

Federal Labor Relations Authority
Quarterly Digest Report: October 1, 2020 – December 31, 2020



The following case digests are summaries of decisions/orders issued by the Federal Labor Relations Authority, with a short description of the issues and facts of each case. Descriptions contained in these case digests are for informational purposes only, do not constitute legal precedent, and are not intended to be a substitute for the opinion of the Authority.

CASE DIGEST: *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Ashland, Ky.*, 71 FLRA 997 (2020)

The Arbitrator found that the Union’s grievance was procedurally arbitrable. The Authority denied the Agency’s nonfact, essence, and exceeded-authority exceptions because the Agency did not demonstrate that the award was deficient on any of those grounds.

CASE DIGEST: *U.S. Small Bus. Admin.*, 71 FLRA 999 (2020) (Member DuBester dissenting)

This case concerns a non-arbitrable classification matter under § 7121(c)(5) of the Federal Service Labor-Management Relations Statute (the Statute)¹ when its essential nature is integrally related to the accuracy of the classification of the grievant’s position.

Member DuBester dissented. He reiterated his position that the majority’s temporary-promotion test is flawed, and he found that the majority’s decision mischaracterized both the award and the grievance to improperly conclude that the temporary promotion claim is barred by § 7121(c)(5).

¹ 5 U.S.C. § 7121(c)(5).

CASE DIGEST: *U.S. Dep't of VA, James J. Peters VA Med. Ctr.*, 71 FLRA 1003 (2020)
 (Member Abbott dissenting)

Arbitrator George Aleman sustained a grievance alleging that the Agency subjected certain employees to hazardous conditions in violation of the parties' agreement. He ordered the Agency to provide all necessary and appropriate personal protective equipment (PPE), training in the use of PPE, and to pay environmental differential pay from the date that the Union first raised its safety concerns until the date the Agency issues a new standard operating procedure regarding the use of PPE. The Agency filed exceptions on grounds that the award: (1) was incomplete, ambiguous, or contradictory as to make implementation impossible; (2) was contrary to law; and (3) failed to draw its essence from the parties' agreement. Because the Agency did not demonstrate that the award is impossible to implement, failed to support its contrary to law exception, and challenged the Arbitrator's factual findings rather than his interpretation of the parties' agreement, the Authority denied the exceptions.

Member Abbott dissented, concluding that the Arbitrator's award is contrary to law for the same reasons as the award in *U.S. Department of Veterans Affairs, John J. Pershing VA Medical Center (Pershing VAMC)*, 71 FLRA 769 (2020) (Member DuBester dissenting), a case that involved the same contract provisions, the same agency (different facility) and essentially the same issue. Member Abbott concluded the appropriate avenue of relief was through the enforcement proceedings set forth in 29 USC 662.

CASE DIGEST: *U.S. Dep't of the Treasury, IRS, Kan. City, Mo.*, 71 FLRA 1007 (2020)
 (Member DuBester dissenting in part)

In this case, the Arbitrator found that the Agency violated the parties' agreement and applicable federal regulations by denying the grievants' requests for administrative leave. As remedies, he ordered the Agency to grant administrative leave to the grievants for any leave that was taken on August 4, 2017 following a hazardous incident and to comply with the parties' agreement in the future. The Authority denied the Agency's essence and contrary-to-law exceptions because they failed to raise any deficiencies in the Arbitrator's application of the legal standard. Additionally, the Authority granted the Agency's essence-exception, in part, because the Arbitrator improperly imposed an additional term that was not specifically provided for in the parties' agreement.

Member DuBester dissented in part. He found that the Arbitrator's order directing the Agency to promptly provide the Union with the accident reports to which it is entitled under the parties' agreement was within the Arbitrator's remedial authority and did not fail to draw its essence from the agreement.

