

**72 FLRA No. 63**

UNITED STATES  
DEPARTMENT OF VETERANS AFFAIRS  
JOHN J. PERSHING VA MEDICAL CENTER  
POPLAR BLUFF, MISSOURI  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 2338  
(Union)

0-AR-5604  
0-AR-5653

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Decision

June 2, 2021

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

Decision by Member Abbott for the Authority

**I. Statement of the Case**

This matter is before the Authority on exceptions filed by the Agency on two awards (award and supplemental award) by Arbitrator George Aleman. Because Case Nos. 0-AR-5604 and 0-AR-5653 involve the same parties and arise from the same arbitration proceeding, we have consolidated them for decision.<sup>1</sup>

The Arbitrator issued an award finding that the Agency violated the terms of the parties' agreement by wrongfully denying requests for use of official time. The Agency filed exceptions to the award based on contrary-to-law, incomplete, ambiguous, or contradictory, bias, essence, and exceeds-authority grounds. While the exceptions to the award were pending before the Authority, the Arbitrator issued a supplemental award specifying the remedial relief under the award, to which the Agency then filed exceptions on contrary-to-law, essence, and exceeds-authority grounds.

Because the Agency does not demonstrate that the Arbitrator's award is contrary to law or otherwise deficient, we deny the Agency's exceptions to the award. And, we dismiss its exceptions to the supplemental award, because the Agency makes its arguments for the first time on exception when it could have, but did not, present its arguments to the Arbitrator.

**II. Background and Arbitrators' Awards**

The Union filed a grievance alleging that the Agency was violating Article 48 of the parties' agreement by denying requests for the use of allocated official time. The Agency denied the grievance, finding that it was not in violation of Article 48, and that the matter was not grievable. The Union thereafter invoked arbitration, and the Arbitrator sustained the grievance in the award dated January 13, 2020.<sup>2</sup>

In the award, the Arbitrator rejected the Agency's threshold argument that the grievance was barred under § 7116(d) of the Federal Service Labor-Management Relations Statute (the Statute)<sup>3</sup> by an earlier-filed grievance that it claimed alleged the same contractual violation. The Arbitrator found that the earlier-filed grievance, alleging the Agency wrongfully denied official time to a specific employee, had no bearing on the present grievance as it concerned only a specific occurrence, whereas the later-filed grievance concerned a contractual violation that was ongoing and general in nature. The Arbitrator also found that Article 43 of the parties' agreement permitted a grievance challenging an "act or occurrence . . . of a continuing nature" to be filed "anytime."<sup>4</sup> Therefore, the Arbitrator concluded the grievance was timely and properly filed under the parties' agreement.

As to the merits, the Arbitrator framed the issue as "whether the Union has been wrongfully denied use of allocated official time as required by the [parties'] [a]greement, and, if so, what shall the remedy be?"<sup>5</sup> Based on testimony and corroborating emails, the Arbitrator found that the Agency had wrongfully denied requests for official time in violation of the parties' agreement when it failed to provide an explanation or operational need for the denials.

As a remedy, and relevant here, the Arbitrator ordered that the Agency cease and desist from denying requests for official time unless it demonstrates a legitimate operational need for doing so, and awarded make-whole relief for individuals wrongfully denied use

<sup>1</sup> See *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Bryan, Tex.*, 70 FLRA 707, 708 (2018) (addressing exceptions to an arbitrator's first and second awards in a single decision).

<sup>2</sup> All further dates are 2020.

<sup>3</sup> 5 U.S.C. § 7116(d).

<sup>4</sup> Award at 21.

<sup>5</sup> *Id.* at 2.

of official time. He also directed that the parties determine the specific number of hours owed to those individuals and expressly retained jurisdiction for sixty days from the date of the award over any issues regarding the remedy. On February 12, the Agency filed exceptions to the award. The Union did not file an opposition to the exceptions.

In March, when the parties were unable to resolve issues regarding implementation of the remedial portion of the award, the Union requested a hearing to resolve the remaining issues. The Arbitrator provided the parties with various dates for a hearing, however, the Agency declined stating that it did not see any reason for a hearing. The Union then twice emailed the Arbitrator, with a copy to the Agency, noting that its calculations regarding relief for the Union officials listed were submitted to the Agency for review but the Agency declined to meet or discuss the calculations to implement the remedy.

The Arbitrator again suggested a hearing to the parties and added that if the parties failed to respond he would issue his decision based on the evidence submitted to him. The Arbitrator also informed the Agency that it was permitted to provide its own submissions for consideration in the matter. The Agency did not do so. The Arbitrator issued the supplemental award on June 18 specifying the amount of time owed by the Agency under the initial award to specific Union officials. On July 19, the Agency filed exceptions to the supplemental award. The Union did not file an opposition to the Agency's exceptions.

