²²

¹⁵ The Authority reviews questions of law de novo. *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In conducting a de novo review, the Authority determines whether the arbitrator’s legal conclusions are consistent with the applicable standard of law. *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator’s underlying factual findings unless the excepting party established that they are nonfacts. See *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014).

¹⁶ Award at 48.

¹⁷ Exceptions Br. at 7-8, 11; 5 U.S.C. § 7106(a)(2). We note that the Agency does not except to the portion of the award requiring an individualized determination concerning the grievant’s telework request; therefore, that portion of the award is not before us.

¹⁸ 70 FLRA at 405; see also *U.S. Dep’t of the Treasury, IRS*, 70 FLRA 792, 793-94 (2018) (*IRS*) (Member DuBester dissenting) (finding the award excessively interfered with management’s right to assign employees); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Lompoc, Cal.*, 70 FLRA 596, 597-98 (2018) (Member DuBester dissenting).

¹⁹ Award at 46.

²⁰ *DOJ*, 70 FLRA at 405; see also *U.S. DOD, Def. Logistics Agency*, 70 FLRA 932, 933 (2018) (Member DuBester dissenting).

²¹ Award at 48.

²² Compare *IRS*, 70 FLRA at 793 (finding an award allowing the grievant to remain in the same position if another employee volunteered to be reassigned, as required by the Memorandum of Understanding and the parties’ agreement, was reasonably and proportionally related to the violation), with *U.S. DHS, U.S. CBP, Detroit Sector, Detroit, Mich.*, 70 FLRA 572, 573

(2018) (*Detroit*) (Member DuBester dissenting) (finding that an award of 12 months of backpay was not reasonably and proportionally related to the agency’s failure to provide disciplinary notice at “earliest practicable date”).

The final question is whether the arbitrator's interpretation of the parties' agreement excessively interferes with a management right.²³ The Authority has long held that management's rights to direct employees and assign work include the right to establish performance standards in order to supervise and determine the quantity, quality, and timeliness of work required of employees.²⁴ Furthermore, management's right to assign work includes the right to establish quotas for assessing employee performance.²⁵ Here, the award prohibits management from setting a standard quota—an average of fifty per month—for the number of hearings an employee must schedule in order to be eligible for telework.²⁶ In *U.S. DOJ, Federal BOP, Federal Correctional Institution, Big Spring, Texas*, the Authority found that an award excessively interfered with management's right to assign work because it prevented the agency from determining the appropriate number of employees per shift.²⁷ Similarly, the award here excessively interferes with management's right to assign work here because it prevents the Agency from determining the appropriate number of hearings for its judges to schedule per month. Because the answer to the last question is yes, the award excessively interferes with management's rights, and we vacate the portion of the award requiring the Agency to conduct an individualized determination for the grievant and allow the grievant to telework if she schedules an average of forty-five cases

for hearing per month.²⁸

IV. Order

Because we find that the award is contrary to law, in part, we vacate the award, in part.

²³ *DOJ*, 70 FLRA at 405.

²⁴ *AFGE, Local 1687*, 52 FLRA 521, 522 (1996) (citing *AFGE, Local 1164*, 49 FLRA 1408, 1414 (1994)); *AFGE, Local 225*, 56 FLRA 686, 687 (2000); *NTEU*, 65 FLRA 509, 511 (2011) (Member Beck dissenting on other grounds) (citing *AFGE, Local 3295*, 44 FLRA 63, 68 (1992)); see also *AFGE, Nat'l Council of Field Labor Locals, Local 2139*, 57 FLRA 292, 294 (2001) (finding that the right to assign work includes the right to establish criteria governing employee's performance of their duties); *NAGE, Local R1-109*, 53 FLRA 403, 409 (1997) (citing *NTEU*, 3 FLRA 769 (1980)) (finding that the right to assign work includes the right to determine the particular duties and work to be assigned to employees).

²⁵ *NTEU, Chapter 22*, 29 FLRA 348, 351 (1987) (citing *NTEU*, 6 FLRA 522, 530-31 (1981)).

²⁶ Award at 48.

²⁷ 70 FLRA 442, 444 (2018) (Member DuBester concurring).

²⁸ Because we set aside a portion of the award on contrary-to-law grounds, we do not reach the Agency's remaining arguments pertaining to that portion of the award. *Detroit*, 70 FLRA at 574 n.18 (finding it unnecessary to address the remaining arguments when an award has been set aside); see also *NFFE, Local 1450, IAMAW*, 70 FLRA 975, 977 (2018); *U.S. Dep't of the Air Force, Grissom Air Reserve Base, Miami, Ind.*, 67 FLRA 342, 343 (2014) (Member Pizzella concurring); Exceptions Br. at 10-12 (arguing the arbitrator exceeded his authority by disregarding the plain language of the parties' agreement); Exceptions Br. at 13 (arguing the award is deficient on essence grounds because it contradicts the plain language of the agreement which provides that the Agency determines what constitutes "reasonably attainable"). We also do not address the Agency's other exceeds authority claim because it merely restates its contrary-to-law claim. *NAIL, Local 5*, 69 FLRA 573, 576 (2016) (citing *AFGE, Nat'l Border Patrol Council, Local 1929*, 63 FLRA 465, 467 (2009)) (finding it unnecessary to address the party's essence exception when it merely restated the party's contrary-to-law exception).

