

Federal Labor Relations Authority
Quarterly Digest Report: October 1, 2019 – December 31, 2019



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. Dep’t of State, Passport Servs.*, 71 FLRA 362 (2019) (Member DuBester concurring) (Chairman Kiko dissenting)

In this case, the Arbitrator rejected the Agency’s argument that it was faced with an “emergency” situation that allowed it to make changes to employee workstations before bargaining pursuant to the parties’ agreement. On exceptions, the Agency asserted that the award was based on nonfacts because the Arbitrator misconstrued the evidence and also raised both essence and contrary-to-law arguments. The Authority denied the Agency’s nonfact arguments because it failed to demonstrate the Arbitrator’s alleged misstatements were central facts and because the Agency merely disagreed with the Arbitrator’s evaluation of the evidence. The Authority also denied the Agency’s essence and contrary-to-law arguments because they largely constituted disagreements with the Arbitrator’s factual findings, which the Authority upheld.

Member DuBester concurred in the decision to deny the Agency’s exceptions, noting that the award permitted the Agency to take interim safety measures while it fulfilled its bargaining obligations.

Chairman Kiko dissented. The Chairman found that the award – requiring the Agency to maintain bins that were falling on, and injuring, employees – precluded the Agency from (1) independently assessing whether an emergency existed, and (2) deciding what actions were needed to address the emergency. Accordingly, she would have set the award aside as excessively interfering with the Agency’s right, under 5 U.S.C. § 7106(a)(2)(D), to take whatever actions may be necessary to carry out the Agency’s mission during emergencies.

CASE DIGEST: *U.S. Dep't of the Army, U.S Army Med. Dep't Activity, Fort George G. Meade, Md.*, 71 FLRA 368 (2019) (Member DuBester concurring)

This case concerned a Union-filed grievance alleging that the grievant was entitled to a permanent promotion because his position allegedly accreted some of his supervisor's higher-graded duties. The Arbitrator sustained the grievance and directed the Agency to promote the grievant from a General Schedule (GS)-7 to a GS-9 "per accretion of grade determinative duties." Consistent with longstanding Authority precedent, the Authority found that the grievance and the award concern a classification matter. Because classification matters are not arbitrable under 5 U.S.C. § 7121(c)(5), the Authority set aside the award.

Member DuBester concurred, finding that the circumstances of this case concerned a classification matter.

CASE DIGEST: *AFGE, Local 2338*, 71 FLRA 371 (2019)

This case involved a grievance alleging that the Agency refused to bargain over official time for certain bargaining-related activities. The Arbitrator found that the parties' master collective-bargaining agreement, mid-term local ground rules agreement, and a Decision and Order (the Order) issued by the Federal Service Impasses Panel (the Panel) required the parties to negotiate in good faith over the official time. However, the Arbitrator found that the Agency was not required to bargain until the Union fulfilled various obligations imposed on it by the Panel. Finding that the Union had not fulfilled its obligations, the Arbitrator denied the grievance. But he directed the parties to bargain pursuant to their agreements and the Order.

On exceptions, the Union argued that the Arbitrator's award failed to draw its essence from the parties' agreements and that it was ambiguous. The Authority found that the Union failed to specify which parts of the agreements the Arbitrator allegedly interpreted in a way that was irrational, unfounded, implausible, or in manifest disregard of the agreements and that the Union's allegations were mere dissatisfaction with the Arbitrator's interpretation of the agreements. Consequently, the Authority denied both exceptions.

CASE DIGEST: *U.S. DOD, Educ. Activity*, 71 FLRA 373 (2019) (Member DuBester concurring in part and dissenting in part)

This case concerned the Agency's obligation, under the parties' collective-bargaining agreement, to credit employees for certain academic-coursework hours when calculating their salaries. The Arbitrator rejected the Agency's argument that the parties' agreement only required the Agency to credit employees for hours earned after they had obtained a master's degree, and he awarded the Union attorney fees. The Agency filed exceptions.

