72 FLRA No. 21

SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS OPERATIONS
(Agency)

and

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

0-AR-5524

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DECISION

March 1, 2021

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

Decision by Member Abbott for the Authority

I. Statement of the Case

With this case, we remind the federal labor-management relations community that the exercise of management rights is still subject to the grievance process,[1] and we conclude the final chapter of a string of grievances between the Agency and the Union.[2]

In this case the Union grieved a directive from the Agency to an employee to schedule more hearings in order to meet a performance standard, and the Agency's subsequent reprimand of that employee for failing to follow the directive. Arbitrator Lise Gelernter found that the Agency violated "federal law"[3] and Article 15 of the parties' agreement because the directive was unreasonable and the discipline was neither "warranted and reasonable"[4] nor for good cause.

The Agency argues that the grievance is not arbitrable, the Arbitrator exceeded her authority, the award fails to draw its essence from the parties' agreement, and the award is contrary to law. We find that the grievance is arbitrable, but the award fails to draw its essence from the parties' agreement, in part, and is contrary to law, in part. Therefore, we vacate the award, in part, but uphold the portion of the award finding the reprimand was not "warranted and reasonable"[5] or for good cause.

II. Background and Arbitrator's Award

On May 19, 2017, the Agency issued the grievant, an administrative law judge (judge), a directive instructing him to schedule more hearings per month. The grievant responded that he had scheduled four additional hearings in August, but that he could not schedule any additional hearings because he was going to be on leave, was attending an educational conference, and the previous denial of his telework request prevented him from working additional hours at home.[6] On June 30, 2017, the Agency issued the grievant another directive ("the directive") to schedule more hearings because four additional hearings did not allow the grievant to meet the Agency's annual scheduling expectations and the reasons provided were not "valid excuses."[7] The grievant failed to schedule more hearings, and the Agency issued a reprimand for failure to follow the directive. The Union

[1] *AFGE, Nat'l Border Patrol Council, Loc. 1929*, 63 FLRA 465, 466 (2009) (*Local 1929*).
[2] *See SSA, Off. of Hearings Operations*, 71 FLRA 687 (2020) (then-Member DuBester dissenting); *SSA, Off. of Hearings Operations*, 71 FLRA 646 (2020) (*SSA III*) (then-Member DuBester dissenting); *SSA, Off. of Hearings Operations*, 71 FLRA 642 (2020) (then-Member DuBester dissenting); *SSA, Off. of Hearings Operations*, 71 FLRA 589 (2020) (*SSA II*) (then-Member DuBester dissenting in part); *SSA*, 71 FLRA 495 (2019) (*SSA I*) (then-Member DuBester dissenting in part); *IFPTE, Ass'n Admin. Law Judges*, 70 FLRA 316 (2017).

[3] Award at 55. While the Arbitrator never specifies what "federal law" the Agency violated, it is clear from the Arbitrator's analysis that she found the Agency's reprimand was not supported by either the "warranted and reasonable" standard established by *Harding v. U.S. Naval Academy*, 567 F. App'x 920, 927-28 (Fed. Cir. 2014) (*Harding*), or the "good cause" standard established by *Douglas v. Veterans Admin.*, 5 M.S.P.R. 280 (1981) (*Douglas*). Award at 40-46.
[4] Award at 39-40; *see also Harding*, 567 F. App'x at 927-28.
[5] Award at 39-40.
[6] Prior to the events of this grievance, the Agency had denied the grievant's request to telework because he was not scheduling enough hearings per month. *Id.* at 6. The Union grieved this telework denial (the telework grievance). After the events leading to the instant grievance, but before the arbitration hearing, the Arbitrator sustained the telework grievance, and she permitted the parties to introduce evidence from the telework-grievance proceedings in the instant arbitration. *See id.* at 6-7. In sustaining the telework grievance, the Arbitrator found that the Agency's expectation that administrative law judges schedule fifty hearings per month was not reasonable. *Id.* For subsequent related proceedings before the Authority *see infra* n.42.
[7] Award at 5.

filed a grievance and invoked arbitration regarding the June directive and the reprimand.

The issues, as framed by the Arbitrator, were whether the grievance was arbitrable, whether the directive violated the parties' agreement or federal law, and whether the reprimand violated the parties' agreement or federal law. The Arbitrator found that the grievance was arbitrable because Article 10, Section 2 of the parties' agreement allowed for "any matter relating to the employment of the employee" to be grieved.[8] The Arbitrator also found that an employee has the right to grieve a disciplinary action resulting from an agency's exercise of its management rights.