CASE DIGEST: *U.S. Dep't of Justice, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 71 FLRA 1013 (2020) (Member DuBester concurring; Member Abbott concurring)

The Union filed a grievance on March 2, 2017, alleging that the Agency violated the parties' agreement by unilaterally terminating a compressed work schedule. The Arbitrator issued an award finding that the Agency terminated the compressed work schedule on March 10, 2017. On exceptions, the Authority found that the award failed to draw its essence from a procedural article in the parties' agreement because the Arbitrator concluded that the Union filed the grievance in response to an event that had not occurred at the time of filing.

Member DuBester concurred, finding that under the particular facts of this case, the award failed to draw its essence from the parties' agreement.

Member Abbott concurred that the grievance was not procedurally arbitrable and that the Arbitrator's award did not draw its essence from the parties' agreement. However, Member Abbott would grant the Agency's exception because the triggering event occurred more than forty days before the grievance was filed -- on July 24, 2016.

CASE DIGEST: *U.S. Marine Corps, Marine Corps Air Station Miramar*, 71 FLRA 1017 (2020) (Member DuBester dissenting in part)

In this case involving a three-day suspension for misconduct, the Arbitrator found the suspension appropriate, but sustained the grievance with regard to the grievant's financial penalty and awarded backpay because of the Agency's delay in taking timely disciplinary action. The Agency argued that the award is contrary to the Back Pay Act (BPA). Because the Agency's contract violation did not cause the grievant's loss of pay, the Authority vacated the award as contrary to the BPA.

Member DuBester dissented in part. He agreed that the backpay remedy violated the BPA, but disagreed that the non-backpay remedies should be vacated.

CASE DIGEST: *AFGE, Local 446 & U.S. Department of Agriculture, Forest Service, Asheville, N.C.*, 71 FLRA 1020 (2020) (Member DuBester concurring)

At issue in this case is whether the Union is entitled to attorney fees simply because it successfully challenged a disciplinary action, resulting in the action being reversed. The Authority found that the denial of attorney fees was consistent with its case precedent and the *Allen* factors. Accordingly, the Authority denied the exception as the awarding of attorney fees under the Back Pay Act must be in the interest of justice.

Member DuBester concurred in the decision to deny the Union's exception.

CASE DIGEST: *AFGE, Local 2076*, 71 FLRA 1023 (2020) (Member DuBester concurring)

The Arbitrator found that the Union failed to establish any of the relevant factors for awarding attorney fees as established by the Merit Systems Protection Board in *Allen v. U.S. Postal Service (Allen)*. The Authority found that the Union's contrary-to-law exception failed to raise any deficiencies in the Arbitrator's application of the *Allen* factors. Specifically, the Authority determined that the grievant was not substantially innocent of the only charge brought against her and the mere fact that the grievant's suspension was mitigated to five days did not demonstrate that the merits award warranted attorney fees under *Allen* factor five. The Authority also denied the Union's remaining exceptions because the Union failed to establish that the Arbitrator's findings were clearly erroneous and that the Arbitrator's finding regarding the timeliness of the Agency's reply did not draw its essence from the parties' agreement. Therefore, the Authority denied the Union's exceptions.

Member DuBester concurred. He agreed that the Union's exceptions should be denied, but reiterated his objection to the majority's reformulation of the standard used to evaluate the appropriateness of attorney fees under the fifth *Allen* factor.

CASE DIGEST: *U.S. DOD, Def. Logistics Agency, Distrib. Warner Robins, Warner Robins AFB, Ga.*, 71 FLRA 1029 (2020) (Member Abbott dissenting)

The Arbitrator found that the Agency violated the parties' collective-bargaining agreement in rating the grievant's performance. The Authority dismissed one of the Agency's nonfact and essence exceptions because the Agency failed to raise its arguments before the Arbitrator. The Authority denied the Agency's remaining exceptions because the Agency failed to demonstrate that: (1) the Arbitrator interpreted the parties' agreement in a way that was irrational, unfounded, implausible, or in manifest disregard of the agreement, or (2) a central fact underlying the award was clearly erroneous.

Member Abbott dissented, concluding that the remedy awarded by the Arbitrator was contrary to law and did not draw its essence from the parties' collective bargaining agreement.

