

72 FLRA No. 154

UNITED STATES  
DEPARTMENT OF THE ARMY  
MILITARY DISTRICT OF WASHINGTON  
FORT MYER, VIRGINIA  
(Agency)

and

INTERNATIONAL ASSOCIATION  
OF FIREFIGHTERS  
LOCAL F-253  
(Union)

0-AR-5621

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DECISION

May 12, 2022

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

**I. Statement of the Case**

Arbitrator Sarah Miller Espinosa issued an award finding that the Agency violated the parties’ master agreement and Standard Operating Guidelines 12 (the local agreement) by denying the Union president (the grievant) official time for training. Based on that finding, the Arbitrator awarded the grievant backpay with interest.

The Agency filed exceptions arguing that the award fails to draw its essence from the master agreement, the Arbitrator lacked the authority to award backpay, and the award violates the doctrine of sovereign immunity. Because the Agency does not demonstrate that the award is deficient, we deny the Agency’s exceptions.

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

Employees are assigned to a forty-eight-hour shift and scheduled to work seventy-two hours every week. In October 2018, the grievant requested 432 hours of official time to attend an intensive six-week training program starting in January 2019. With the request, the grievant attached a document that provided information about the training’s various courses. The Agency denied the request because: (1) 432 hours exceeded a reasonable amount of official time; (2) “[t]h[e] training [was] not . . .

[of] mutual concern to the [Agency] and the Union and the [Agency]’s interests [were] not served by the [grievant]’s attendance”; and (3) the document that the grievant attached to the request was not a “detailed agenda” showing the “dates [and] times of the c[ourses].”<sup>1</sup>

In response to the denial, the grievant provided the Agency with the 2018 training agenda and explained that the 2019 training agenda was not currently available. However, the Agency reaffirmed its denial of the grievant’s official-time request “due to mission readiness and . . . budgetary” considerations.<sup>2</sup>

In November 2018, the Union filed a grievance alleging that the Agency violated Article 5, Section 7 of the master agreement (Article 5) and the local agreement by denying the grievant’s official-time request.

As relevant here, Article 5 permits official time for union officers to attend “training sessions on labor relations matters, provided . . . such training is determined by the [Agency] to be of mutual concern to the [Agency] and the Union and the [Agency]’s interests will be served by the employee’s attendance.”<sup>3</sup> Under Article 5, the Union “bear[s] the responsibility for showing how the training will have the required benefit to the [Agency].”<sup>4</sup> The article further states that a “detailed agenda with information . . . to be covered in the training session will be required . . . no later than [two] weeks before the event.”<sup>5</sup>

After the grievance was filed, the Agency agreed to allow the grievant to submit the 2019 agenda once it became available. In January 2019, the grievant submitted the 2019 agenda, and the Agency determined that several courses were mutually beneficial and approved 40 hours of official time for them. However, the grievance as a whole remained unresolved, and the parties proceeded to arbitration. Prior to arbitration, the grievant attended the entire six-week training using a combination of official time, annual leave, and leave without pay.

The Arbitrator framed the issues as: “Whether the Agency violated the . . . [local agreement] and/or the [master] . . . agreement when . . . it denied [the grievant] official time to attend the training[?] If so, what is the remedy?”<sup>6</sup>

<sup>1</sup> Award at 9.

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

<sup>3</sup> *Id.* at 3.

<sup>4</sup> *Id.*

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

<sup>6</sup> *Id.* at 2.

Before the Arbitrator, the Agency argued that the grievant's request was unreasonable given that the local agreement limited official-time usage per calendar year. The Arbitrator observed that the local agreement unambiguously provided each Union officer "a total of 120 [hours] per calendar year of [o]fficial [t]ime [for training]."<sup>7</sup> Thus, the Arbitrator concluded that "the maximum amount" of official time available to the grievant was 120 hours.<sup>8</sup> Because the Agency had granted the grievant forty hours of official time to attend the training, the Arbitrator's analysis focused on whether the Agency violated Article 5 by denying the grievant an additional eighty hours.