As to the merits, the Arbitrator found that the directive and reprimand at issue were tied to the Agency's fifty-hearing-per-month scheduling expectation. The Arbitrator went on to find that the fifty-hearing-per-month scheduling expectation was not enforced until after the parties' agreement was modified to include Article 15.L.3,[9] which allowed the Agency to restrict telework if a judge was not scheduling a "reasonably attainable" number of hearings.[10] The Arbitrator concluded that because, in a previous arbitration, she had found that the scheduling expectation was not "reasonably attainable,"[11] it was also not reasonable for the Agency to rely on that expectation to support the directive or the reprimand.[12]

At arbitration, the parties disputed the applicable legal standard for assessing the appropriateness of the reprimand. The Agency asked the Arbitrator to apply the "warranted and reasonable" standard from *Harding v. U.S. Naval Academy* (*Harding*).[13] Applying that standard, the Arbitrator found that the reprimand was not reasonable because "[d]irecting an employee to . . . work faster than that particular employee is capable of working, especially when most other employees cannot work that fast, is not a reasonable request," and failure to comply with an unreasonable request does not justify discipline.[14] The Arbitrator also found that the reprimand was not warranted because the grievant was not "engaging in misconduct that merited any discipline."[15] The Union asked the Arbitrator to apply the good cause standard from *Douglas v. Veterans Administration* (*Douglas*).[16] The Arbitrator found that the Agency failed to demonstrate that it had good cause for disciplining the grievant because "it did not prove that [the grievant's] failure to comply with [the scheduling] directives . . . was misconduct."[17] The Arbitrator also found that the *Douglas* factors did not support the Agency's use of the directives as a basis for discipline because the scheduling expectation was unreasonable, and therefore, the directives were "not a legitimate basis under federal law and arbitral doctrine for discipline."[18] Thus, she concluded that the reprimand was not appropriate under either party's proffered standard.

The Arbitrator also found that the Agency violated Article 15 of the parties' agreement—even though Article 15 deals exclusively with telework—when it issued the reprimand and directive because it "acted unreasonably in applying the Article 15 standard" to the grievant as a basis for discipline.[19] As a remedy, the Arbitrator ordered the Agency to rescind the reprimand, expunge the reprimand from all records, allow the grievant to apply for telework, place the grievant back on the reassignment roster, and refrain from using the directive against the grievant because it was unreasonable and not a valid basis for discipline.

On July 17, 2019, the Agency filed exceptions to the Arbitrator's award. On August 21, 2019, the Union filed its opposition to the Agency's exceptions.

III. Analysis and Conclusions

A. The grievance is substantively arbitrable.

The Agency argues that any grievance concerning the reasonableness of its determination of how many hearings a judge should schedule is not substantively arbitrable because it is contrary to § 7106(a) of the Federal Service Labor-Management Relations Statute (Statute) and Authority precedent.[20] We considered this same contrary-to-law argument in *SSA,*

[8] *Id.* at 34-35; Exceptions, Ex. 12, 2013 National Agreement (CBA) at 34.
[9] CBA at 66 ("If, the employer determines that a [j]udge has not scheduled a reasonably attainable number of cases for hearing, then after advising the [j]udge of that determination and further advising the [j]udge that his or her ability to telework may be restricted, the [e]mployer may limit the ability of the [j]udge to telework until a reasonably attainable number of cases are scheduled.").
[10] Award at 37.
[11] *See supra* n.6.
[12] Award at 38.
[13] 567 F. App'x at 927-28.
[14] Award at 42.
[15] *Id.* at 44.
[16] 5 M.S.P.R. at 280.
[17] Award at 44.
[18] *Id.* at 47.
[19] *Id.* at 50.
[20] Exceptions Br. at 16-25. The Authority reviews questions of law de novo. *AFGE, Loc. 1738*, 71 FLRA 505, 506 (2019) (then-Member DuBester concurring) (citations omitted). 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 506 n.17 (citations omitted).

Office of Hearings Operations (*SSA III*),[21] and its repetition here fares no better. The Authority has repeatedly held that the management rights provisions of § 7106 of the Statute do not provide a basis for finding a grievance non-arbitrable.[22] Accordingly, the Agency's exception here fails to demonstrate how the Arbitrator's determination that the grievance is substantively arbitrable is contrary to law.[23] As such, we deny the Agency's exception.

