

**71 FLRA No. 111**

SOCIAL SECURITY ADMINISTRATION  
OFFICE OF HEARINGS OPERATIONS  
(Agency)

and

INTERNATIONAL FEDERATION  
OF PROFESSIONAL  
AND TECHNICAL ENGINEERS  
ASSOCIATION OF  
ADMINISTRATIVE LAW JUDGES  
(Union)

0-AR-5476

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DECISION

February 21, 2020

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

Decision by Member Abbott for the Authority

**I. Statement of the Case**

With this decision, we reiterate our holding in *Social Security Administration (SSA)*<sup>1</sup> that management's rights to direct employees and assign work include the right to set and enforce performance quotas regarding the quantity, quality, and timeliness of employees' work.

Like *SSA*, this case involves another alleged violation of the telework provision in the parties' agreement.<sup>2</sup> Arbitrator Melinda G. Gordon found that the Agency violated the parties' agreement when it denied the grievant's telework request. The Agency argues that the award fails to draw its essence from the parties' agreement, the Arbitrator exceeded her authority, and the award is contrary to law. Applying the standard adopted in *U.S. DOJ, Federal BOP (DOJ)*,<sup>3</sup> 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.<sup>4</sup>

On February 18, 2014, the Agency issued a memorandum interpreting 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."<sup>5</sup> The Agency issued another memorandum to its supervisors on February 15, 2017, instructing them that "[b]efore removing an [administrative law judge] from telework, please have a collegial conversation."<sup>6</sup>

<sup>1</sup> 71 FLRA 495 (2019) (Member DuBester dissenting in part).

<sup>2</sup> *Id.* at 495-96.

<sup>3</sup> 70 FLRA 398, 405-06 (2018) (Member DuBester dissenting).

<sup>4</sup> Exceptions, Ex. 5 at 66.

<sup>5</sup> Exceptions, Ex. 7 at 2.

<sup>6</sup> Exceptions, Ex. 10 at 2.

The grievant submitted a telework request indicating that he would schedule an average of forty-seven cases for hearing each month. The grievant's supervisor then invited him to schedule more cases for hearing to satisfy the requirement or provide acceptable reasons for not scheduling fifty cases for hearing per month. The grievant did not schedule additional cases for hearing, and the Agency subsequently denied the grievant's telework request. The grievant claimed that the Agency did not have a conversation with him before denying his telework request. The grievant also asserted that in formulating his request, he considered earned leave time, conference time, and the time he needed to ensure claimants received due process and a full and fair hearing; and that faulty Agency hearing equipment, lack of IT personnel, and lack of a personal law clerk caused hearing delays. The Union filed a grievance and invoked arbitration.<sup>7</sup>

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 denying the grievant's telework request. The Arbitrator also found that scheduling forty-seven cases for hearing was reasonable. The Arbitrator instructed the Agency to allow the grievant to telework from February 1, 2019 through September 30, 2019, provided he scheduled on average forty-seven cases for hearing per month. The Arbitrator also provided that after September 30, 2019, the grievant should follow the guidance and schedule fifty cases for hearing per month, and she directed the Agency to make individualized determinations regarding the grievant's telework requests. 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 he is not able to schedule fifty cases for hearing per month.

On February 27, 2019, the Agency filed exceptions to the award. The Union filed its opposition to the exceptions on March 28, 2019.

### III. Analysis and Conclusions

#### A. We uphold the award, in part.

As discussed above, the Arbitrator found that the Agency violated the parties' agreement. As part of her remedy for this violation, she instructed the Agency to "engage in a collegial discussion with the [g]rievant" before denying any of his future telework requests.<sup>8</sup> The

<sup>7</sup> During the five-day hearing before the Arbitrator, the parties presented in-depth statistical comparisons of judges' outputs from various regional offices of the Agency and expert testimony regarding work productivity within the Agency.

<sup>8</sup> Award at 51.

Agency argues that the Arbitrator exceeded her authority<sup>9</sup> when she required the Agency to have a collegial conversation before restricting telework, because, by doing so, she ignored an express limitation on her authority contained in the parties' agreement.<sup>10</sup> The parties' agreement states that "the arbitrator shall have no authority to alter the terms of this [a]greement."<sup>11</sup> However, the Agency's exceptions do not identify an express contractual limitation on the Arbitrator's authority to provide a remedy, if she found that a violation of the agreement occurred. Here, we have not disturbed the Arbitrator's determination that the Agency violated the agreement. That the Agency disagrees with one awarded remedy, a collegial conversation, does not persuade us that the Arbitrator exceeded her authority by awarding it.<sup>12</sup> Therefore, we deny the Agency's exceeds-authority exception.

