

**71 FLRA No. 122**

SOCIAL SECURITY ADMINISTRATION  
OFFICE OF HEARINGS OPERATIONS  
(Agency)

and

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

0-AR-5514

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DECISION

March 30, 2020

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

Decision by Member Abbott for the Authority

**I. Statement of the Case**

This case is another chapter in the chronicle between the Agency and the Union over the telework provision in the parties' collective-bargaining agreement.<sup>1</sup> While this chapter varies somewhat from its predecessors, the story ends the same.

Arbitrator Lise Gelernter 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, the award is incomplete, ambiguous, or contradictory, and the award is contrary to law. Applying the standard adopted in *U.S. DOJ, Federal BOP (DOJ)*,<sup>2</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.

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<sup>1</sup> See *IFPTE, Ass'n Admin. Law Judges*, 70 FLRA 316 (2017) (*IFPTE*); see also *SSA, Office of Hearings Operations*, 71 FLRA 589 (2020) (*SSA II*) (Member DuBester dissenting in part); *SSA*, 71 FLRA 495 (2019) (*SSA I*) (Member DuBester dissenting in part).

<sup>2</sup> 70 FLRA 398, 405-06 (2018) (Member DuBester dissenting).

**II. Background and Arbitrator's Award**

Like *SSA I*<sup>3</sup> and *SSA II*,<sup>4</sup> this case involves the denial of the grievant's telework request for failure to schedule a "reasonably attainable" number of cases for hearing per month. The parties' collective bargaining agreement contains a provision for telework. As relevant here, Article 15, Section 7.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>5</sup>

On February 18, 2014, the Agency issued a memorandum clarifying Section 7.L.3, which stated "scheduling an average of at least fifty cases for hearing per month will generally signify a reasonably attainable number for the purposes of this contractual provision."<sup>6</sup> The Agency issued another memorandum on February 15, 2017, maintaining that an average of fifty scheduled hearings per month is a "reasonably attainable" number of hearings for the telework period of April 1, 2017 to September 30, 2017 and instructing supervisors that "[b]efore removing an [administrative law judge (Judge)] from telework, please have a collegial conversation."<sup>7</sup>

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<sup>3</sup> 71 FLRA 495.

<sup>4</sup> 71 FLRA 589.

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

<sup>6</sup> Exceptions, Ex. 6 at 1 (emphasis omitted).

<sup>7</sup> Exceptions, Ex. 9 at 2.

Thereafter, the grievant submitted a telework request for the April 2017 to September 2017 telework period indicating that he would schedule an average of forty to forty-five cases for hearing per month, except in months when he would be on leave.<sup>8</sup> The Agency met with the grievant, informed him that he had not scheduled a reasonably attainable number of cases for hearing, and that he did not provide extenuating circumstances that would justify scheduling fewer than fifty cases for hearing per month. The grievant asserted his proposed hearing schedule was appropriate when considering his scheduled leave, and the fact that the number of hearings he had scheduled required him to work more than forty hours per week. The grievant did not schedule additional cases for hearing, and the Agency subsequently denied the grievant's telework request. In the grievance, the grievant also asserted that the proposed number of hearings was reasonable given the large size of the case files, lack of sufficient support staff due to a hiring freeze, deficient work of some support staff, the amount of time required to be spent on non-adjudicatory work, the use of interpreters, the use of medical and vocational expert witnesses, his past experience of issuing cases outside the Agency's time limits after scheduling too many cases, and the need to fulfill obligations of due process. The Agency denied the grievance and the Union invoked arbitration.<sup>9</sup>

The Arbitrator found that the grievance was substantively arbitrable because the language from Article 15, Section 7.L.3 and 7.L.4 explicitly provided for arbitration of "any dispute as to whether the [Agency] has properly restricted the ability to telework."<sup>10</sup> As to the merits, the Arbitrator found that the Agency violated the parties' agreement by denying the grievant's telework request because it "conditioned his ability to telework on a scheduling goal that was not 'reasonably attainable.'"<sup>11</sup> The Arbitrator also found that scheduling forty to forty-five cases for hearing per month was reasonable.