CASE DIGEST: *U.S. Dep't of the Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility*, 71 FLRA 1033 (2020)

The Arbitrator found that the Agency did not violate the parties' agreement or applicable law by not providing the grievant with a copy of an investigative report related to a harassment complaint. The Union filed exceptions on nonfact, contrary-to-law, and essence grounds. The Authority denied the Union's exceptions because the Union did not demonstrate that the award was deficient on any of the cited grounds.

CASE DIGEST: *U.S. Dep't of VA, Health Res. Ctr.*, 71 FLRA 1036 (2020)
(Member DuBester concurring)

The Arbitrator found that the Agency violated its Absence and Leave Policy (the policy) by requiring a bargaining-unit employee, who is a disabled veteran and teleworks, to verify her

medical appointment by a method not required by the policy. Because the Arbitrator found that the policy did not address how a bargaining-unit employee should properly verify their medical appointments—when that employee exclusively teleworks and is a disabled veteran—he ordered the Agency to negotiate an addendum to the policy to address how a disabled, teleworking veteran should verify their medical appointments. Because the Agency’s exception failed to establish any deficiencies in the award and constituted a mere reargument of its case, the Authority denied the Agency’s essence-exception.

Member DuBester concurred in the decision to deny the Agency’s exception.

CASE DIGEST: *AFGE, Local 2338*, 71 FLRA 1039 (2020)

The Arbitrator found that the Agency violated the parties’ agreement and the Federal Service Labor-Management Relations Statute by failing to respond to the Union’s information requests and requiring Union members to use official time for training. The Union filed exceptions on contrary to law, essence, and nonfact grounds. The Authority found that the Union failed to raise one of its contrary-to-law arguments before the Arbitrator and failed to support its nonfact exception. Additionally, the Authority denied the Union’s remaining exceptions because they failed to demonstrate that the award was deficient.

CASE DIGEST: *U.S. Dep’t of VA, Nashville Reg’l, Nashville, Tenn.*, 71 FLRA 1042 (2020) (Member Abbott concurring)

The Arbitrator sustained the Union’s grievance challenging the grievant’s fourteen-day suspension for misconduct and mitigated the suspension to a letter of reprimand. The Authority denied the Agency’s nonfact, contrary-to-law, and public policy exceptions because the Agency did not establish that the award was deficient on any of these grounds.

Member Abbott concurred on the result but wrote separately to highlight the apparent lack of concern by the Arbitrator for the veteran caller.

CASE DIGEST: *U.S. Dep’t of Justice, Executive Office of Immigration Review & Nat’l Ass’n of Immigration Judges, IFPTE, Judicial Council 2*, 71 FLRA 1046 (2020) (Member DuBester dissenting)

With this case, we reevaluate our precedent concerning whether immigration judges are management officials under 5 U.S.C. § 7103(a)(11). The Agency filed an application for review with the Authority, arguing that the Authority should, among other things, reconsider its decision in *U.S. DOJ, Executive Office for Immigration Review*, 56 FLRA 616 (2000) (*EOIR 2000*). After considering the record and reviewing prior precedent, the Authority found that *EOIR 2000* was incorrectly decided. As such, the Authority vacated that decision and found that immigration judges are management officials, and therefore, excluded from being members of the bargaining unit pursuant to the Federal Service Labor-Management Relations Statute.

Member DuBester dissented, finding that the majority ignored precedent governing both the review of unit certifications and the scope of the “management official” exclusion, as defined

in § 7103(a)(11). He also found that the majority failed to establish any plausible reason for reconsidering *EOIR 2000* or concluding that it conflicted with Authority precedent.