### III. Analysis and Conclusions

#### A. The award is consistent with law.

The Agency raises several arguments that the award is contrary to law.<sup>6</sup>

##### 1. The grievance is not barred under § 7116(d) of the Statute.

The Agency argues that the award is contrary to § 7116(d) of the Statute because the grievance was barred

by an earlier-filed grievance.<sup>7</sup> Under § 7116(d) of the Statute, issues may be raised under a negotiated grievance procedure or under the statutory unfair-labor-practice (ULP) procedure, but not under both procedures.<sup>8</sup> Section 7116(d) prohibits parties from litigating the same issue as *both* an ULP charge and a grievance.<sup>9</sup> Here, the Agency argues that the grievance was barred by an earlier-filed grievance.<sup>10</sup> The Arbitrator rejected the Agency's argument, finding the grievance was "properly before [him] . . . and not barred" under § 7116(d) as each concerned separate matters and distinct issues.<sup>11</sup> We agree that the issues raised in the grievances were not the same; we also note that the Union raised issues only under "the grievance procedure . . . not under both [grievance and ULP] procedures."<sup>12</sup> Therefore, we deny this exception.<sup>13</sup>

<sup>7</sup> Exceptions to Award at 4.

<sup>8</sup> *U.S. Dep't of the Navy, Navy Region Mid-Atl., Norfolk, VA.*, 70 FLRA 512, 514 (2018) (*Navy Mid-Atl.*) (then-Member DuBester dissenting) (citing 5 U.S.C. § 7116(d)).

<sup>9</sup> *U.S. Dep't. of VA*, 71 FLRA 785 (2020) (then-Member DuBester dissenting) (citing *Navy Mid-Atl.*, 70 FLRA at 516) (finding § 7116(d) bars a later-filed grievance when the grievance raises issues which are substantially similar to those raised in an earlier-filed ULP); e.g., *Sport Air Traffic Controllers Org.*, 71 FLRA 626, 628 (2020) (then-Member DuBester dissenting) (finding grievance was barred by § 7116(d) because grievance and earlier-filed ULP charge both raised the same issue).

<sup>10</sup> Exceptions to Award at 4.

<sup>11</sup> Award at 22.

<sup>12</sup> 5 U.S.C. § 7116(d). Member Kiko notes that although § 7116(d) does not operate to bar a grievance on the basis of a previously filed *grievance*, the Union had also filed several ULP charges that predated the grievance. See Award at 21. The Arbitrator found these ULP charges, some of which involved official time, were not sufficiently related to the grievance for § 7116(d) to apply. As the Agency does not specifically challenge this finding, and did not include the ULP charges in the record, Member Kiko notes that the Authority is constrained to rely on the Arbitrator's § 7116(d) analysis.

<sup>13</sup> The Agency also argues that the award fails to draw its essence from the parties' agreement because the grievance was improperly filed. Exceptions to Award at 9-12. However, in finding the grievance procedurally arbitrable, the Arbitrator relied on wording in Article 43 permitting grievances challenging an "act or occurrence . . . of a continuing nature" to be filed "anytime." Award at 21; see also Exceptions, Attach. 20, Master Agreement Excerpt at 4 (Article 43 requires a grievance to be filed within thirty days of the date the Union became aware of the act or occurrence at issue *unless* "the act or occurrence is of a continuing nature," in which case the grievance may be filed "anytime."). Because the Agency merely disagrees with the Arbitrator's application of the parties' agreement, we deny its exception. *SSA*, 71 FLRA 352, 353 (2019) (then-Member DuBester concurring) (denying the agency's essence exception because it merely disagreed "with the arbitrator's interpretation and application of a collective[-]bargaining agreement").

<sup>6</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, Loc. 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. *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014).

2. The award does not excessively interfere with management's rights.

The Agency argues that the award is contrary to § 7106(a)(2)(B) of the Statute<sup>14</sup> because it “usurps” and “abrogates” the Agency’s management rights.<sup>15</sup> Specifically, the Agency claims that the Arbitrator removes the Agency’s discretion to deny official time.<sup>16</sup> However, the Arbitrator did not prohibit the Agency from denying official time. Rather, he found that the Agency violated the parties’ agreement by denying official time without justification and without offering to provide alternative dates when the official time could be used.<sup>17</sup> The Authority will only apply the three-part framework set forth in *U.S. DOJ, Federal BOP*,<sup>18</sup> in “cases where the awards or remedies affect[] a management right.”<sup>19</sup> Here, the Agency has made only a bare assertion that the award affects its management rights, and that assertion appears to mischaracterize the award.<sup>20</sup> Accordingly, we find that the Agency has not demonstrated that the award affects its § 7106(a)(2)(B) rights.<sup>21</sup>

<sup>14</sup> 5 U.S.C. § 7106(a)(2)(B) (listing management’s rights “to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted”).