The Arbitrator instructed the Agency to allow the grievant to telework two days per week for up to thirty months,<sup>12</sup> provided he scheduled forty to forty-five cases for hearing per "non-holiday, non-leave month."<sup>13</sup> For the grievant's telework requests after the thirty-month period, the Arbitrator directed the Agency to make an individualized assessment of whether the grievant has scheduled a reasonably attainable number of hearings, and engage in a collegial conversation with the grievant if he is not able to schedule a reasonably attainable number of hearings per month. The award also instructed the Agency to "have a valid basis for determining what would be a 'reasonably attainable' number of scheduled hearings."<sup>14</sup>

On June 10, 2019, the Agency filed exceptions to the award. The Union filed its opposition to the exceptions on July 8, 2019.

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<sup>8</sup> According to the record, the grievant was able to schedule fifty hearings in January 2018. Award at 29.

<sup>9</sup> During the seven-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>10</sup> Exceptions, Ex. 5 at 66.

<sup>11</sup> Award at 48.

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<sup>12</sup> The Arbitrator found thirty months to be appropriate because it was equivalent to the "telework opportunities [the grievant] missed as of July 1, 2019." Award at 48. The Arbitrator also noted that the grievant's "failure to apply for telework for any of the missed telework periods does not preclude a remedy for those periods because it was apparent that any telework application he might have submitted that scheduled fewer than [fifty] hearings per month would be futile." *Id.* at 48 n.17.

<sup>13</sup> *Id.* at 48.

<sup>14</sup> *Id.* at 51.

### III. Analysis and Conclusions

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

The Agency claims the award fails to draw its essence from the parties' agreement.<sup>15</sup> Specifically, the Agency argues that the requirement of an individualized assessment of what is reasonably attainable for each judge fails to draw its essence from the parties' agreement because it is not required by the parties' agreement.<sup>16</sup> The Authority will not find an award deficient on essence grounds when the arbitrator's interpretation is a plausible interpretation of the parties' agreement.<sup>17</sup> Here, the Arbitrator's interpretation that Section 7.L.3 required the Agency to make an individualized assessment of what is a reasonably attainable number of hearings is a plausible interpretation of the parties' agreement because the provision allows for the restriction of an *individual's* ability to telework.<sup>18</sup> Therefore, the Agency has failed to demonstrate how the award is not a plausible interpretation of the parties' agreement. Accordingly, we deny the Agency's essence exceptions.

The Agency also argues that the Arbitrator exceeded her authority<sup>19</sup> by disregarding the express

<sup>15</sup> The Authority will find an award 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. *U.S. Small Bus. Admin.*, 70 FLRA 525, 527 (2018) (SBA) (Member DuBester concurring in part, dissenting in part) (citing *Library of Cong.*, 60 FLRA 715, 717 (2005)).

<sup>16</sup> Exceptions Br. at 34-36. Because the parties and underlying facts are the same, and we addressed identical arguments in *SSA I* and *SSA II*, we deny the Agency's other essence exceptions – challenging the arbitrability of the grievance and requirement of a collegial conversation – on the same grounds expressed in *SSA I* and *SSA II*. *SSA I*, 71 FLRA at 496; *SSA II*, 71 FLRA at 590; Exceptions Br. at 31-33; *id.* at 36-37.

<sup>17</sup> *U.S. Dep't of VA, Malcolm Randall VA Med. Ctr., Gainesville, Fla.*, 71 FLRA 103, 104-05 (2019).

<sup>18</sup> Exceptions, Ex. 5 at 66 (“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.” (emphasis added)).