Regarding Article 5's requirement that the training be of "mutual concern" to the Agency and Union, the Arbitrator noted that the Agency conceded that at least some training courses were of mutual interest by granting the grievant forty hours of official time.<sup>9</sup> The Arbitrator then examined the 2019 agenda and found that it "reveal[ed] a number of additional [courses] accurately described as labor relations training."<sup>10</sup> Comparing these courses against similar courses for which the Agency had previously granted other Union officers' official-time requests, the Arbitrator determined that the Union met its burden of proof under Article 5.

Next, the Arbitrator addressed the Agency's argument that the grievant "failed to provide a[n] agenda two weeks before the training" as Article 5 required.<sup>11</sup> The Arbitrator found that the grievant submitted the 2018 agenda "well in advance of the two-week time frame," and the training agenda was "substantially the same from year to year."<sup>12</sup> In addition, the Arbitrator found that the 2019 agenda "was not provided to participants until the program began"; the grievant provided that agenda to the Agency "as soon as it became available"; and, "most consequentially, the Agency itself agreed to allow [the grievant] to submit the agenda when [the grievant] received it."<sup>13</sup> Based on this evidence, the Arbitrator found the Agency's argument that the grievant untimely submitted the 2019 agenda was "without merit."<sup>14</sup>

<sup>7</sup> *Id.* at 6, 19.

<sup>8</sup> Member Abbott notes he would be remiss if he did not comment on the number of hours disputed in this case. 120 hours of annual training simply do not promote an effective and efficient government. 120 hours amounts to fifteen days of annual training – available only to union officials. Few federal employees, if any, are guaranteed 15 days a year of training.

<sup>9</sup> *Id.* at 20.

<sup>10</sup> *Id.* at 17.

<sup>11</sup> *Id.* at 20 n.3.

<sup>12</sup> *Id.* at 20.

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

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

<sup>15</sup> *Id.*

Based on the above, the Arbitrator concluded that the Agency violated Article 5 and the local agreement by not granting the grievant 120 hours of official time.<sup>16</sup> As a remedy, the Arbitrator directed the Agency to make the grievant whole by awarding backpay with interest pursuant to the Back Pay Act (the Act).<sup>17</sup> Specifically, the Arbitrator directed the Agency pay the grievant "with an amount equal to all or any part of the pay, allowances, or differentials . . . which [the grievant] normally would have earned or received had [eighty] hours of official time been granted in lieu of leave without pay."<sup>18</sup> The Arbitrator retained jurisdiction to consider a request for attorney fees.<sup>19</sup>

On April 22, 2020, the Agency filed exceptions to the award,<sup>20</sup> and on May 21, 2020, the Union filed its opposition.

<sup>16</sup> *Id.* at 22 (finding that the Agency "committed an unjustified or unwarranted personnel action" which "resulted in the reduction of the [grievant]'s pay").

<sup>17</sup> 5 U.S.C. § 5596.

<sup>18</sup> Award at 23.

<sup>19</sup> *Id.* at 22 ("The Arbitrator retains jurisdiction to . . . consider a Union petition for the award of attorney fees pursuant to the Back Pay Act.").

<sup>20</sup> The Agency filed an exceptions form that states the Agency's "closing statement will be attached." Exceptions at 6-7. However, the Agency did not actually attach an exceptions brief. Thus, we consider only the contentions the Agency made within the form. See *U.S. Dep't of VA, Health Res. Ctr., Topeka, Kan.*, 71 FLRA 583, 584 n.6 (2020). The Agency also requests an expedited, abbreviated decision. See Exceptions at 7. After considering the circumstances of this case, including its complexity, potential for precedential value, and dissimilarity to other, fully detailed decisions involving the same or similar issues, we determine that an expedited, abbreviated decision is not appropriate. Accordingly, we deny the Agency's request. See *AFGE, Nat'l INS Council*, 69 FLRA 549, 550 (2016); see also *AFGE, Loc. 1148*, 70 FLRA 712, 713 n.8 (2018) (then-Member DuBester concurring).