CASE DIGEST: *U.S. DHS, U.S. CBP, Laredo, Tex.*, 71 FLRA 1069 (2020)
 (Member Abbott dissenting)

The Agency filed exceptions challenging the decision of the Administrative Law Judge, who found that the Agency committed an unfair labor practice (ULP) under 5 U.S.C. § 7116(a)(1) and (2) when a supervisor retaliated against a border patrol agent based on the agent's report of alleged wrongdoing by the supervisor. The Authority rejected the Agency's argument that § 7116(d) barred the ULP, finding that an earlier email from the Union representative to management did not constitute a grievance under the parties' negotiated grievance procedure. The Authority further found that the Judge did not err in determining that the General Counsel had established a prima facie case of discrimination under § 7116(a)(2), and that the Agency failed to rebut the prima facie case. Accordingly, the Authority denied the exceptions.

Member Abbott dissented concluding that the complaint was barred by § 7116(d), deficient and should have been dismissed. Member Abbott also noted that the alleged misconduct of the Agency should have been charged under § 7116(a)(4), not § 7116(a)(2).

CASE DIGEST: *U.S., Dep't of Ed., Office of Fed. Student Aid & AFGE, Council 252*,
 71 FLRA 1105 (2020) (Chairman Kiko dissenting)

This case reiterates the basic principle that parties are bound by the terms of a negotiated agreement and that any change to the agreement is subject to its terms and the requirements of the Federal Service Labor-Management Relations Statute. The Union grieved the Agency's implementation of a new telework policy that limits employees to two days of telework per week. The Arbitrator found that the Agency violated the parties' agreement and the Statute when it unilaterally implemented the new policy without affording the Union an opportunity for pre-decisional involvement, as required by the parties' agreement, and without giving the Union notice and an opportunity to bargain over implementation of the new policy. The Authority denied the Agency's exceptions because they fail to demonstrate how the award is deficient.

Chairman Kiko dissented because she would find that the Agency's changes to the telework policy were "covered by" a provision in the parties' agreement that preserved management's authority to restrict telework participation in order to avoid diminished organizational performance. She also found that the award did not draw its essence from the parties' agreement because the Agency's contractual obligation to participate in midterm bargaining was limited to matters not "covered by" the agreement, and the parties had agreed that the Agency could make changes necessary for the functioning of the Agency.

CASE DIGEST: *U.S. Dep't of VA, Veterans Benefits Admin. and AFGE, Nat'l VA Council #53*, 71 FLRA 1113 (2020) (Chairman Kiko dissenting in part)

The Agency filed exceptions challenging an award in which the Arbitrator found that the Agency violated the parties' collective-bargaining agreement when it ceased providing ninety-day performance improvement plans as a prerequisite for performance-based removals. The Authority concluded that it had jurisdiction under 5 U.S.C. § 7122(a) because the issue at arbitration related to a violation of the parties' collective-bargaining agreement, not a removal under 38 U.S.C. § 714 – which, like removals under 5 U.S.C. §§ 4303 and § 7512, are appealable to the Merit Systems Protection Board and, in turn, to the United States Court of Appeals for the Federal Circuit. On the merits, the Authority found that the Agency failed to demonstrate that the award was deficient as contrary-to-law, exceeds-authority, or essence grounds. Accordingly, the Authority dismissed the exceptions.

Chairman Kiko dissented in part because she would have found that the award was contrary to the plain wording and intent of 38 U.S.C. § 714.

CASE DIGEST: *U.S. Dep't of the Interior, Nat'l Park Serv., U.S. Park Police*, 71 FLRA 1121 (2020) (Member DuBester dissenting)

The Authority held that the Agency was not required to bargain before discontinuing an unlawful practice and enforcing a policy that implemented a government-wide regulation.

Member DuBester dissented in part, finding that the Arbitrator correctly concluded that the Agency violated its duty to bargain because the record showed that the Agency could have provided the Union with notice and an opportunity to bargain before changing the practice.

CASE DIGEST: *AFGE, Council 53, Nat'l VA Council*, 71 FLRA 1124 (2020) (Member Abbott dissenting)

The Authority consolidated two petitions for review, each containing one Union proposal. Because the Agency had not alleged that the proposals were nonnegotiable or permissively negotiable, the Authority dismissed the petitions without prejudice to the Union's right to refile.