The Agency also argues that the same substantive arbitrability determination fails to draw its essence from the parties' agreement.[24] Specifically, the Agency argues that Article 3 of the parties' agreement, which reiterates the management rights found in § 7106 of the Statute, precludes the grievance because the Agency has "the exclusive authority to set scheduling expectations."[25] However, as discussed above, the management rights provisions of § 7106 of the Statute do not provide a basis for finding a grievance non-arbitrable. Furthermore, the parties' agreement clearly provides that the Union can grieve, and subsequently take to arbitration, any matter relating to the employment of a judge or "the effect or interpretation, or a claim of a breach, of this Agreement[,] or [a]ny claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting the conditions of employment."[26] The plain language clearly indicates that the issues in this grievance—the scheduling directive and reprimand—are arbitrable. Accordingly, we deny the Agency's essence exception to the substantive arbitrability of the grievance because the Agency has failed to demonstrate that the arbitrability finding is irrational, implausible, or a manifest disregard of the parties' agreement.[27]

B. The award fails to draws its essence from the parties' agreement, in part.

The Agency argues the award fails to draw its essence from Article 15 of the parties' agreement.[28] Specifically, the Agency argues that the award—finding violations of Article 15 of the parties' agreement—cannot draw its essence from the parties' agreement because Article 15 concerns telework, while the grievance does not involve telework.[29] As stated above, the Arbitrator found that the Agency's scheduling directives were tied to the "reasonably attainable" standard from Article 15.[30] As such, the Arbitrator found that "*although the reprimand did not involve telework directly,* [the Agency] . . . violate[d] Article 15 because the Agency acted unreasonably in applying the Article 15 standard" to the grievant as a basis for discipline.[31] Article 15 of the parties' agreement is titled "*Telework*" and *only deals with the parties' negotiated telework program*.[32] As the Arbitrator conceded, the grievance did not concern

[21] 71 FLRA at 649 (citations omitted).

[22] *See id.*; *Local 1929*, 63 FLRA at 466 (2009) (citations omitted) (finding that arbitrators may not rely on § 7106 to determine jurisdiction, but may rely on § 7106 in considering the substantive issue presented by the grievance and remedy); *U.S. DHS, CBP, N.Y.C., N.Y.*, 61 FLRA 72, 75 (2005) (Member Pope concurring) (citing *U.S. Dep't of the Navy, Pac. Missile Test Ctr., Point Mugu, Cal.*, 43 FLRA 157, 159 (1991); *U.S. Info. Agency*, 32 FLRA 739, 748-49 (1988); *Newark Air Force Station*, 30 FLRA 616, 631-35 (1987); *Marine Corps Logistics Support Base, Pac., Barstow, Cal.*, 3 FLRA 397, 398-99 (1980)); *see also SSA I*, 71 FLRA at 496 (finding a grievance concerning the restriction of telework pursuant to the parties' agreement was substantively arbitrable).

[23] Exceptions Br. at 16-23. The Agency also argues that the Arbitrator exceeded her authority in finding the grievance substantively arbitrable because her authority is limited by law and the parties' agreement which, according to the Agency, prohibits the arbitration of grievances that interfere with management's rights. *Id.* at 23-24. We deny this exception for the same reasons we denied the Agency's contrary-to-law exceptions to the arbitrability determination. *See AFGE, Loc. 1698*, 70 FLRA 96, 99 (2016) (citing *Indep. Union of Pension Emp. For Democracy & Justice*, 68 FLRA 999, 1007 (2015)) (denying exceptions that were based on previously denied exceptions).

[24] The Authority will find 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. DOJ, Fed. BOP, Fed. Corr. Inst., Miami, Fla.*, 71 FLRA 660, 661 n.11 (2020) (Member Abbott concurring; then-Member DuBester dissenting) (citing *U.S. Dep't of Treasury, IRS, Off. of Chief Counsel*, 70 FLRA 783, 785 n.31 (2018) (*IRS*) (then-Member DuBester dissenting); *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990) (*OSHA*)).

[25] Exceptions Br. at 24.

[26] CBA at 34, 40.

[27] The Agency also argues that the substantive arbitrability finding "contravenes the plain language of Article 15." Exceptions Br. at 25. The Authority has previously held that Article 15 of the parties' agreement allows for arbitration. *See SSA I*, 71 FLRA at 496. Accordingly, we deny this exception.