### III. Analysis and Conclusions

#### A. The award draws its essence from the master agreement.

The Agency argues that the award fails to draw its essence from Article 5 in several respects.<sup>21</sup> As noted above, Article 5 places the burden on the Union to show “how the training will have the required benefit” to the Union and the Agency.<sup>22</sup> It also requires that a “detailed [training] agenda” be provided “no later than [two] weeks before the event.”<sup>23</sup>

First, the Agency argues that “[t]he Arbitrator failed to hold the Union to its burden of proving how the requested official time was of mutual benefit” under Article 5.<sup>24</sup> But the Arbitrator explicitly considered Article 5 and determined that the Union met its burden.<sup>25</sup> The Agency’s argument merely disagrees with the Arbitrator’s evaluation of the evidence supporting that determination—such as the Arbitrator reviewing the 2019 agenda and concluding that the Agency had previously approved official-time requests for similar training courses.<sup>26</sup> Therefore, we find that the Agency’s argument does not establish that the award fails to draw its essence from the master agreement.<sup>27</sup>

Second, the Agency asserts that the Arbitrator erred in finding that the grievant’s submission of the 2018 agenda complied with Article 5.<sup>28</sup> There is no dispute that the grievant submitted the 2018 agenda “well in advance” of the 2019 training and that agenda was substantially similar to the 2019 agenda.<sup>29</sup>

Moreover, the 2019 agenda was not available before the training began, and the Agency agreed to review the 2019 agenda after the training began.<sup>30</sup> Once the grievant provided the 2019 agenda, the Agency accepted it and subsequently granted the grievant forty hours of official time.<sup>31</sup> Given this evidence, we find that the Arbitrator’s conclusion regarding the grievant’s submission of the training agenda is not irrational, unfounded, implausible, or in manifest disregard of Article 5.<sup>32</sup>

Third, the Agency contends that the Arbitrator showed a manifest disregard for Articles 5 and 29 of the master agreement by awarding backpay and attorney fees that the Union did not raise as an issue when it filed the grievance.<sup>33</sup> Article 29 states, in relevant part, that “[t]he Arbitrator shall have no authority to add to or modify any terms of this [a]greement and shall limit the findings to the issue[s] submitted to [a]rbitration.”<sup>34</sup> The Agency fails to explain how Articles 5 or 29 limit the Arbitrator’s ability to award remedies. Nor does the plain wording of either article limit the Arbitrator’s remedial authority.<sup>35</sup> Moreover, the Arbitrator did not award attorney fees; instead, the Arbitrator merely retained jurisdiction to consider an attorney-fee petition.<sup>36</sup> Accordingly, the Agency fails to demonstrate that the Arbitrator showed a manifest disregard of the agreement when awarding backpay with interest.<sup>37</sup>

Therefore, we deny the Agency’s essence exceptions.

#### B. The Arbitrator did not lack the authority to award backpay.

In its exceeded-authority exception, the Agency argues that the Arbitrator lacked the authority to award backpay with interest because the grievance did not

<sup>21</sup> The Authority will find that 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. *U.S. Small Bus. Admin.*, 70 FLRA 525, 527 (2018) (then-Member DuBester concurring, in part, and dissenting, in part). The Authority has found that an award does not fail to draw its essence from the parties’ agreement where the excepting party challenges the arbitrator’s evaluation of the evidence. *See AFGE, Loc. 2516*, 72 FLRA 567, 570 (2021) (*Loc. 2516*).

<sup>22</sup> Award at 3.

<sup>23</sup> *Id.*

<sup>24</sup> Exceptions at 5.

<sup>25</sup> Award at 17, 20.

<sup>26</sup> *Id.* at 20 n.3.

<sup>27</sup> *See Loc. 2516*, 72 FLRA at 570 (denying essence exception arguing that the arbitrator incorrectly concluded that party failed to present sufficient evidence to support its case).