The Authority determined that the Arbitrator's finding on crediting hours did not show that he exceeded his authority, or that the award failed to draw its essence from the agreement or was based on a nonfact. However, the Authority found that the Arbitrator failed to adequately

articulate a basis for awarding attorney-fees, as required by the Back Pay Act. Accordingly, the Authority denied the Agency's exceptions, except for its attorney-fee argument, and remanded the attorney-fee issue to the parties.

While Member DuBester agreed with the decision to remand the attorney-fee issue to the parties for resubmission to the Arbitrator, he disagreed that the standard set forth in *AFGE, Local 1633* should be applied on remand for the reasons set forth in his dissent in that case.

CASE DIGEST: *U.S. Dep't of VA, N. Cal. Health Care Sys., Mather, Cal.*, 71 FLRA 377 (2019) (Member Abbott dissenting)

This case concerns the timeliness of the Agency's exceptions. The Agency argued that it timely filed its exceptions because it deposited them with a commercial-delivery service on the due date. The Authority found that the Agency's proffered evidence did not demonstrate that the Agency actually deposited the exceptions on the date alleged. Therefore, the Authority dismissed the Agency's exceptions as untimely.

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CASE DIGEST: *U.S. Dep't of the Treasury, Office of the Comptroller of the Currency*, 71 FLRA 387 (2019) (Member DuBester dissenting in part)

This case involved grievances over a 2014 and a 2015 performance evaluation. The Arbitrator determined that the 2014 grievance was timely, sustained both grievances on the merits, and directed the Agency to adjust the grievant's performance evaluation ratings and pay accordingly. On exceptions, the Agency challenged the Arbitrator's procedural-arbitrability determination and her determination on the merits as failing to draw their essence from the parties' agreement. The Agency also challenged the remedy as contrary to management's rights to direct employees and assign work. The Authority found the Arbitrator's procedural-arbitrability determination inconsistent with the plain language of the parties' agreement, and set aside the portion of the award relating to the 2014 grievance. The Authority denied the Agency's essence exception as it pertained to the 2015 grievance. However, the Authority granted the Agency's management right's exception, finding the Arbitrator's remedy contrary to law because it excessively interfered with management's right to evaluate and rate the grievant's job performance, and also vacated that portion of the award.

Member DuBester agreed with the denial of the essence exception as to the 2015 grievance. He dissented from the remainder of the decision, finding that the Arbitrator's procedural-arbitrability determination is a plausible interpretation of the parties' agreement and her remedy is not contrary to management's rights.

CASE DIGEST: *Nat'l Weather Serv. Emps. Org.*, 71 FLRA 380 (2019) (Member DuBester dissenting)

The parties' previous agreement contained a provision drafted by the Federal Service Impasse Panel, which provided that either party could terminate any and all sections of the agreement if a new agreement was not reached within ninety days. The Arbitrator found that, while the Agency violated the agreement when it terminated the previous agreement, the Agency's actions did not constitute an unfair labor practice. The Authority vacated the award finding that it failed to draw its essence from the parties' agreement. Revising its previous decision in *National Weather Service Employees Organization*, 71 FLRA 380 (2019), the Authority also found that the Agency's actions did not constitute an unfair labor practice because the record demonstrated that the previous agreement remained in effect until the approval of a new agreement.

Member DuBester dissented, concluding that he would uphold the Arbitrator's award finding that the Agency improperly terminated the parties' collective-bargaining agreement because the Agency's right to terminate the agreement expired when the Union and the Agency requested FMCS/FSIP assistance within the time period provided by the contract. He would also grant the Union's contrary-to-law exception to conclude that the Agency unlawfully repudiated the parties' agreement under § 7116(a)(1) and (5) of the Statute because it improperly terminated the entire agreement. Member DuBester noted his concern that the majority amended its decision after the U.S. Court of Appeals for the District of Columbia Circuit had denied the Authority's motion to remand the case for further analysis and discussion.