[28] The Authority will find 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. *Libr. of Cong.*, 60 FLRA 715, 717 (2005) (Member Pope dissenting) (citing *OSHA*, 34 FLRA at 575).

[29] Exceptions Br. at 26-27.

[30] Award at 35-36.

[31] *Id.* at 50 (emphasis added).

[32] CBA at 58-69.

telework but instead involved a directive from the Agency to schedule more hearings in order to meet the performance standard set by the Agency, and the subsequent reprimand for failure to follow the directive.[33] Therefore, the Arbitrator's determination that the Agency violated the telework provision of the parties' agreement in a grievance that did not involve telework is an implausible interpretation of the parties' agreement.[34] Accordingly, we vacate the portions of the award finding violations of Article 15.[35]

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

The Agency argues that the Arbitrator's determination that the scheduling directive was unreasonable is contrary to its rights to assign work and direct employees under § 7106(a) of the Statute, and the finding that the reprimand was unreasonable also violates its rights to assign work and direct employees.[36] Accordingly, the Agency argues that the Authority should vacate the remedies the Arbitrator ordered as a result.[37]

First, the Agency argues that the Arbitrator's determination that the scheduling directive was unreasonable is contrary to management's rights to assign work and direct employees because it prevents management from determining performance expectations related to the quality, quantity and timeliness of judges' work.[38] This is precisely the same scheduling requirement that we addressed in the five previous cases between these very parties.[39] Indeed in *SSA III*, we reversed this arbitrator's determination regarding the scheduling requirement,[40] which was the same determination she adopted for her analysis here.[41] As we applied *U.S. DOJ, Federal BOP*[42] in those cases,[43] we also find that the award here prevents management from determining the appropriate number of hearings for the grievant to schedule per month and issuing a directive stating the performance standard. Therefore, we vacate the portions of the award finding the scheduling directive

[33] Award at 3-6; Exceptions, Ex. 9.

[34] *See IRS*, 70 FLRA at 785-86 (finding an award failed to draw its essence from the parties' agreement because the Arbitrator's interpretation that the word "merit" cannot include disciplinary history was not a plausible interpretation of the parties' agreement). *But see U.S. Dep't of the Navy, Marine Corps Combat Dev. Command, Marine Corps Base, Quantico, Va.*, 67 FLRA 542, 547 (2014) (Member Pizzella dissenting on separate grounds) (finding that the Arbitrator's interpretation and application of a provision dealing with position descriptions over a different provision dealing with position descriptions did not fail to draw its essence from the parties' agreement).

[35] Because we set aside the portions of the award finding violations of Article 15, we do not address the Agency's exceeds-authority exception to the same portions of the award. Exceptions Br. at 28 (arguing the Arbitrator exceeder her authority by modifying Article 15 of the parties' agreement in order to find a violation of Article 15); *see U.S. DOD, Def. Logistics Agency Aviation, Richmond, Va.*, 70 FLRA 206, 207 (2017) (setting aside award on exceeded-authority ground made it unnecessary to review remaining exceptions).

[36] Exceptions Br. at 7-9. 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) (Member Pizzella concurring).

[37] Exceptions Br. at 5, 7.

[38] *Id.* at 7-9.

[39] *SSA I*, 71 FLRA at 498 (setting aside as contrary to management rights an arbitrator's (1) substitution of a different hearings-per-month performance expectation for a grievant and (2) direction that the Agency permit a grievant to telework); *SSA II*, 71 FLRA at 592 (same); *SSA III*, 71 FLRA at 649-50 (same). 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. *AFGE, Loc. 1687*, 52 FLRA 521, 522 (1996) (citing *AFGE, Loc. 1164*, 49 FLRA 1408, 1414 (1994); *NTEU*, 3 FLRA 769, 775-76 (1980)); *AFGE, Loc. 225*, 56 FLRA 686, 687 (2000); *NTEU*, 65 FLRA 509, 511 (2011) (Member Beck dissenting on other grounds) (citing *AFGE, Loc. 3295*, 44 FLRA 63, 68 (1992)); *see also AFGE, Nat'l Council of Field Labor Locs., Loc. 2139*, 57 FLRA 292, 294 & n.6 (2001) (finding that the right to assign work includes the right to establish criteria governing employee's performance of their duties); *NAGE, Loc. R1-109*, 53 FLRA 403, 409 (1997) (citing *NTEU*, 3 FLRA at 769) (finding that the right to assign work includes the right to determine the particular duties and work to be assigned to employees). Furthermore, management's right to assign work includes the right to establish quotas for assessing employee performance. *SSA I*, 71 FLRA at 498; *NTEU, Chapter 22*, 29 FLRA 348, 351 (1987) (citing *SSA, Ne. Program Service Ctr.*, 18 FLRA 437, 440 (1985); *NTEU,* 6 FLRA 522, 530-31 (1981)).