<sup>28</sup> Exceptions at 5.

<sup>29</sup> Award at 20.

<sup>30</sup> *Id.*

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

<sup>32</sup> *See U.S. Dep’t of VA, Denver Reg’l Off.*, 70 FLRA 870, 871 (2018) (then-Member DuBester concurring) (denying essence exception for failure to demonstrate that the arbitrator’s interpretation was not plausible).

<sup>33</sup> Exceptions at 5.

<sup>34</sup> Award at 4.

<sup>35</sup> *See id.* at 3-5.

<sup>36</sup> *Id.* at 22 (“The Arbitrator retains jurisdiction to . . . consider a Union petition for the award of attorney fees pursuant to the Back Pay Act.”).

<sup>37</sup> *See U.S. DHS, U.S. CBP, El Paso, Tex.*, 72 FLRA 293, 295 (2021) (*CBP*) (Member Kiko concurring; Member Abbott concurring) (finding the excepting party failed to identify any specific language that demonstrated that the arbitrator’s interpretation of the parties’ agreement was irrational, implausible, unfounded, or in manifest disregard of the agreement); *id.* at 296 (denying attorney-fee exception as premature because the arbitrator only retained jurisdiction to consider a petition for attorney fees).

request backpay.<sup>38</sup> As relevant here, the Authority will find that arbitrators exceed their authority when they disregard specific limitations on their authority.<sup>39</sup> 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.<sup>40</sup>

Here, the Agency does not identify any contractual limitation on the Arbitrator's authority to provide a remedy for a violation of the master or local agreement.<sup>41</sup> Moreover, the issue the Arbitrator framed included the question of an appropriate remedy if the Agency violated the master agreement or the local agreement by denying the grievant official time.<sup>42</sup> Thus, the awarded remedy – backpay with interest – is directly responsive to the issues before the Arbitrator, and we deny this exception.<sup>43</sup>

C. The remedy is not contrary to the doctrine of sovereign immunity.

The Agency argues that the backpay remedy is contrary to the doctrine of sovereign immunity.<sup>44</sup> Under

the doctrine of sovereign immunity, the United States is immune to lawsuits except to the extent that the government waives that immunity.<sup>45</sup> Consequently, an arbitration award that requires an agency to provide monetary damages to a union or employee must be supported by statutory authority by which the government has permitted itself to be sued.<sup>46</sup> The Act constitutes a waiver of sovereign immunity.<sup>47</sup>

Here, the Agency claims that the remedy violates the doctrine of sovereign immunity, but the Agency fails to challenge the Arbitrator's award of backpay under the Act.<sup>48</sup> The Arbitrator awarded backpay after finding the grievant was improperly denied official time,<sup>49</sup> and the Authority has found that backpay is an appropriate remedy under the Act when an employee is improperly denied official time.<sup>50</sup> Because the Agency does not successfully dispute the Arbitrator's conclusion that the Agency improperly denied the grievant official time, the Agency does not challenge the Arbitrator's basis for awarding backpay under the Act. Since the backpay remedy remains undisturbed, and the

<sup>38</sup> Exceptions at 6 (“The Arbitrator disregarded specific limitations . . . [by] award[ing] backpay with interest . . .”).

<sup>39</sup> *SSA, Off. of Hearings Operations*, 71 FLRA 589, 590 n.9 (2020) (*SSA*) (then-Member DuBester dissenting in part on other grounds).

<sup>40</sup> *See id.*

<sup>41</sup> *See* Exceptions at 6-7.

<sup>42</sup> Award at 2 (framing the issues as whether the Agency violated the master or the local agreement by denying the grievant official time and, “[i]f so, what is the remedy?”).