CASE DIGEST: *AFGE, Local 3310 & U.S. Dep't of the Army, U.S. Army Corps of Eng'rs, Vicksburg Dist. & U.S. Dep't of the Army, U.S. Army Corps of Eng'rs, Eng'r Research & Dev. Ctr.*, 71 FLRA 395 (2019) (Member DuBester Dissenting)

This case concerned grievants who unsuccessfully sought liquidated damages under the Fair Labor Standards Act (FLSA) for unpaid overtime compensation. The Arbitrator denied the Union's request for liquidated damages because the Agency established an affirmative defense under the FLSA and the Portal-to-Portal Act. The Authority deferred to the factual findings made by the Arbitrator and found that the Agency acted in good faith and had reasonable grounds for its actions. Accordingly, the Authority concluded that the grievants were not owed liquidated damages under the FLSA and the Portal-to-Portal Act.

Member DuBester dissented. While also deferring to the Arbitrator's factual findings, he would find that the Agency did not establish the affirmative defense to liquidated damages and the award is contrary to law.

CASE DIGEST: *U.S. Dep't of the Treasury, IRS*, 71 FLRA 400 (2019) (Member Abbott dissenting)

This case concerned an award granting attorney fees to Union counsel for (1) case-representation work related to the litigation and settlement of hundreds of overtime offers, and (2) work performed disputing the reasonableness of the Union's requested fees. Through the settlement of the underlying grievance, the Union secured over \$400,000 in backpay for the affected employees.

The Agency filed exceptions disputing the reasonableness of the awarded attorney fees. The Authority found no basis for reducing the fees for case-representation work based on either the reasonableness of the hours the attorneys worked or the degree of their success. Although the Union had requested additional remedies in the grievance, the Authority determined that the Union's failure to obtain them did not diminish the significance of the "substantial" \$400,000 backpay remedy. However, regarding the number of hours that the Union billed for work related to the fee dispute, the Authority found it unreasonable, and reduced the fees to reflect an appropriate amount.

CASE DIGEST: *AFGE, Local 940*, 71 FLRA 415 (2019)

This case concerned the negotiability of one proposal. The Agency failed to submit a statement of position (SOP), and subsequently failed to respond to the Authority's order directing it to show cause why the Authority should not find that its failure to submit a SOP is a concession that the proposal is negotiable. Accordingly, the Authority found that the Agency failed to support its argument that the proposal is outside the duty to bargain. The Authority therefore granted the Union's petition.

CASE DIGEST: *AFGE, Nat'l Veterans Affairs, Council #53 & VA*, 71 FLRA 410 (2019) (Member DuBester concurring).

This case concerns the Agency's duty to bargain over the implementation of the Veterans Affairs Accountability and Whistleblower Protection Act of 2017 (Accountability Act). The Arbitrator concluded that the Agency did not have a duty to bargain because the Accountability Act specifically provided for the procedures and the Agency had sole and exclusive discretion. The Union filed exceptions arguing the award was contrary to law. The Authority found that the award was contrary to law because the Agency had a duty to bargain under §§ 7106(b)(2) and (3) of the Federal Service Labor-Management Relations Statute.

Member DuBester concurred in the decision to vacate the award as contrary to law.

CASE DIGEST: *NFFE, Local 1998, IAMW*, 71 FLRA 417 (2019) (Member Abbott dissenting, in part)

This case concerned the negotiability of one proposal relating to the establishment and administration of alternative work schedules. The Agency argued that the proposal involved a permissive subject of bargaining under 5 U.S.C. § 7106(b)(1). However, it did not support that argument, or address the Union's contention that the proposal was negotiable under the Federal Employees Flexible and Compressed Work Schedules Act of 1982. Accordingly, consistent with the Authority's Regulations, the Authority concluded that the Agency conceded that the proposal was negotiable, and the Authority directed the Agency to bargain, upon request, over that proposal.

Member Abbott wrote in partial dissent that he would have found that Proposal 5 fell outside the Agency's duty to bargain, because the proposal expanded existing compressed work schedules, thereby impinging on section 7106(b)(1) matters. The Agency had already stated it elected not to bargain. Further, the premise that all aspects of an alternative work schedule is subject to bargaining was fatally flawed, and finally, the decision ran counter to Executive Order 13836.