Member Abbott dissented, disagreeing with the majority's decision to dismiss this case and allow the Union the right to refile these negotiability disputes.

CASE DIGEST: *U.S. Dep't of VA, N. Calif. Health Care Sys. & AFGE, Local 1206*, 71 FLRA 1127 (2020) (Member DuBester dissenting)

With this case, we further address the outer limits of a negotiated grievance procedure. At issue in this case is whether a Union can seek reimbursement for expenses incurred as a result of a contract with a third-party through the negotiated grievance procedures under the parties' agreement. The Authority found that the issue at arbitration cannot be the subject of a grievance or subsequent arbitral award, because it did not constitute a grievance under § 7103(a)(9) of the

Federal Services Labor-Management Relations Statute. Accordingly, the Authority vacated the award.

Member DuBester dissented. He found that the award should be addressed on its merits, not vacated on jurisdictional grounds based on the majority's characterization of the grievance, which was not part of the record.

CASE DIGEST: *AFGE, Local 2338*, 71 FLRA 1131 (2020) (Member Abbott dissenting in part)

The Arbitrator denied the Union's grievance, finding that the Union failed to demonstrate that bargaining-unit pipefitters were entitled to environmental differential pay. The Union filed exceptions to the award based on bias, fair-hearing, nonfact, contrary-to-law, and essence grounds. Because the Union did not establish that the award is deficient on any of these grounds, the Authority denied the exceptions.

Member Abbott dissented in part because he did not agree with the Authority's determination that the scope of the grievance could be read so narrowly as to exclude the Union's claim concerning exposure to asbestos. Member Abbott would have remanded the matter to the Arbitrator to address the Union's claims concerning exposure to asbestos.

CASE DIGEST: *IFPTE, Local 4, Chapter 1*, 71 FLRA 1135 (2020) (Member DuBester concurring)

This case concerned the negotiability of one proposal that would require the Agency to consider a broad range of performance-based elements when determining which employees will be separated in a reduction in force. The Agency argued that the Union's proposal is non-negotiable because the Agency has sole and exclusive discretion over the matter, and that the proposal is otherwise contrary to law and regulation. The Authority found that the Agency failed to establish that it has sole and exclusive discretion or that the proposal conflicts with law or regulation, and granted the Union's petition.

Member DuBester concurred in the decision granting the Union's petition.

CASE DIGEST: *U.S. Dep't of VA, John J. Pershing VA Med. Ctr.*, 71 FLRA 1141 (2020) (Member DuBester dissenting)

In this case, the Arbitrator found a grievance concerning the Agency's process of scheduling Title 38 physicians to perform patient care duties on weekends to be arbitrable and the Agency excepted. The Authority found that the award was contrary to law because the grievance is excluded from the negotiated grievance procedure pursuant to 38 U.S.C. § 7422. The Authority set aside the award.

Member DuBester dissented, noting that only the Secretary of the Department of Veterans Affairs may determine that a grievance is excluded from the negotiated grievance procedure under § 7422. Because the Secretary had made no such determination applicable to

the issue before the Arbitrator, Member DuBester would have denied the Agency's contrary-to-law exception.

CASE DIGEST: *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Talladega, Ala.*, 71 FLRA 1145 (2020) (Member DuBester dissenting)

The Arbitrator found that the Union committed a technical violation of the parties' agreement by not filing the grievance with the proper Agency official, but nevertheless concluded that the grievance was arbitrable. The Authority found that the Arbitrator's procedural-arbitrability determination failed to draw its essence from the parties' agreement because the Arbitrator relied on extraneous considerations instead of the plain wording of the parties' agreement.

Member DuBester dissented, noting that the Arbitrator made findings that supported his conclusion that the agreement did not require dismissal of the grievance. Therefore, he would have denied the Agency's essence exception.