<sup>19</sup> The Authority will find that an arbitrator exceeded his or her authority when he or she fails to resolve an issue submitted to arbitration, resolves an issue not submitted to arbitration, disregards specific limitations on his or her authority, or awards relief to those not encompassed within the grievance. *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996).

limitation that she could not alter the terms of the parties' agreement,<sup>20</sup> because she altered the terms of the parties' agreement to require: an individualized assessment for what is reasonably attainable for the grievant, a collegial conversation with the grievant if he is unable to schedule a reasonably attainable number of hearings per month, and a valid basis for what is reasonably attainable.<sup>21</sup> This argument is nearly identical to the exceeds-authority exception in *SSA II*.<sup>22</sup> For the same reasons we stated in *SSA II*, we deny the Agency's exceeds exception challenging the “collegial conversation,” individual assessment, and valid basis remedies.<sup>23, 24</sup>

Finally, the Agency argues the Arbitrator exceeded her authority by awarding relief to individuals other than the grievant.<sup>25</sup> Specifically, the Agency complains about the following statements from the Arbitrator:

But the Agency's data, on its own, is sufficient to prove the Union's contention that the scheduling goals were not reasonably attainable for most ALJs;<sup>26</sup> [t]he Agency violated the [parties' agreement] . . . because it conditioned [the grievant's] ability to telework on a scheduling goal that was not ‘reasonably attainable’ for him or most other judges;<sup>27</sup> [and] [i]t is not clear that I have the jurisdiction to give the remainder of the relief that the Union has requested . . . [h]owever, in order to comply with the CBA with respect to [the grievant], the Agency will necessarily have to take steps that

<sup>20</sup> Exceptions Br. at 18-22; Exceptions, Ex. 5 at 41 (Art. 11, § 4 provides: “The arbitrator is bound by applicable law . . . [and] shall have no authority to alter the terms of this Agreement.”).

<sup>21</sup> Exceptions Br. at 18-22.

<sup>22</sup> 71 FLRA at 590 (finding that contractual wording prohibiting the arbitrator from altering the terms of the agreement did not limit arbitrator's authority to provide a remedy for a contractual violation).

<sup>23</sup> *Id.*; see also *AFGE, Local 701*, 55 FLRA 631, 633 (1999) (Member Cabaniss dissenting on other grounds) (finding the Arbitrator did not exceed his authority, but instead exercised his power under the parties' agreement and Authority case law to interpret provisions of the agreement).

<sup>24</sup> Member Abbott notes this is not the first time the Agency has taken a “myopic view of its obligations to its own employees” and is dismayed by the Agency's apparent assertion that it does not need to provide a “valid basis” to employees before restricting telework. See *SSA*, 71 FLRA 333, 336 (Member Abbott concurring; Chairman Kiko dissenting) (Concurring Opinion of Member Abbott).

<sup>25</sup> Exceptions Br. at 23-25.

<sup>26</sup> Award at 45 (emphasis omitted).

<sup>27</sup> *Id.* at 48.

will also have an impact on other judges.<sup>28</sup>

The Authority has held that statements that are not essential to the Arbitrator's decision are dicta, and dicta does not provide a basis for finding an award deficient.<sup>29</sup> These statements are not essential to the decision, and therefore, are dicta. As such, the Agency has failed to demonstrate how the award is deficient. Furthermore, the Agency acknowledges that these statements are dicta,<sup>30</sup> and the Union concedes that the award is limited to the grievant.<sup>31</sup> Therefore, the Agency fails to demonstrate how the Arbitrator exceeded her authority.<sup>32</sup>

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

The Agency argues that the Arbitrator's substantive arbitrability determination is contrary to law<sup>33</sup> because it excessively interferes with management's rights.<sup>34</sup> The Agency's argument is based on a claim that anything that implicates management rights cannot be subject to arbitration. However, the Authority has held that the management rights provisions of 5 U.S.C. § 7106 do not provide a basis for finding grievances non-arbitrable.<sup>35</sup> As such, we deny the exception.<sup>36</sup>

The Agency also argues that the remedy—defining an average of forty to forty-five cases for hearing per non-holiday, non-leave month as reasonably attainable for the grievant and allowing the grievant to telework two days per week for thirty months<sup>37</sup>—is contrary to law because it excessively interferes with management's rights to direct employees and assign work.<sup>38</sup>

Under the management rights analysis established in *DOJ*,<sup>39</sup> in order to determine whether a remedy is contrary to a management right, the first question that must be answered is whether the

<sup>28</sup> *Id.* at 50.