CASE DIGEST: *NATCA*, 71 FLRA 424 (2019)

This case concerned whether the Agency violated the parties' agreement by not paying certain employees premium pay when they worked alone and a supervisor was unavailable. The Arbitrator denied the Union's grievance, finding that the employees did not supervise an "area" as required by the parties' agreement and therefore they had no contractual right to receive premium pay. The Union filed a nonfact exception alleging that the Arbitrator based his award on an erroneous assumption. The Authority denied the exception because the Union did not establish that the Arbitrator's assumption was clearly erroneous and the Union's argument did not challenge a central fact underlying the award.

CASE DIGEST: *U.S. Dep't of VA, John J. Pershing VA Med. Ctr.*, 71 FLRA 426 (2019) (Member DuBester Concurring)

In this case, the Authority's Office of Case Intake and Publication issued a deficiency order (DO) directing the Agency to correct a procedural deficiency with the filing of its exceptions. The Agency failed to respond timely to the DO and later argued its human resources and executive offices never received the order. The Authority determined that the Agency failed to establish extraordinary circumstances warranting waiver of its failure to respond to the DO within the time limit and, therefore, dismissed the Agency's exceptions.

Member DuBester concurred in the decision to dismiss the Agency's exceptions.

CASE DIGEST: *Dep't of VA, VA Med. Ctr., Decatur, Ga.*, 71 FLRA 428 (2019)

This case arose from a complaint alleging that the Agency committed a ULP by refusing the Union's request for documents concerning an administrative investigation into allegations of fraud, harassment, and retaliation by Agency management. The Judge found that the Agency was required to provide the unredacted documents pursuant to § 7114(b)(4), and that its failure to do so was a ULP under § 7116(a)(1), (5), and (8). In reaching that conclusion, the Judge found that the public interest in disclosure outweighed the privacy interests of the management officials who were disciplined as a result of the investigation. The Authority denied the Agency's exceptions, finding that (1) the Union established a particularized need for the requested information; (2) release of the documents would not have been contrary to the Privacy Act; and (3) the alleged factual errors by the Judge were not material to the outcome of the case.

CASE DIGEST: *U.S. Army Corps of Eng'rs, Little Rock Dist.*, 71 FLRA 451 (2019) (Member DuBester concurring; Member Abbott concurring; Chairman Kiko dissenting).

The Activity/Petitioner filed an application for review of an FLRA Regional Director's decision finding that two bargaining units remained appropriate following reorganizations. The Authority found that the record adequately demonstrated that both units are appropriate within the meaning of § 7112(a) of the Federal Service Labor-Management Relations Statute following the reorganizations. While the reorganizations affected the Petitioner's management system, the Authority determined that the reorganizations did not significantly change the bargaining-unit employees' job duties, duty stations, or working conditions. Therefore, the Authority denied the Petitioner's application for review and concluded that the unit employees still share a clear and identifiable community of interest with their respective unions, that the current unit structure promotes effective dealings, and that the current unit structure promotes efficiency of operations following the reorganizations.

Member DuBester concurred in the decision to deny the application for review.

Member Abbott wrote separately in concurrence to note that he agreed with the Chairman that the Authority has previously accorded far too much weight to the status quo in determining which bargaining-unit structure is most effective and efficient. Here, however, the Agency argued that it was merely inconvenienced by the current bargaining-unit structure and, therefore, did not demonstrate a single unit would be more appropriate.

Chairman Kiko dissented. She found that the RD's deference to the status quo resulted in his failure to properly consider the effect of the reorganization on employees' community of interest and the substantial inefficiencies resulting from maintaining the separate units. The Chairman would have granted the application for review and found that only a consolidated unit is appropriate.

CASE DIGEST: *AFGE, Local 1502*, 71 FLRA 468 (2019) (Member DuBester dissenting)

This case concerned a prematurely filed petition for review. The Union filed its petition without first obtaining a written allegation of non-negotiability from the Agency, instead arguing that meeting minutes from a collective-bargaining session constituted the written allegation of non-negotiability. The Authority found the broad summary of statements made during a negotiation session, here labeled as “minutes,” do not constitute a written declaration of non-negotiability. Therefore, the Authority dismissed the petition as prematurely filed.

Member DuBester dissented, finding that the minutes constituted an unsolicited written allegation of non-negotiability because they explicitly stated that the Agency declared the Union’s proposal non-negotiable and set forth the Agency’s legal basis for its position. He further noted that the Agency refused the Union’s subsequent request for a written declaration of nonnegotiability on the basis that it had already stated its position in the minutes. Accordingly, Member DuBester would find that the petition was timely filed.

