

71 FLRA No. 120

SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS OPERATIONS
(Agency)

and

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

0-AR-5519

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DECISION

March 25, 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

This matter is before the Authority on exceptions to an award of Arbitrator James M. Cooney filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute)¹ and part 2425 of the Authority's Regulations.²

We have determined that this case is appropriate for issuance as an expedited, abbreviated decision under § 2425.7 of the Authority's Regulations.³

The Agency argues that the grievance is not arbitrable because it excessively interferes with management's rights⁴ and fails to draw its essence from the parties' agreement,⁵ and that the award is contrary to law.⁶ In *SSA (SSA I)*⁷ and *SSA, Office of Hearings*

Operations (SSA II),⁸ we considered nearly identical grievances between the same parties and concluded that the grievances were arbitrable,⁹ and the awarded remedies were contrary to law, in part, because they excessively interfered with management's rights to assign work and direct employees.¹⁰ Because the grievance in this case is nearly identical to the grievance in *SSA I* and *SSA II*, we find that the grievance is arbitrable,¹¹ and we set aside the awarded remedies—requiring the Agency to define an average of twenty-nine cases for hearing per month for one telework period and thirty cases for hearing per month for another telework period as reasonably attainable for the grievant—as contrary to law because they excessively interfere with management's rights to assign work and direct employees.¹² As such, the portion of the remedy that requires the Agency to place the grievant's "denied telework days into a bank for [his] future use at his discretion, so long as it does not conflict with his scheduled hearings days," is moot because there are no "denied telework days" to award.¹³ Upon full consideration of the circumstances of this case, including the case's similarity to other fully detailed decisions involving the same or similar issues,¹⁴ we conclude that the award is deficient on the grounds raised in the exception and set forth in § 7122(a).

⁸ 71 FLRA 589 (2020) (*SSA II*) (Member DuBester dissenting in part).

⁹ *SSA I*, 71 FLRA at 496; *see also SSA II*, 71 FLRA at 590.

¹⁰ *SSA I*, 71 FLRA 497-98; *see also SSA II*, 71 FLRA 591-92.

¹¹ *See SSA I*, 71 FLRA at 496 (finding the grievance arbitrable because the telework provision of the parties' agreement explicitly provides for arbitration); *see also SSA II*, 71 FLRA at 590 (same).

¹² *See SSA I*, 71 FLRA at 497-98 (finding the part of the award requiring the Agency to define an average of forty-five cases for hearing per month as reasonably attainable for the grievant is contrary to law because it excessively interferes with management's rights to assign work and direct employees); *see also SSA II*, 71 FLRA at 591-92 (finding the part of the award requiring the Agency to define an average of forty-seven cases for hearing per month as reasonably attainable for the grievant is contrary to law because it excessively interferes with management's rights to assign work and direct employees).

¹³ Award at 27.

¹⁴ 5 C.F.R. § 2425.7; *see SSA I*, 71 FLRA 496-98; *see also SSA II*, 71 FLRA at 591-92; *IFPTE, Ass'n Admin. Law Judges*, 70 FLRA 316, 316-18 (2017) (finding the Arbitrator's interpretation of the telework provision of the parties' agreement "require[d] telework to have been restricted before the Union could challenge the Agency's actions" drew its essence from the parties' agreement and was consistent with law); *AFGE, Nat'l Border Patrol Council, Local 1929*, 63 FLRA 465, 466 (2009) (citing *U.S. DHS, CBP, N.Y.C., N.Y.*, 61 FLRA 72, 75 (2005)) (holding that the management rights provisions of 5 U.S.C. § 7106 do not provide a basis for finding grievances non-arbitrable).

¹ 5 U.S.C. § 7122(a).

² 5 C.F.R. pt. 2425.

³ *Id.* § 2425.7 ("Even absent a [party's] request, the Authority may issue expedited, abbreviated decisions in appropriate cases.").

⁴ Exceptions Br. at 21-25.

⁵ *Id.* at 30-32.

⁶ *Id.* at 15-16, 18-20, 27-29.

⁷ 71 FLRA 495 (2019) (*SSA I*) (Member DuBester dissenting in part).

Accordingly, we grant the Agency's contrary-to-law exception and vacate the awarded remedies.¹⁵

Member DuBester, dissenting:

I agree with the majority's decision to deny the Agency's essence and contrary-to-law exceptions 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.¹

¹⁵ Because we set aside the awarded remedies on contrary-to-law grounds, we do not reach the Agency's remaining arguments. *U.S. DHS, U.S. CBP, Detroit Sector, Detroit, Mich.*, 70 FLRA 572, 574 n.18 (2018) (Member DuBester dissenting) (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 17-18 (arguing the awarded remedies are contrary to the Telework Act); *id.* at 25-27 (arguing that Arbitrator exceeded his authority by modifying the parties' agreement); *id.* at 31-32 (arguing that the awarded remedies fail to draw their essence from the parties' agreement).

¹ *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); *see also U.S. DOJ, Fed. BOP*, 70 FLRA 398, 409-12 (2018) (Dissenting Opinion of Member DuBester) (objecting to three-part test for analyzing whether an award excessively interferes with a management right).