Similarly, the Agency argues that the "collegial discussion" remedy fails to draw its essence from the parties' agreement.<sup>13</sup> This argument is identical to the essence exception challenging an identical remedy that we denied in *SSA*.<sup>14</sup> For the same reasons that we stated in *SSA*, we deny the Agency's essence exception challenging the "collegial conversation" remedy.<sup>15</sup>

<sup>9</sup> As relevant here, the Authority will find that an arbitrator exceeded his or her authority when he or she disregards specific limitations on his or her authority. *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). When an exception concerns whether the remedy awarded by the arbitrator exceeded the arbitrator's authority, both the Authority and Federal courts have consistently emphasized the broad discretion to be accorded arbitrators in the fashioning of appropriate remedies. *U.S. DOL, Bureau of Labor Statistics, Wash., D.C.*, 59 FLRA 533, 534 (2003) (*DOL*).

<sup>10</sup> Exceptions Br. at 17-18.

<sup>11</sup> Exceptions, Ex. 5 at 41.

<sup>12</sup> *U.S. DOJ, Fed. BOP, Fed. Det. Ctr., Honolulu, Haw.*, 66 FLRA 858, 862 (2012) (Chairman Pope dissenting in part) (arbitrator did not exceed authority by awarding particular remedy where the remedy addressed the harm caused by the Agency's violation) (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Sheridan, Or.*, 66 FLRA 388, 391 (2011)); *DOL*, 59 FLRA at 535 (denying exceeds-authority exception because remedy was responsive to the violations and appropriate).

<sup>13</sup> Exceptions Br. at 20-21.

<sup>14</sup> 71 FLRA at 496.

<sup>15</sup> *Id.* As in *SSA*, the Agency also argues that the Arbitrator's arbitrability determination fails to draw its essence from the parties' agreement. See Exceptions Br. at 18-20. For the same reasons that we stated in *SSA*, we deny this exception. 71 FLRA at 496.

B. The award is contrary to law, in part.<sup>16</sup>

The Agency argues that another of the awarded remedies—defining an average of forty-seven cases for hearing per month as reasonably attainable for the grievant<sup>17</sup>—is contrary to law because it excessively interferes with management’s rights to direct employees and assign work.<sup>18</sup>

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.<sup>19</sup> 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 his telework request.<sup>20</sup>

Then we turn to whether the arbitrator’s remedy reasonably and proportionally relates to that violation.<sup>21</sup> Here, the remedy—that the Agency provide the grievant with an individualized determination and allow him to telework from February 2019 to September 2019 provided he schedule an average of forty-seven cases for hearing per month<sup>22</sup>—is reasonably and proportionally related to the found violation.<sup>23</sup> Therefore, the answer to the second question is yes.

The final question is whether the arbitrator’s interpretation of the parties’ agreement excessively interferes with a management right.<sup>24</sup> The Authority has 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.<sup>25</sup> Furthermore, management’s right to assign work includes the right to establish goals for assessing employee performance.<sup>26</sup>

Here, the awarded remedy orders the Agency to accept a defined amount of work from the grievant of forty-seven scheduled hearings per month.<sup>27</sup> As we

<sup>16</sup> 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).

<sup>17</sup> Award at 49-50.

<sup>18</sup> Exceptions Br. at 8-14; 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 all future telework requests by the grievant;” therefore, that portion of the award is not before us. Award at 50.

<sup>19</sup> 70 FLRA at 405; see also *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Big Springs, Tex.*, 70 FLRA 442, 444 (2018) (Member DuBester concurring).

