

**71 FLRA No. 129**

SOCIAL SECURITY ADMINISTRATION  
OFFICE OF HEARINGS OPERATIONS  
(Agency)

and

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

0-AR-5543

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DECISION

April 8, 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 is the fifth case between the same parties involving the application of the same telework provision in the parties' agreement.<sup>1</sup> And, once again, we conclude that a remedy that limits the Agency's ability to premise telework approval on the scheduling of a minimum number of hearings per month excessively interferes with management's right to direct employees and assign work.

Arbitrator James M. Darby 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 his authority, 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

<sup>1</sup> See *SSA, Office of Hearings Operations*, 71 FLRA 646 (2020) (*SSA III*) (Member DuBester dissenting); *SSA, Office of Hearings Operations*, 71 FLRA 642 (2020) (Member DuBester dissenting); *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); *IFPTE, Ass'n Admin. Law Judges*, 70 FLRA 316 (2017) (*IFPTE*).

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

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 facts of this grievance are not different in any meaningful respect from those given in the previous cases.<sup>3</sup> Again, the grievant is an administrative law judge whose request to telework was denied because of his failure to schedule fifty cases for hearing per month. 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>4</sup>

On February 18, 2014, the Agency issued a memorandum clarifying provision 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>5</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] from telework, please have a collegial conversation."<sup>6</sup>

The grievant submitted a telework request for the April 2017 to September 2017 telework period indicating that he would schedule an average of forty-five cases for hearing per month. 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

<sup>3</sup> *SSA III*, 71 FLRA at 646-47; *SSA II*, 71 FLRA at 589-90; *SSA I*, 71 FLRA at 495-96.

<sup>4</sup> Exceptions, Ex. 6, Collective-Bargaining Agreement at 66.

<sup>5</sup> Exceptions, Ex. 11, February 8, 2014 Telework Memorandum at 2 (emphasis omitted).

<sup>6</sup> Exceptions, Ex. 14, February 15, 2017 Telework Memorandum at 2.

would justify scheduling fewer than fifty cases for hearing per month.<sup>7</sup> The grievant did not schedule additional cases for hearing, and the Agency subsequently denied the grievant's telework request. The Agency denied the grievance and the Union invoked arbitration.<sup>8</sup>

The Arbitrator found that the term "reasonably attainable" was ambiguous;<sup>9</sup> therefore, he looked to the bargaining history of the provision, which in this case was the Federal Service Impasses Panel (the Panel) proceedings.<sup>10</sup> Based on this information, the Arbitrator found that "reasonably attainable" was meant "'to be situation specific, taking into account all relevant and appropriate factors,'" and it was "not intended to be used as a 'stick' to require all [judges] to produce a certain designated number of annual dispositions."<sup>11</sup> The Arbitrator further found that the Agency failed to consider "any factors impacting the [g]rievant's ability to schedule [fifty] cases per month."<sup>12</sup> Therefore, the Arbitrator held that the Agency violated the parties' agreement because it failed to follow the procedures for determining what was "reasonably attainable" for the grievant.<sup>13</sup> As a remedy, the Arbitrator ordered the Agency to restore the grievant's lost telework days for the period of April 2017 to September 2017, and allow him to use the telework days at his discretion as long as it did not interfere with his scheduled hearing days.

On September 12, 2019, the Agency filed exceptions to the award. The Union filed its opposition to the exceptions on October 9, 2019.

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<sup>7</sup> At the hearing, the grievant testified that he did not provide the Agency with any extenuating circumstances prior to filing the grievance. Award at 20. During his testimony, the grievant justified his proposed hearing schedule by stating that scheduling more hearings per month "would require him to issue decisions that were not 'policy-compliant and [did not] meet all the regulations,'" and that he "spends considerable time before a hearing becoming familiar with the file and preparing questions for claimants." *Id.* He also pointed to equipment problems, the use of interpreters, and volunteering to handle other cases and hearings as reasons for his inability to schedule more hearings per month. *Id.*

<sup>8</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>9</sup> Award at 41.

<sup>10</sup> See *SSA, Office of Disability Adjudication & Review, Balt., Md.*, 12 FSIP 054 at 16 (2012) (*SSA, Balt.*).

<sup>11</sup> Award at 42.

<sup>12</sup> *Id.* at 43.