[40] 71 FLRA at 649-50.

[41] Award at 38.

[42] 70 FLRA 398, 405-06 (2018) (then-Member DuBester dissenting).

[43] *See SSA III*, 71 FLRA at 649-50; *SSA II*, 71 FLRA at 592; *SSA I*, 71 FLRA at 498.

unreasonable as contrary to management's rights, and the resulting remedy.[44]

The Agency also asserts that the Arbitrator's determination that the reprimand was unreasonable is contrary to management's right to assign work and direct employees because she based her determination on the unreasonableness of the scheduling directive.[45] However, the Agency fails to challenge the Arbitrator's determination that the reprimand did not meet either the "warranted and reasonable" standard of *Harding*[46] or the good cause standard of *Douglas*.[47] Where an arbitrator has based an award on separate and independent grounds, the Authority has required the excepting party to establish that all grounds are deficient in order to have the award found deficient.[48] If the excepting party fails to do so, the Authority has found it unnecessary to address exceptions to the other grounds.[49] The Agency's exception does not challenge the Arbitrator's determination that the grievant's actions do not constitute misconduct, instead it focuses on whether the Arbitrator can second-guess its performance standards for employees.[50] Because the Agency does not challenge the Arbitrator's separate and independent basis for finding the reprimand unwarranted, we dismiss this exception.[51] Accordingly, we uphold the portion of the award concerning the reprimand.

IV. Order

We vacate the award, in part, and uphold the award, in part.

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[44] 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. *U.S. DHS, U.S. CBP, Detroit Sector, Detroit, Mich.*, 70 FLRA 572, 574 n.18 (2018) (finding it unnecessary to address the remaining arguments when an award has been set aside); *see also NFFE, Loc. 1450, IAMAW*, 70 FLRA 975, 977 (2018); Exceptions Br. at 9-10 (arguing the award is contrary to law because the Agency did not waive its management rights); Exceptions Br. at 10-12, 14 (arguing the Arbitrator exceeded her authority by modifying the provision of the agreement dealing with management rights); Exceptions Br. at 10-16 (arguing the award fails to draw its essence from the agreement because Article 3 restates management's rights). We also deny the Agency's other exceeds authority claim because it merely disputes the Arbitrator's reasoning and evaluation of the evidence. Exceptions Br. at 12-14; *see SSA*, 70 FLRA 227, 230 (2017) (finding that an agency's attempt to relitigate its interpretation of the agreement and the evidentiary weight given by the arbitrator fails to demonstrate that the award is deficient); *Pro. Airways Sys. Specialists*, 64 FLRA 500, 501 (2010) (finding a parties' disagreement with the arbitrator's reasoning did not demonstrate that the award was deficient).

[45] Exceptions Br. at 7-9. The Agency also argues that the award finding the reprimand unreasonable is contrary to law because it did not waive its right to discipline employees. Exceptions Br. at 9-10. The Arbitrator did not find that the Agency waived its right to discipline employees, but found that the Agency failed to demonstrate that the discipline was either reasonable and warranted or for good cause. Award at 42-47. Therefore, we deny the Agency's exception because it is based on a finding that the Arbitrator did not make. *See AFGE, Loc. 1897*, 67 FLRA 239, 241 (2014) (Member Pizzella concurring) (*Local 1897*) (finding an exception based on a misunderstanding of the award does not demonstrate that the award is deficient).

[46] Award at 44 (finding that the reprimand was not warranted because the grievant was not "engaging in misconduct that merited any discipline").

[47] *Id.* (finding that the reprimand was not for good cause because the Agency "did not prove that [the grievant's] failure to comply with [the] directives . . . was misconduct").

[48] *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Forrest City, Ark.*, 68 FLRA 672, 674-675 (2015) (*Forrest City*) (citations omitted).

[49] *Id.*; *see also U.S. EPA*, 70 FLRA 715, 716 (2018) (Member Abbott concurring).