Member DuBester, dissenting in part:

I agree with the majority's conclusion that the award draws its essence from the parties' agreement. However, I disagree with the majority's conclusion that the award violates management's rights to direct employees and assign work. The majority's application of the three-part test adopted in *U.S. DOJ, Federal BOP*¹ once again demonstrates the arbitrary nature of that analysis.²

The facts of this case are not complicated. The parties agreed to an article in their bargaining agreement setting forth conditions judges must meet "to be eligible to participate in telework."³ The article includes a provision allowing the Agency to restrict a judge's ability to telework if the judge "has not scheduled a reasonably attainable number of cases for hearing."⁴ Notably, the parties also agreed that "any dispute as to whether the Agency has properly restricted the ability to telework" under this provision "is to be resolved pursuant to the [parties'] negotiated grievance and arbitration procedures."⁵ After the Agency denied the grievant's telework request because she had not, in the Agency's view, scheduled a reasonably attainable number of cases, the Union utilized the grievance procedure to resolve the dispute.

The Arbitrator found that the Agency violated the parties' agreement by failing to make an individualized determination regarding what was reasonably attainable for the grievant.⁶ Applying the agreement, and considering the extensive record developed by the parties, the Arbitrator concluded that the Agency's requirement that the grievant schedule fifty cases per month to be eligible for telework "was not reasonably attainable."⁷ The Arbitrator also found, however, that the grievant could have reasonably scheduled forty-five cases per month, and therefore directed the Agency to permit the grievant to telework if she met this condition.⁸

Notably, neither the Agency nor the majority challenges the portion of the award requiring the Agency to make an individualized determination regarding the grievant's telework request.⁹ Instead, the majority vacates the award's remedy because it "excessively interferes" with management's rights to direct employees and assign work.¹⁰

The majority's conclusion reflects a basic misunderstanding of the Authority precedent upon which it is based. The majority notes that management's rights to direct employees and assign work "include the right to establish performance standards in order to supervise and determine the quantity, quality, and timeliness of the work required of employees."¹¹ To support this conclusion, the majority relies exclusively upon decisions in which the Authority has found proposals non-negotiable because they interfered with the agency's right to "establish the qualifications and skills" required for a position;¹² to determine "the content of a performance standard";¹³ to "establish the particular levels of performance required to achieve a particular summary rating for overall performance";¹⁴ to establish customer service standards expected of employees;¹⁵ and to "hold[] an employee responsible for his or her performance expectations if those expectations have not been communicated to the employee in writing."¹⁶

¹ 70 FLRA 398 (2018) (Member DuBester dissenting).

² *Id.*; see also *U.S. Dep't of the Treasury, IRS*, 70 FLRA 792 (2018) (Member DuBester dissenting); *U.S. DHS, CBP, Detroit Sector, Detroit, Mich.*, 70 FLRA 572 (2018) (Member DuBester dissenting).

³ Award at 4; Exceptions, Ex. 3 (CBA) at 59.

⁴ Award at 5; CBA at 66.

⁵ Award at 5; CBA at 66.

⁶ Award at 41 nn.9-10, 42, 46.

⁷ *Id.* at 42, 46.

⁸ *Id.* at 47.

⁹ Majority at 4 n.17.

¹⁰ *Id.* at 5-6.

¹¹ Majority at 5.

¹² *NAGE, Local R1-109*, 53 FLRA 403, 410 (1997).

¹³ *AFGE, Local 1687*, 52 FLRA 521, 523 (1996).

¹⁴ *AFGE, Local 225*, 56 FLRA 686, 688 (2000).

¹⁵ *AFGE, Nat'l Council of Field Labor Locals, Local 2139*, 57 FLRA 292, 294 (2001).

¹⁶ *NTEU*, 65 FLRA 509, 511 (2011).

But neither the Arbitrator's award nor the contract provision it enforces has *any effect* on the Agency's ability to establish the content of the judges' performance standards, or its ability to require the judges to schedule a particular number of cases as a condition of receiving a particular performance rating. And the majority's conclusion that the award offends the Agency's right to assign work because it "prohibits management from setting a standard quota . . . for the number of hearings an employee must schedule" to avoid telework restrictions is similarly flawed.¹⁷ Indeed, the primary case upon which the majority relies for this conclusion – *NTEU, Chapter 22*¹⁸ – stands for an entirely separate principle – namely, that a proposal which would preclude the agency from requiring that employees on detail maintain a production standard or quota was non-negotiable because it interfered with the agency's ability to evaluate their performance.¹⁹

Nothing in the Arbitrator's award affects the Agency's ability to evaluate the judges' performance. The award simply enforces a contract provision governing the conditions under which the judges may be allowed to telework. And the Authority has consistently rejected arguments that awards enforcing similar contractual provisions violate management's rights.²⁹

Accordingly, I dissent in part, and would deny the Agency's contrary-to-law exception.

¹⁷ Majority at 5.

¹⁸ 29 FLRA 348, 351 (1987).

¹⁹ *Id.* at 351 (finding that the proposal would interfere "with the ability of the [a]gency to *review and evaluate* the performance by detailed employees of assigned duties.") (emphasis added). The other case cited by the majority for this conclusion is similarly unavailing. The award at issue in *U.S. DOJ, Federal BOP, Federal Correctional Institution, Big Spring, Texas*, was vacated because it required the agency to "always staff" particular posts. 70 FLRA 442, 444 (2018) (Member DuBester concurring). The majority fails to explain how this decision has any relevance to an award determining whether an employee's eligibility to telework has been properly restricted.

²⁹ See, e.g., *U.S. Dep't of HHS, Ctrs. for Medicare & Medicaid Servs., Balt., Md.*, 57 FLRA 704, 707 (2002) (award requiring agency to grant grievant's request to telework "does not affect management's right to . . . assign work" because it "does not concern the assignment of . . . duties to the grievant," but rather "the location . . . where these duties will be performed"); *U.S. Food & Drug Admin., Detroit Dist.*, 59 FLRA 679, 682 (2004) (award ordering agency to reinstate grievants' telework agreements does not affect the agency's right to assign work).