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

### III. Analysis and Conclusion

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

The Agency argues that the Arbitrator exceeded his authority<sup>14</sup> by looking to extrinsic evidence—the Jaffee Report<sup>15</sup>—to modify the clear and unambiguous terms of the parties' telework provision.<sup>16</sup> In support of its argument, the Agency states that the Arbitrator found that Article 15, Section 7.L.3 of the parties' agreement was "clear and unambiguous."<sup>17</sup> While the Arbitrator did find that part of 7.L.3 was clear and unambiguous,<sup>18</sup> he also found that the phrase "reasonably attainable" was not defined in the parties' agreement, and thus, was ambiguous.<sup>19</sup> We agree with the Arbitrator that "reasonably attainable" is ambiguous.<sup>20</sup> Therefore, the Agency has failed to demonstrate how the Arbitrator erred in looking to the Jaffee Report—which recommended and explained the language of 7.L.3 imposed by the Panel—to interpret the language

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<sup>14</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) (*Local 1617*).

<sup>15</sup> The Panel relied on the Fact[-]Finding Report and Recommendations of Arbitrator Jaffee (Jaffee Report) when it imposed the language of 7.L.3 on the parties as part of their collective-bargaining agreement. See *SSA, Balt.*, 12 FSIP 054 at 16.

<sup>16</sup> Exceptions Br. at 22-24. The Agency also argues that the Arbitrator exceeded his authority by finding the grievance was arbitrable because he failed to respect management's rights to assign work and direct employees. *Id.* at 16-22. As we held in *SSA III*, the management rights provisions of 5 U.S.C. § 7106 do not provide a basis for finding grievances non-arbitrable. 71 FLRA at 649 (citing *AFGE, Nat'l Border Patrol Council, Local 1929*, 63 FLRA 465, 466 (2009)). Therefore, the Arbitrator did not exceed his authority because he did not "fail to respect" the Agency's management rights. Accordingly, we deny the exception.

<sup>17</sup> Exceptions Br. at 22.

<sup>18</sup> Award at 36-37 (finding that the part of L(3) stating "[t]he Parties agree that any dispute as to whether the Employer has properly restricted the ability to telework under this paragraph is to be resolved pursuant to the negotiated grievance and arbitration procedures" was clear and unambiguous).

<sup>19</sup> *Id.* at 41.

<sup>20</sup> See *Local 1617*, 51 FLRA at 1647 (award not deficient on ground that arbitrator exceeded his or her authority where excepting party does not establish that arbitrator failed to resolve an issue submitted to arbitration, resolved an issue not submitted to arbitration, disregarded specific limitations on his or her authority, or awarded relief to those not encompassed within the grievance).

“reasonably attainable.”<sup>21</sup> Accordingly, we deny the exception.

The Agency also argues the award fails to draw its essence from the parties’ agreement because the Arbitrator found that the grievant had the “right to telework.”<sup>22</sup> The Agency’s exception is based on the following language from the award:

Given its insistence that he schedule [fifty] cases for hearing each month, when it is clear the vast majority of [Judges] are unable to do so and without considering the [g]rievant’s individual circumstances, the Agency has seriously abridged the [g]rievant’s *right to telework*, far beyond that which was intended by Section 7.L.3.<sup>23</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>24</sup> This statement is part of the Arbitrator’s summary of his analysis and is not essential to the decision. The Arbitrator’s decision would remain unchanged if “right to telework” was substituted with “ability to telework.” Furthermore, on the next page of the award, the Arbitrator states that the grievant could “no longer enjoy the ability to telework.”<sup>25</sup> Therefore, the phrase “right to telework” is dicta, and thus, the Agency has failed to demonstrate how the award fails to

draw its essence from the parties’ agreement.<sup>26</sup> As such, we deny this exception.

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

The Agency argues that the award is contrary to the Federal Service Labor-Management Relations Statute (the Statute)<sup>27</sup> because it excessively interferes with management’s rights to assign work and direct employees.<sup>28</sup> The Agency argues that the remedies—restoring the grievant’s lost telework days and allowing him to use the telework days at his discretion as long as it did not interfere with his scheduled hearing days<sup>29</sup>—are contrary to law because they excessively interfere with management’s rights to direct employees and assign work.<sup>30</sup>

Under the management rights analysis established in *DOJ*,<sup>31</sup> in order to determine whether a remedy is contrary to a management right, the first question that must be answered is whether the arbitrator

<sup>21</sup> See *NTEU v. FLRA*, 466 F.3d 1079, 1081 (D.C. Cir. 2006) (stating that “where the terms of a bargaining agreement are ambiguous, we look to evidence of the parties’ contemporaneous understanding”). Here, the “parties’ contemporaneous understanding” for the provision is contained in the decision by the Panel imposing the language of 7.L.3. *But see U.S. Small Bus. Admin.*, 70 FLRA 525, 528 (2018) (Member DuBester concurring in part, dissenting in part) (holding that “arbitrators may not look beyond a collective-bargaining agreement—to extraneous considerations such as past practice—to modify an agreement’s *clear and unambiguous terms*”) (emphasis added).

<sup>22</sup> Exceptions Br. at 28.

<sup>23</sup> Award at 44 (emphasis added).