CASE DIGEST: *NLRB*, 71 FLRA 1149 (2020) (Chairman Kiko concurring; Member Abbott dissenting)

The Arbitrator found that the Union's grievance alleging a violation of § 7116(a)(1) of the Federal Service Labor-Management Relations Statute (Statute) was substantively arbitrable under the parties' collective-bargaining agreement. The Agency filed exceptions to the award based on contrary-to-law and essence grounds. Because the Agency did not demonstrate that the award was deficient on either ground, the Authority denied the Agency's exceptions.

Chairman Kiko concurred, noting that the tenuous theory underlying the grievance still amounted to an alleged violation of the Statute. Because the Statute is a "law . . . affecting conditions of employment" for purposes of § 7103(a)(9), she was constrained to find the grievance arbitrable.

Member Abbott dissented, as he would have granted the Agency's exceptions, finding the Arbitrator's interpretation contrary to law and failing to draw its essence from the expired and inapplicable Board-side CBA.

CASE DIGEST: *U.S. DHS, U.S. CBP*, 71 FLRA 1155 (2020) (Member Abbott dissenting)

The Arbitrator found that the Agency discriminated against the grievant, and violated the parties' collective-bargaining agreement and an Agency policy when it removed the grievant from certain collateral duties. Because the Agency did not except to all of the separate and independent grounds for the award, the Authority found that the exceptions did not provide a basis for finding the award deficient.

Member Abbott dissented, concluding that the Arbitrator's award did not draw its essence from the CBA and was contrary to law.

CASE DIGEST: *U.S. Dep't of the Treasury, IRS, Kan. City Campus*, 71 FLRA 1161 (2020)
(Member DuBester dissenting)

In this case, the Arbitrator found that the Union's mass-grievance claims and institutional-grievance claims were procedurally arbitrable. On exceptions, the Authority found that the Arbitrator's arbitrability findings failed to draw their essence from the parties' agreement. Accordingly, the Authority set aside the award.

Member DuBester dissented, finding that the Arbitrator's conclusion that the grievance was arbitrable as a mass grievance under Article 41, Section 5 of the parties' agreement was a plausible interpretation of the parties' agreement.

CASE DIGEST: *U.S. Dep't of Educ., Fed. Student Aid*, 71 FLRA 1166 (2020)
(Member DuBester concurring)

In this case, the Arbitrator found that the Agency violated the parties' collective-bargaining agreement and federal law when the Agency changed its telework policy and denied the grievant's request to continue working under her existing telework agreement. The Agency excepted on several grounds, including that the award failed to draw its essence from the parties' agreement, was contrary to law, and was ambiguous. The Authority denied the exceptions, but set aside the portion of the remedy requiring the Agency to reimburse the grievant for expenses as contrary to the doctrine of sovereign immunity.

Member DuBester concurred, but noted that he would find the award did not affect the Agency's right to direct employees and assign work and, therefore, he would not reach the question of whether the remedy excessively interfered with those rights.

CASE DIGEST: *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Dublin, Cal.*, 71 FLRA 1172
(2020) (Member DuBester dissenting in part)

In the merits award, the Arbitrator found that the Agency violated the parties' agreement and awarded several remedies regarding the Agency's improper recording and distribution of overtime assignments. Subsequently, the Arbitrator conducted a remedial hearing to address the remaining disputes and issued a tentative remedial award and final remedial award. While the Authority found that the Agency's exceptions to the remedial awards were timely, the Authority dismissed all of the Agency's exceptions to the merits award because it was a final award. Furthermore, the Authority found that the remedial awards were contrary to law, in part, because they violated the Agency's management right to assign employees and to assign work.

Member DuBester dissented in part, finding that the remedies were not contrary to law.

CASE DIGEST: *AFGE, Nat'l Council of Field Labor Locals*, 71 FLRA 1180 (2020)

The Arbitrator denied a Union grievance challenging the substance and application of certain employees' performance standards. The Union filed exceptions to the award on contrary-to-law; essence, and nonfact grounds. The Union also alleged that the award was

incomplete, ambiguous, or contradictory as to make implementation impossible and deficient on other grounds not listed in the Authority's Regulations. The Authority denied the Union's exceptions because they did not demonstrate that the award was deficient.