<sup>15</sup> Exceptions to Award at 5.

<sup>16</sup> *Id.*

<sup>17</sup> Award at 22.

<sup>18</sup> 70 FLRA 398, 405 (2018) (then-Member DuBester dissenting).

<sup>19</sup> *U.S. Dep’t of the Treasury, Office of the Comptroller of the Currency*, 71 FLRA 387, 390 (2019) (then-Member DuBester dissenting in part) (quoting *U.S. DOD, Def. Logistics Agency*, 70 FLRA 932, 933 (2018) (then-Member DuBester dissenting)).

<sup>20</sup> The Agency’s argument consists of a single sentence: “[The] Arbitrator[’s] . . . award usurps the Agency’s [m]anagement [r]ights, or abrogates the Agency’s [m]anagement [r]ights, by removing the Agency from the decision process of being able to deny official time usage for non-statutory official time as well as denying the Agency the right to deny official time for non-statutory official time during periods of time when a [U]nion representative would not otherwise be in duty status.” Exceptions to Award at 5. The Agency fails to even specifically identify which of the § 7106(a)(2)(B) rights it alleges are affected by the award.

<sup>21</sup> See *U.S. Dept. of Transp., FAA, Wash., D.C.*, 55 FLRA 322, 326 (1999) (finding that bare assertion that an award precluded the agency from documenting official time, without a sufficient explanation of the award’s effect on the cited management rights, did not establish an effect on management’s rights to assign work or determine personnel). The Agency also argues that the Arbitrator exceeded his authority by awarding relief to individuals not named in the grievance. Exceptions to Award at 13. However, the Arbitrator awarded relief only to Union officials identified as such in the grievance. Award at 22; see also *id.* at 18. Therefore, the Agency’s argument is without merit and is denied. *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Dublin, Cal.*, 71 FLRA 1172, 1175 n.24 (2020) (then-Member DuBester dissenting in part); see *U.S. DOL,*

The Agency argues that the award is contrary to § 7131(a), (c), or (d) of the Statute for the same reason.<sup>22</sup> However, because this exception is premised on only the management rights argument we reject above, and the Agency failed to support its exception or explain how the award is contrary to the Statute, we deny the exception.<sup>23</sup>

- B. Sections 2425.4(c) and 2429.5 of the Authority’s Regulations bar the Agency’s exceptions to the supplemental award.

Under §§ 2425.4(c) and 2429.5 of the Authority’s Regulations, the Authority will not consider any arguments that could have been, but were not, presented to the arbitrator.<sup>24</sup>

In its exceptions to the supplemental award, the Agency argues that the supplemental award is contrary to law and regulation, does not draw its essence from the parties’ agreement, and that the Arbitrator exceeded his

*Bureau of Labor Stat., Wash., D.C.*, 59 FLRA 533, 535 (2003) (denying exceeds-authority exception because remedy was responsive to the violations and appropriate).

<sup>22</sup> Exceptions to Award at 5; see 5 U.S.C. § 7131(a), (c), (d).

<sup>23</sup> 5 C.F.R. § 2425.6(e)(1) (“An exception may be subject to dismissal or denial if . . . [t]he excepting party fails to . . . support a ground” for review listed in § 2425.6(a)-(c)); see also *U.S. DHS, U.S. CBP, U.S. Border Patrol, El Paso, Tex.*, 61 FLRA 122, 125 (2005) (denying contrary-to-law exception when “[t]he [a]gency fails to establish how [the arbitrator’s] interpretation and application conflicts with §7131(d) of the Statute”). The Agency also asserts that the award is incomplete, ambiguous, or contradictory as to make implementation of the award impossible, because it is “incomplete and unclear and appears to conflict with itself.” Exceptions to Award at 6. However, besides this brief assertion, the Agency fails to support its exception or explain how the award is impossible to implement. Accordingly, we deny this exception. 5 C.F.R. § 2425.6(e)(1); see *AFGE, Loc. 2145*, 70 FLRA 413, 413 (2018) (denying incomplete, ambiguous, or contradictory exception as unsupported). In addition, the Agency also argues that the Arbitrator was biased because he provided a no-cost partial copy of the hearing transcript to the Union. Exceptions to Award at 8. However, providing a copy of the transcript to the parties does not by itself establish that the Arbitrator exhibited partiality, and we deny this exception. See *U.S. Dep’t of the Treasury, IRS, Wage & Inv. Div., Austin, Tex.*, 70 FLRA 924, 930 (2018) (then-Member DuBester concurring, in part, and dissenting, in part) (denying bias exception finding that record evidence of emails “show[ed] that the [a]rbitrator acted scrupulously to avoid any potential bias” and did not establish that the arbitrator exhibited partiality).