<sup>24</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>25</sup> Award at 45.

<sup>26</sup> As in *SSA*, the Agency also argues that the arbitrability determination fails to draw its essence from the parties’ agreement. Exceptions Br. at 28-29. For the same reasons as we stated in *SSA*, we deny this exception. 71 FLRA at 496. As in *SSA III*, the Agency also argues that the Arbitrator’s finding that the Agency was required to make an individualized determination before restricting telework fails to draw its essence from the parties’ agreement. Exceptions Br. at 28. For the same reasons that we stated in *SSA III*, we deny this exception. 71 FLRA at 648; *see also IFTPE*, 70 FLRA at 317 (finding that 7.L.3 provided that a judge could grieve a telework restriction, but he or she had to wait until telework was actually restricted).

<sup>27</sup> 5 U.S.C. §§ 7101-7135.

<sup>28</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>29</sup> Award at 48.

<sup>30</sup> Exceptions Br. at 11-15; *see also id.* at 24-27 (arguing the arbitrator exceeded his authority by awarding a remedy that excessively interfered with management rights).

<sup>31</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 reasonably and proportionally related to the violation of the parties’ agreement, and (3) whether the award excessively interferes with a management right).

found a violation of the parties' agreement.<sup>32</sup> Here, the Arbitrator found that the Agency violated the parties' agreement when it failed to follow the procedures for determining what was "reasonably attainable" for the grievant.<sup>33</sup> The second question is whether the arbitrator's remedy reasonably and proportionally relates to that violation.<sup>34</sup> Here, the remedies—restoring the grievant's lost telework days and allowing him to use the telework days at his discretion as long as it did not interfere with his scheduled hearing days<sup>35</sup>—are reasonably and proportionally related to the found violation.<sup>36</sup>

The final question is whether the arbitrator's interpretation of the parties' agreement excessively interferes with a management right.<sup>37</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>38</sup> Furthermore, management's right to assign work includes the right to establish quotas for assessing employee performance.<sup>39</sup>

Here, once again as in the prior cases,<sup>40</sup> the awarded remedies—allowing the grievant to telework, restoring his lost telework days, and allowing him to use those days at his discretion—prohibit management from enforcing the standard quota—an average of fifty per month—which applies to all judges, and effectively imposed an entirely different standard of forty-five scheduled hearings per month that applies only to this grievant.<sup>41</sup> As we explained in *SSA I*, remedies that prevent the Agency from requiring an employee to schedule a particular number of hearings per month that *the Agency* has determined to be appropriate, excessively interfere with the Agency's rights to direct employees and assign work.<sup>42</sup> Therefore, the answer to the last question is yes, the remedies excessively interfere with management's rights. And so, we vacate these remedies.<sup>43</sup>

<sup>32</sup> *Id.* 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. Complex, Lompoc, Cal.*, 70 FLRA 596, 597-98 (2018) (Member DuBester dissenting).

<sup>33</sup> Award at 47.

<sup>34</sup> 70 FLRA at 405; *see also U.S. DOD, Def. Logistics Agency*, 70 FLRA 932, 933 (2018) (Member DuBester dissenting) (finding the award of reinstatement, full-time telework from a new duty station, 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; *U.S. DHS, U.S. CBP, Detroit Sector, Detroit, Mich.*, 70 FLRA 572, 573 (2018) (*Detroit*) (Member DuBester dissenting).

<sup>35</sup> Award at 48.

<sup>36</sup> *See SSA III*, 71 FLRA at 650; *SSA II*, 71 FLRA at 591; *SSA I*, 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 twelve months of backpay was not reasonably and proportionally related to the agency's failure to use an expedited grievance process).

<sup>37</sup> *DOJ*, 70 FLRA at 405.

<sup>38</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>39</sup> *NTEU, Chapter 22*, 29 FLRA 348, 351 (1987) (citing *NTEU*, 6 FLRA 522, 530-31 (1981)).

<sup>40</sup> *See SSA III*, 71 FLRA at 650-51; *SSA II*, 71 FLRA at 591-92; *SSA I*, 71 FLRA at 498.

<sup>41</sup> Award at 43, 48.

<sup>42</sup> *See* 71 FLRA at 498.

<sup>43</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 14-15 (arguing the award is contrary to the Telework Act because it prevents the Agency from determining who is allowed to telework, requires the Agency to treat the grievant, a teleworker by the award, differently than a non-teleworker, and prevents the Agency from ensuring telework does not diminish employee performance or agency operations); *id.* at 16-22 (arguing the Arbitrator exceeded his authority by failing to respect management's rights).

**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 exceeded-authority and essence exceptions. 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>1</sup> SSA, *Office of Hearing Operations*, 71 FLRA 646, 651 (2020) (Dissenting Opinion of Member DuBester); 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).