<sup>29</sup> *AFGE, Council of Prison Locals 33, Local 3690*, 69 FLRA 127, 131 (2015) (citing *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Coleman II, Fla.*, 68 FLRA 52, 56 (2014); *Broad. Bd. of Governors, Office of Cuba Broad.*, 64 FLRA 888, 891-92 (2010); *NFFE, Local 1827*, 52 FLRA 1378, 1385 (1997)).

<sup>30</sup> Exceptions Br. at 24.

<sup>31</sup> Opp'n Br. at 13-14.

<sup>32</sup> The Agency also argues that the award is ambiguous because the Arbitrator failed to define what constitutes a "valid basis" for determining a reasonably attainable number of hearings. Exceptions Br. at 28-29. The Authority will find an award deficient when the award is incomplete, ambiguous, or contradictory as to make implementation of the award impossible. *U.S. Dep't of the Army, Corps of Eng'rs, Walla Walla Dist., Pasco, Wash.*, 63 FLRA 161, 163 (2009). For an award to be found deficient on this ground, the appealing party must demonstrate that the award is impossible to implement because the meaning and effect of the award are too unclear or uncertain. *NATCA*, 55 FLRA 1025, 1027 (1999) (Member Wasserman dissenting). Without requiring the Agency to take a specific action, the Arbitrator provided specific examples of the kinds of objective evidence that *could* constitute a valid basis. Award at 49-50. Therefore, the Agency has failed to demonstrate how the award – requiring the Agency to support its determination "with data, observations or some other information that shows why its view of what is [']reasonably attainable['] is valid" – is impossible to implement. Exceptions Br. at 21. Accordingly, we deny the exception.

<sup>33</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>34</sup> Exceptions Br. at 7-12.

<sup>35</sup> *AFGE, Nat'l Border Patrol Council, Local 1929*, 63 FLRA 465, 466 (2009) (*Local 1929*) (citing *U.S. DHS, CBP, N.Y., N.Y.*, 61 FLRA 72, 75 (2005)).

<sup>36</sup> The Agency also argues that the arbitrability determination is contrary to law because it did not waive its management rights, and what is "reasonably attainable" is not a procedure because it "directly interferes with the exercise of a management right." Exceptions Br. at 11-12. The Agency's arguments are merely attempts to reargue its assertion that any decision made pursuant to a management right is not substantively arbitrable. As such, we deny these exceptions for the same reason we denied its other contrary to law exception about the substantive arbitrability of the grievance. See *Local 1929*, 63 FLRA at 466.

<sup>37</sup> Award at 48-49.

<sup>38</sup> Exceptions Br. at 13-14, 18.

<sup>39</sup> 70 FLRA at 405-06 (holding that in determining whether an award is contrary to a management right under the Statute, the Authority will ask three questions: (1) whether the Arbitrator found a violation of a contract provision, (2) whether the award is reasonable and proportionally related to the violation of the parties' agreement, and (3) whether the award excessively interferes with a management right).

arbitrator found a violation of the parties' agreement.<sup>40</sup> Here, like in *SSA I* and *SSA II*, 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>41</sup> 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.<sup>42</sup> Here, the remedy—that the Agency define an average of forty to forty-five case for hearing per non-holiday, non-leave month as “reasonably attainable” for the grievant and allow him to telework two days per week for up to thirty months<sup>43</sup>—is reasonably and proportionally related to the found violation because it corresponds with the grievant's missed telework opportunities.<sup>44</sup>