CASE DIGEST: *U.S. Dep’t of the Army, Fort Wainwright Law Ctr., Fort Wainwright, Alaska*, 71 FLRA 471 (2019)

This case concerned management’s alleged good-faith-doubts that the certified exclusive representatives of twelve bargaining units continued to represent a majority of the employees in each of their respective units. The RD found the petitioner’s doubts unsubstantiated, and he denied the requested representation elections.

The petitioner filed ten applications for review challenging the RD’s denials of representation elections in ten of the twelve units, arguing that the RD failed to apply established law that required particularized findings about the majority support for the exclusive representative of each unit. The Authority held that the RD’s findings were insufficient to support his rejections of the petitioner’s good-faith-doubt claims regarding the ten challenged units. Accordingly, the Authority granted the ten applications and remanded the RD’s decision, in part, for further findings.

While Member DuBester concurred in the decision to remand the Agency’s petitions to the Regional Director (RD), he emphasized the RD’s findings that the bargaining units at issue in the petitions encompass more than 1,000 employees generally located at only three Army installations across the state of Alaska, are covered by only two bargaining agreements, and the labor relations activities are handled by only two representatives for the unions and management. Based on those unique circumstances, Member DuBester concluded it is to be expected that some of the unions’ actions were not explicitly devoted to the exclusive benefit of a particular bargaining unit, and that the RD’s findings should not be faulted for simply reflecting these circumstances.

CASE DIGEST: *SSA & Ass'n of Admin. Law Judges*, 71 FLRA 495 (2019) (Member DuBester dissenting).

In this case, the Agency denied the grievant's telework request because the grievant did not satisfy the requirement to schedule a reasonably attainable number of cases for hearing per month. The Arbitrator found that the Agency violated the parties' agreement when it denied the grievant's telework request, and ordered the Agency to allow the grievant to telework if she scheduled an average of forty-five cases for hearing per month. The Arbitrator also ordered the Agency to have a collegial conversation with the grievant before restricting telework in the future. The Authority found that the award is contrary to law, in part, because it excessively interferes with management's rights to direct employees and assign work. The Authority denied the Agency's essence exceptions, finding that the Agency had failed to demonstrate that the Arbitrator's interpretation of the parties' agreement was not plausible.

Member DuBester dissented. He found that, consistent with Authority precedent, the award and the contract provision it enforced had no effect on management's right to direct employees or assign work.

Case Digest: *U.S. Dep't of the Air Force, 377 Aerospace Med. Squadron, Kirtland Air Force Base, N.M.*, 71 FLRA 501 (2019)

The Agency conceded filing untimely exceptions to an arbitration award. Nonetheless, the Agency requested that the Authority consider the exceptions, alleging that an employee "either intentionally or negligently" failed to mail them. The Authority's Regulations do not permit, for any reason, the extension or waiver of the thirty-day timeframe for filings exceptions in § 7122(b) of the Federal Service Labor-Management Relations Statute. Therefore, the Authority dismissed the Agency's exceptions as untimely.

CASE DIGEST: *AFGE, Local 1738 & VA, Med. Ctr., Salisbury, N.C.*, 71 FLRA 505 (2019) (Member DuBester concurring).

This case is before the Authority on exceptions to an award finding that the Agency violated the parties' agreement by failing to properly refer the grievant's file to the Professional Standards Board in order to effect a permanent promotion. Although the Agency retroactively revoked the grievant's promotion, the Arbitrator directed the Agency to refrain from collecting the additional salary and benefits she had earned while serving in the promoted position. The Arbitrator did not order backpay and denied attorney fees. The Union argued the award was contrary to the parties' agreement and the Back Pay Act. The Authority denied the exceptions, finding that Union failed to demonstrate that the ordered remedy was in error or that the denial of attorney fees was contrary to law.

Member DuBester concurred, finding that the award was not contrary to law. He also found that, consistent with the broad discretion afforded to arbitrators to fashion remedies, the award drew its essence from the parties' agreement.