CASE DIGEST: *AFGE, Local 2338*, 71 FLRA 1185 (2020) (Member Abbott concurring)

The Arbitrator denied the Union's grievance alleging that the Agency failed to investigate acts of bullying and discrimination against the grievants. The Union filed exceptions to the award on nonfact, fair-hearing, and contrary-to-law grounds. The Authority found that the Union's arguments failed to demonstrate that the award was deficient and denied the exceptions.

Member Abbott agreed with the decision to deny the Union's exceptions but wrote separately highlighting the facts of this case.

CASE DIGEST: *AFGE, Local 779*, 71 FLRA 1190 (2020) (Member Abbott dissenting)

This case concerned the negotiability of one proposal based on an unsolicited allegation of nonnegotiability made by the Agency. Because the Union filed its petition more than fifteen days after receiving the unsolicited allegation of nonnegotiability, the Authority dismissed the petition without prejudice to the Union's right to refile.

Member Abbott dissented, disagreeing with the majority's decision to dismiss this case and allow the Union the right to refile this negotiability dispute.

CASE DIGEST: *NFFE, VA Council of Consolidated Locals*, 71 FLRA 1193 (2020)
(Member DuBester concurring)

This case concerned the negotiability of a Memorandum of Understanding (MOU) that was disapproved by the Secretary of Veterans Affairs (VA) as inconsistent with 38 U.S.C. § 7422. The Authority concluded that it lacked jurisdiction to review the Secretary's negotiability determination under Title 38 of the U.S. Code and dismissed the Union's petition for review.

Member DuBester concurred with the decision to dismiss the Union's petition.

CASE DIGEST: *AFGE and U.S. Dep't of VA*, 71 FLRA 1196 (2020) (Member DuBester concurring)

The Authority consolidated twenty petitions for review, each containing one Union proposal. Because the Agency had not alleged that the proposals were nonnegotiable or permissively negotiable, the Authority dismissed the petitions without prejudice to the Union's right to refile.

Member DuBester concurred with the decision to dismiss the Union's petitions.

CASE DIGEST: *U.S. EPA, Office of Research & Dev., Ctr. for Env'tl Measuring & Modeling, Gulf Ecosystems Measurement & Modeling Div., Gulf Breeze, Fla., 71 FLRA 1199 (2020)*

The Authority previously granted review of the decision and order of a Federal Labor Relations Authority Regional Director (RD). On review of the merits, the Authority determined that the RD erred in finding that an environmental-toxicologist position appointed under 42 U.S.C. § 209(g) was covered by the Federal Service Labor Management Relations Statute (Statute) and including it in the bargaining unit represented by the Union. The Authority found that § 209(g) granted the Agency the authority to designate fellowships and to prescribe the conditions under which appointed employees hold them. Acting under this authority, the EPA excluded § 209(g) appointees from the coverage of Statute and from the bargaining unit that the Union represents. Accordingly, the Authority found that the RD erred in concluding that the position was eligible for inclusion in the unit.

Member Abbott agreed that the RD erred by finding that the ecological toxicologist position was covered by the Statute. However, Member Abbott wrote separately to address his concerns with the timeliness of the Authority's decision.

Member DuBester dissented, finding that the majority misconstrued 42 U.S.C. § 209(g) and the precedent upon which the majority relied to conclude that the position at issue is excluded from coverage of the Statute.

CASE DIGEST: *AFGE, Council 170 and U.S. Dep't of Defense, Defense Contract Management Agency, 71 FLRA 1220 (2020) (Member DuBester concurring)*

This case involved one proposal that allegedly implicated management rights under 5 U.S.C. § 7106(a). The Agency generally asserted that the proposal interfered with management rights; however, it failed to support its argument. Therefore, the Authority found that the Agency waived its argument that the proposal was outside the duty to bargain. Accordingly, the Authority granted the petition for review.