The final question is whether the arbitrator's interpretation of the parties' agreement excessively interferes with a management right.<sup>45</sup> 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.<sup>46</sup> Furthermore, management's right to assign work includes the right to establish quotas for assessing employee performance.<sup>47</sup> Here, the awarded remedy prohibits management from enforcing the standard quota—an average of fifty scheduled hearings per month—which applies to all judges, and imposes an entirely different standard of forty to forty-five per non-holiday, non-leave month that applies only to this grievant.<sup>48</sup> Because the Arbitrator substituted her own judgement regarding how much work the Agency could direct from a judge, the remedy excessively interferes with the Agency's exercise of a management right. Therefore, the answer to the last question is yes, the 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 to forty-five cases for hearing per non-holiday, non-leave month, and therefore, the portion of the remedy allowing

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<sup>40</sup> *Id.* at 405; *see also U.S. Dep't of 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).

<sup>41</sup> Award at 48.

<sup>42</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); *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); *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 violation).

<sup>43</sup> Award at 48-49.

<sup>44</sup> *See SSA I*, 71 FLRA at 497; *SSA II*, 71 FLRA at 591. *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 twelve months of backpay was not reasonably and proportionally related to the Agency's failure to use the expedited grievance process).

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<sup>45</sup> *DOJ*, 70 FLRA at 405.

<sup>46</sup> *NTEU*, 65 FLRA 509, 511 (2011) (Member Beck dissenting on other grounds) (citing *AFGE, Local 3295*, 44 FLRA 63, 68 (1992)); *AFGE, Local 225*, 56 FLRA 686, 687 (2000); *AFGE, Local 1687*, 52 FLRA 521, 522 (1996) (citing *AFGE, Local 1164*, 49 FLRA 1408, 1414 (1994)); *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 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>47</sup> *NTEU, Chapter 22*, 29 FLRA 348, 351 (1987) (citing *NTEU*, 6 FLRA 522, 530-31 (1981)). Member Abbott notes as evident from the award, this arbitration was part of a full-scale fight between the Union and the Agency regarding the Agency's expectation of work from its judges. *See* Award at 50 (“It is not clear that I have the jurisdiction to give the remainder of the relief that the Union has requested . . . because it involves addressing issues that go beyond resolving the grievance at issue in this case.”).

<sup>48</sup> Award at 48-49.

the grievant to telework two days per week for up to thirty months also falls.<sup>49</sup>

#### IV. Order

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

#### Member DuBester, dissenting:

I agree with the majority's decision in Part A to deny the Agency's exceptions. I also agree with the majority's decision in Part B to deny the Agency's contrary-to-law exception challenging the Arbitrator's finding that the grievance was arbitrable. However, for reasons expressed in dissenting opinions addressing similar grievances, I strongly disagree with the majority's conclusion that the awarded remedy is contrary to law.<sup>1</sup>

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<sup>49</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 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 30-31 (arguing that the Arbitrator's determination of what constitutes "reasonably attainable" fails to draw its essence from the parties' agreement); *id.* at 18-19, 22 (arguing the Arbitrator exceeded her authority by determining what is reasonably attainable and permitting the grievant to telework); *id.* at 25-28 (arguing the portion of the award that allows the grievant to telework for thirty months if he schedules forty to forty-five cases for hearing per "non-holiday, non-leave month" is ambiguous); *id.* at 14 n.8 (remedy allowing grievant to telework was improper because grievant was not allowed to telework for one year as a result of disciplinary action).

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<sup>1</sup> *SSA, Office of Hearings Operations*, 71 FLRA 589, 592 (2020) (Dissenting Opinion of Member DuBester); *SSA*, 71 FLRA 495, 499-500 (2019) (Dissenting Opinion of Member DuBester).