<sup>24</sup> 5 C.F.R. §§ 2425.4(c), 2429.5; *AFGE, Loc. 3627*, 70 FLRA 627, 627 (2018); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Bennettsville, S.C.*, 70 FLRA 342, 343 (2017) (citing *U.S. DOL*, 67 FLRA 287, 288 (2014); *AFGE, Loc. 3448*, 67 FLRA 73, 73-74 (2012)).

authority.<sup>25</sup> During the remedial phase of the proceeding, the Union notified the Arbitrator that the parties had been unable to resolve issues regarding implementation of the remedy, and asked for a hearing to resolve the issues.<sup>26</sup> The Arbitrator then offered the parties various dates for a hearing on the matter.<sup>27</sup> However, the Agency declined to participate.<sup>28</sup> The Union proposed remedial relief based on its calculations of official time hours that the Agency wrongly denied, but the Agency did not respond<sup>29</sup> or dispute these calculations.<sup>30</sup> Based upon those calculations,<sup>31</sup> the Arbitrator awarded various amounts of straight time to the Union officials who had been wrongfully denied official time.<sup>32</sup>

The Agency had the opportunity to challenge the Union's calculations but did not do so.<sup>33</sup> Thus, we will not consider its challenge to those calculations here.<sup>34</sup>

Therefore, we dismiss the Agency's exceptions to the supplemental award because its arguments are barred by §§ 2425.4(c) and 2429.5.

#### IV. Decision

We deny the Agency's exceptions to the award and dismiss its exceptions to the supplemental award.

<sup>25</sup> Exceptions to Supplemental Award at 3-10.

<sup>26</sup> Supplemental Award at 1 (Supp. Award).

<sup>27</sup> *Id.*; see *U.S. Dep't of Transp., FAA, Wash., D.C.*, 65 FLRA 950, 954 (2011) (determining arbitrator had jurisdiction where she expressly retained jurisdiction to resolve disputes over the implementation of the remedy, and she asserted jurisdiction within the timeframe during which she had retained jurisdiction); *AFGE, Loc. 1156 & Laborers Int'l Union, Loc. 1170*, 57 FLRA 602, 603 (2001) (finding arbitrator with retained jurisdiction to resolve disputes over interpretation or implementation of a remedy may issue supplemental award resolving such disputes).

<sup>28</sup> Supp. Award at 1; see, e.g., *U.S. DOJ, Fed. BOP, USP Admin. Maximum (ADX), Florence, Colo.*, 64 FLRA 1168, 1170 (2010) (dismissing exception under 5 C.F.R. § 2429.5 where agency had notice of specific remedy sought by union at arbitration and could have, but did not, present its argument to the arbitrator disputing that remedy).

<sup>29</sup> Supp. Award at 3; see, e.g., *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Atwater, Cal.*, 65 FLRA 256, 257 (2010) ("The case law interpreting 5 C.F.R. § 2429.5 makes clear that the Authority will not consider a contention that was not presented to the [a]rbitrator." (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Oakdale, La.*, 63 FLRA 178, 179-80 (2009))).

<sup>30</sup> Supp. Award at 4.

<sup>31</sup> *Id.* at 2.

<sup>32</sup> *Id.* at 4; *U.S. Dep't of the Treasury, IRS*, 63 FLRA 157, 159 (2009) (finding where official time is wrongfully denied and representational duties are performed on nonduty time employees are entitled to be paid at appropriate straight time rate (citing *U.S. Dep't of Transp., FAA, Sw. Region, Fort Worth, Tex.*, 59 FLRA 530, 532 (2003))).

<sup>33</sup> Member Abbott notes that when a party, such as the Agency here, declines to participate at any stage of the arbitral process, it does so at its own peril. It is quite disingenuous to sit idly by and then expect the Authority to resolve the issue. That course of inaction is a poor litigation strategy and is not consistent with good-faith arbitration.

<sup>34</sup> Member Kiko notes that the Agency's non-participation is especially perplexing when one considers the magnitude of the awarded remedy: 410 hours, or over 50 workdays, of straight-time compensation over and above the grievants' regular compensation.

**Chairman DuBester, concurring:**

I agree with the Decision to deny the Agency's exceptions to the award and dismiss its exceptions to the supplemental award.<sup>1</sup>

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<sup>1</sup> I note my continued disagreement with the 5 U.S.C. § 7116(d) analytical framework that the majority adopted in *U.S. Department of the Navy, Navy Region Mid-Atlantic, Norfolk, Virginia*, for reasons stated in my dissent in that case. 70 FLRA 512, 518 (2018) (Dissenting Opinion of then-Member DuBester).