Member DuBester concurred in the decision to grant the Union's petition.

CASE DIGEST: *Patent Office Professional Ass'n and U.S. Patent & Trademark Office, Alexandria, Va., 71 FLRA 1223 (2020) (Member DuBester dissenting)*

This case involved seven ground-rules proposals that implicated Executive Orders 13836 and 13837. The Authority found that the Executive Orders carry the force and effect of law, and therefore, the proposals were outside the duty to bargain because they were contrary to the Executive Orders. Accordingly, the Authority dismissed the petition for review.

Member DuBester dissented, finding that the majority's decision failed to consider whether the Executive Orders conflicted with the Federal Service Labor-Management Relations Statute (the Statute). And addressing this question, he concluded that the provisions of the

Executive Orders on which the majority relied conflict with the Statute and therefore cannot be enforced.

CASE DIGEST: *National Treasury Employees Union and U.S. Patent & Trademark Office*, 71 FLRA 1235 (2020) (Member DuBester dissenting)

This case involved a proposal seeking official time for employees notwithstanding conflicting provisions of Executive Order 13,837. The Authority affirmed that Executive Order 13,837 has the force and effect of law, and, therefore, the proposal was outside the duty to bargain. Accordingly, the Authority dismissed the petition for review.

Member DuBester dissented, finding that the provisions of Executive Order 13,837 upon which the majority relied are inconsistent with the language and purpose of the Federal Service Labor-Management Relations Statute.

CASE DIGEST: *U.S. Dep't of Commerce, Nat'l Oceanic and Atmospheric Admin., Nat'l Weather Serv.*, 71 FLRA 1239 (2020) (Member Abbott concurring; Chairman Kiko dissenting)

The Arbitrator found that the Agency violated the parties' ground rules agreement (the ground rules) by failing to respond to the Union's requests for formal declarations of nonnegotiability. The Authority found that that the Agency's essence exception constituted mere disagreement with the Arbitrator's findings and failed to demonstrate that the award does not draw its essence from the ground rules. Furthermore, the Authority denied the Agency's contrary-to-law exception because the Authority's Regulations do not prevent an agency from obligating itself through an agreement to making formal declarations of nonnegotiability upon request.

Member Abbott concurred in the decision but wrote separately to emphasize that the provision at issue runs counter to the negotiability framework in the Statute and the Authority's regulations. Furthermore, while the provision did not "facilitate and encourage the amicable settlement of [the] disputes" between the parties, he could not conclude that the Arbitrator's interpretation of the ground rules was implausible.

Chairman Kiko dissented on the ground that the award failed to draw its essence from the ground rules. Because the Agency was not alleging that the proposals were nonnegotiable, the ground rules did not require the Agency to provide a formal declaration of nonnegotiability.

CASE DIGEST: *U.S. DHS, U.S. CBP and NTEU, Chapter 160*, 71 FLRA 1244 (2020) (Member DuBester concurring)

The parties agreed to bifurcate arbitral proceedings into a merits phase and a remedial phase. After the Arbitrator issued a merits award—but before the remedial phase of the arbitration—the Agency filed exceptions challenging certain aspects of the merits award. The Authority held that this interlocutory exception did not present extraordinary circumstances

CASE DIGEST: *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Miami, Fla., 71 FLRA 1262 (2020)*
(Member DuBester dissenting)

The Arbitrator found that the Union's grievance was arbitrable and that the Agency violated the parties' agreement by partially denying the grievant's official-time request. The Agency filed exceptions to the award on the grounds that it failed to draw its essence from the parties' agreement. The Authority denied the exceptions, concluding that the Agency failed to (1) present evidence that Union's request for a second panel of arbitrators was untimely under the parties' agreement and (2) establish that the arbitrator's interpretation conflicted with the plain wording of the parties' agreement.

Member DuBester concurred that the Agency's exceptions should be denied. He also wrote separately to express his disagreement with the majority's earlier decision to reverse the Authority's carve-out doctrine.