<sup>20</sup> Award at 49-50. Member Abbott notes that this language, “reasonably attainable”, is in the parties’ agreement, albeit as imposed by an earlier Federal Service Impasses Panel order, and so, the Agency cannot now be surprised that the question of what is “reasonably attainable” has been brought before an arbitrator. The purpose of the *DOJ* test was never to get agencies out of their agreements. See *AFGE, Local 3294*, 70 FLRA 432, 436 n.47 (2018) (Member DuBester concurring). Equally, the purpose of bringing a grievance through the negotiated grievance procedure is to bring an alleged violation of the agreement to an interpretation, and resolution, of a third party, and not to avoid bringing a contested topic to the bargaining table. A five (5) day hearing with a parade of experts and reports, by both sides, more than suggests that this was not about one person at all, but an effort to force change into the workplace by an arbitrator’s fiat. It seems the Agency and the Union have much they should discuss in another forum, such as at the bargaining table.

<sup>21</sup> *DOJ*, 70 FLRA at 405; see also *U.S. DOD, Def. Logistics Agency*, 70 FLRA 932, 933 (2018) (Member DuBester dissenting) (finding the award of full-time telework and backpay was not reasonably and proportionally related to the Agency’s failure to provide a specific justification for denying a telework request); *U.S. Dep’t of the Treasury, IRS*, 70 FLRA 792, 793-94 (2018) (*IRS*) (Member DuBester dissenting); *U.S. DHS, U.S. CBP, Detroit Sector, Detroit, Mich.*, 70 FLRA 572, 573 (2018) (*Detroit*) (Member DuBester dissenting).

<sup>22</sup> Award at 49-50.

<sup>23</sup> See *SSA*, 71 FLRA at 497; *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 *Detroit*, 70 FLRA at 573 (finding that an award of 12 months of backpay was not reasonably and proportionally related to the Agency’s failure to use an expedited grievance process).

<sup>24</sup> *DOJ*, 70 FLRA at 405.

<sup>25</sup> *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) (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) (Member Wasserman dissenting) (finding that the right to assign work includes the right to establish criteria governing employee’s performance of their duties); *NAGE, Local RI-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).

<sup>26</sup> *NTEU, Chapter 22*, 29 FLRA 348, 351 (1987) (citing *NTEU*, 6 FLRA 522, 530-31 (1981)).

<sup>27</sup> Award at 49-50.

explained in *SSA*, this type of remedy—one that prevents the Agency from requiring its employee to schedule the number of hearings per month that *the Agency* has determined appropriate—excessively interferes with the Agency’s rights to direct employees and assign work.<sup>28</sup> Therefore, the answer to the last question is yes, the awarded remedy excessively interferes with management’s rights, and we vacate the portion of the award requiring the Agency to define “reasonably attainable” for the grievant as an average of forty-seven cases for hearing per month.<sup>29</sup>

#### IV. Order

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

#### Member DuBester, dissenting in part:

I agree with the majority’s decision in Part A to deny the Agency’s exceptions. However, I strongly disagree with the majority’s conclusion in Part B of its decision that the award is contrary to law.

Repeating the mistakes of its decision in *SSA*,<sup>1</sup> the majority once again concludes that the award – which simply enforces the parties’ agreement regarding conditions under which judges are eligible to telework – offends the Agency’s right to direct employees and assign work. As I explained in my dissenting opinion in *SSA*,<sup>2</sup> the majority’s conclusion rests upon cases that have no relevance to the Arbitrator’s award or the contract provision it enforces.

Applying Authority precedent that actually governs awards enforcing similar contract provisions,<sup>3</sup> I would deny the Agency’s contrary-to-law exception. Accordingly, I dissent from Part B of the majority’s decision.

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<sup>28</sup> 71 FLRA at 498.

<sup>29</sup> 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 573 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); Exceptions Br. at 18-20 (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”); *id.* at 14-16 (arguing Arbitrator exceeded her authority by “failing to respect” management’s rights to direct employees and assign work); *id.* at 16-17 (arguing that the timing of the remedy that we are vacating exceeded the Arbitrator’s authority); *id.* at 17-18 (arguing that the Arbitrator exceeded her authority by considering extrinsic evidence to interpret the provision dealing with a “reasonably attainable” number of hearings per month).

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<sup>1</sup> 71 FLRA 495 (2019) (Member DuBester dissenting in part).

<sup>2</sup> *Id.* at 499 (Dissenting Opinion of Member DuBester).

<sup>3</sup> *See, e.g., U.S. Dep’t of HHS, Ctrs. for Medicare & Medicaid Servs., Balt., Md.*, 57 FLRA 704, 707 (2000) (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).