<sup>43</sup> *See U.S. Dep’t of VA, Nashville Reg’l Off., VA Benefits Admin.*, 72 FLRA 371, 374 (2021) (Member Abbott concurring) (denying exceeded-authority exception where the remedy was directly responsive to the issues that the arbitrator adopted and framed); *SSA*, 71 FLRA at 590 (denying exceeded-authority exception because the excepting party “d[id] not identify an express contractual limitation on the [a]rbitrator’s authority to provide a remedy”). The Agency also contends that the Arbitrator lacked the authority to award eighty hours of backpay because the grievant had previously used fourteen and a half hours of official time. Exceptions at 6. However, this contention does not show that the Arbitrator failed to resolve an issue submitted to arbitration, resolved an issue not submitted to arbitration, disregarded specific limitations, or awarded relief to persons not encompassed by the grievance. *See AFGE, Loc. 3917*, 72 FLRA 651, 654 n.39 (2022) (Chairman DuBester concurring) (denying exceeded-authority exception because the excepting party failed to address the standard for determining whether arbitrators exceeded their authority). Thus, we deny this exception.

<sup>44</sup> Exceptions at 6. The Union asserts that §§ 2425.4(c) and 2429.5 of the Authority’s Regulations bar the Agency’s argument concerning sovereign immunity. Opp’n Br. at 26-27 (citing 5 C.F.R. §§ 2425.4, 2429.5). Because the Authority has held that an agency can raise a claim of federal sovereign

immunity at any time, it is unnecessary for us to determine whether the Agency raised this argument below. *See U.S. DHS, U.S. CBP*, 68 FLRA 524, 528 (2015) (“[T]he Authority has declined to apply §§ 2425.4(c) and 2429.5 to bar claims regarding sovereign immunity because such claims may be raised at any time.”).

<sup>45</sup> *U.S. Dep’t of VA, San Diego Healthcare Sys., San Diego, Cal.*, 70 FLRA 641, 642 n.17 (2018) (then-Member DuBester concurring, in part, and dissenting, in part on other grounds) (citing *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 68 FLRA 960, 962 (2015)).

<sup>46</sup> *Id.* The Authority reviews questions of law de novo. *U.S. Dep’t of the Air Force, Peterson Air Force Base, Colo.*, 72 FLRA 143, 144 (2021). In conducting a de novo review, the Authority determines whether the arbitrator’s legal conclusions are consistent with the applicable standard of law. *Id.* at 144 n.17.

<sup>47</sup> *See AFGE, Loc. 2338*, 71 FLRA 343, 344 (2019) (noting that “a collective-bargaining agreement may only authorize monetary awards where the requirements for a statutory waiver of sovereign immunity – such as under the [Act] – have been satisfied”).

<sup>48</sup> Exceptions at 6-7.

<sup>49</sup> Award at 22 (finding that the Agency “committed an unjustified or unwarranted personnel action” which “resulted in the reduction of the [grievant]’s pay”).

<sup>50</sup> *See CBP*, 72 FLRA at 296 (“[W]here official time authorized by the provisions of a collective[-]bargaining agreement is wrongfully denied and the representational functions are performed on nonduty time, [§] 7131(d) entitles the aggrieved employee to be paid at the appropriate straight-time rate for the amount of time that should have been official time.” (quoting *U.S. DOD, Def. Cont. Audit Agency, Ne. Region, Lexington, Mass.*, 47 FLRA 1314, 1322 (1993))).

Act waives sovereign immunity, we deny this exception.<sup>51</sup>

#### **IV. Decision**

We deny the Agency's exceptions.

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<sup>51</sup> See *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Milan, Mich.*, 63 FLRA 188, 190 (2009) (denying sovereign immunity claim where it “depend[ed] on [the agency’s] claim that the award fail[ed] to satisfy one of the requirements” of the Act). The Agency also argues that the Arbitrator lacked the authority to award, and violated the doctrine of sovereign immunity by awarding, attorney fees. Exceptions at 6. But, as discussed above, the Arbitrator did not award attorney fees. See Award at 22. Accordingly, the Agency’s arguments are premature. See *CBP*, 72 FLRA at 296.