[50] It is clear from the record that the Agency focused its case on arguing it has the right to set *performance standards* and hold judges accountable to those *performance standards*, instead of proving the allegation of misconduct, specifically failure to follow the directive. Exceptions Br. at 8 (arguing management's rights include the right to set performance standards); *id.* at 8-9 (arguing that judges are "not shielded from . . . performance expectations"); *id.* at 9 ("Agency management exercised its exclusive rights to direct and assign the quantity and timeliness of . . . work."); *id.* at 11 (arguing that the Agency exercised its reserved management rights when it determined judges would be required to schedule an average of fifty cases for hearing per month); Exceptions, Ex. 8, Agency Closing Br. at 28 (arguing that "[r]estrictions on an [a]gency's authority to determine the content of performance standards directly interfere with management's rights to direct employee's and assign work"); *id.* at 39 ("the Agency has exercised its authority to issue both directives and discipline to [judges] for not meeting *performance expectations*.") (emphasis added).

[51] *Forrest City*, 68 FLRA at 675.

Chairman DuBester, dissenting:

I agree with the majority's decision in Part A to deny the Agency's exceptions challenging the Arbitrator's finding that the grievance was arbitrable. However, I do not agree with the majority's conclusion in Part B that the award fails to draw its essence from the parties' collective-bargaining agreement. And, I disagree with the majority's decision to in Part C to vacate the portion of the award finding that the Agency's scheduling directive was unreasonable.

The facts of this case are straightforward. As noted by the Arbitrator, Article 15 of the parties' agreement sets forth conditions that judges must meet to be eligible to participate in telework. The article includes a provision allowing the Agency to restrict a judge's ability to telework if the judge "has not scheduled a reasonably attainable number of cases for hearing."[1] The Agency issued a memorandum stating that "scheduling an average of at least fifty (50) cases for hearing per month will generally signify a reasonably attainable number for the purposes of [Article 15]."[2] It subsequently directed the grievant to schedule more hearings, and then reprimanded him for failing to follow the directive and failing to schedule fifty hearings per month, and the Union grieved these actions.

The Union argued before the Arbitrator that the Agency violated Article 15 "by applying the [fifty]-hearing per month standard that it established as 'reasonably attainable' for telework to the scheduling directive."[3] The Arbitrator agreed, explaining that, "although the reprimand did not involve telework directly, it did violate Article 15 because the Agency acted unreasonably in applying the Article 15 standard it had set to [the grievant] in issuing the directive and reprimand."[4]

The majority concludes that this finding does not draw its essence from Article 15 because the Union's grievance "did not concern telework."[5] But this misses the point. The Arbitrator concluded that the Agency violated Article 15 because it *misapplied* this provision to *discipline* the grievant. In my view, this conclusion is not based upon an implausible interpretation of the parties' agreement for the simple reason that Article 15, *by its plain language*, relates solely to telework eligibility.

I also disagree with the majority's conclusion that the Arbitrator's determination regarding the scheduling directive was contrary to law. In previous dissents, I have observed that the three-part test crafted by the majority in *U.S. DOJ, Federal BOP* (*DOJ*)[6] for analyzing whether an award excessively interferes with a management right "lack[s] discernible principles," and that its application therefore "'invite[s] the exercise of arbitrary power.'"[7]

Here, the majority does not even bother to apply the *DOJ* test to the particular facts of this case. Instead, it short-circuits this ill-conceived test to summarily conclude that the Agency's action violated management's rights. And it bases this conclusion upon its previous application of the test in decisions that not only did not involve disciplinary actions, but which were themselves fundamentally flawed.[8] Accordingly, I cannot join the decision to vacate this portion of the award on the grounds set forth by the majority.

[1] Award at 11.
[2] *Id.* at 12 (emphasis omitted).
[3] *Id.* at 50.
[4] *Id.*
[5] Majority at 6.
[6] 70 FLRA 398 (2018) (then-Member DuBester dissenting).
[7] *U.S. DHS, U.S. CBP, Detroit Sector, Detroit, Mich.*, 70 FLRA 572, 576 (2018) (Dissenting Opinion of then-Member DuBester) (quoting *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223-24 (2018) (Concurring Opinion of Justice Gorsuch)).
[8] *See, e.g.*, *SSA, Off. of Hearings Operations*, 71 FLRA 646, 651 (2020) (Dissenting Opinion of then-Member DuBester); *SSA, Off. of Hearings Operations*, 71 FLRA 589, 592 (2020) (Dissenting Opinion of then-Member DuBester); *SSA*, 71 FLRA 495, 499-500 (2019) (Dissenting Opinion of then-Member DuBester).