

Federal Labor Relations Authority
Quarterly Digest Report: July 1, 2020 – September 30, 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: *AFGE, Local 1594*, 71 FLRA 878 (2020)

The Arbitrator sustained an Agency grievance alleging that the Union violated the parties' national-level settlement agreement by not paying for half the cost of the arbitrator's copy of a transcript in an earlier case. The Authority denied the Union's essence, exceeds-authority, and nonfact exceptions because the Union did not establish that the award was deficient on any of these grounds.

CASE DIGEST: *AFGE, Local 3430*, 71 FLRA 881 (2020) (Member Abbott concurring)

This case concerned the negotiability of sixteen provisions disapproved on Agency-head review. In its statement of position, the Agency stated that the provisions were contrary to law, but did not provide any authority or arguments supporting its position. The Authority found that the Agency failed to support its argument that the provisions are contrary to law and ordered the Agency to rescind its disapproval of the sixteen provisions.

Member Abbott concurred emphasizing that the Authority cannot salvage arguments that are argued poorly, presented insufficiently, or are not supported at all. He further emphasized that the Agency's actions do not comport with the purposes of the Federal Service Labor-Management Relations Statute.

CASE DIGEST: *NFFE, IAMAW, Fed. Dist. 1, Fed. Local 1998*, 71 FLRA 889 (2020)

The Union filed a petition for review of proposals concerning the implementation of an auditing program. The Agency rejected the Union's proposals solely because the Union was attempting to bargain at the local level, rather than the national level. Because the Agency's argument that the Union was attempting to bargain below the level of recognition raised only a bargaining-obligation dispute, the petition failed to present a negotiability dispute, and the Authority dismissed the petition without prejudice.

CASE DIGEST: *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla. and AFGE, Local 506, Council of Prisons Local #33*, 71 FLRA 892 (2020)

The Union filed a grievance on February 14, 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 was based on a nonfact because the Agency's actions in March 2017 could not have formed the basis for the Union's February 2017 grievance. The Authority additionally found that, even if the Authority deferred to the Arbitrator's factual finding, the award fails to draw its essence from the parties' agreement.

Member DuBester concurred in part. He agreed with the decision to grant the nonfact exception and set aside the award on that basis, but found it unnecessary to address the Agency's essence exception.

CASE DIGEST: *U.S. DHS, U.S. CBP and AFGE, Local 3307, Nat'l Border Patrol Council*, 71 FLRA 895 (2020)

This case concerned whether the Union timely filed its grievance. The Agency placed the grievant on administrative duty following his off-duty arrest for driving while intoxicated. Approximately eighteen months later, he was acquitted of the charge, and the Agency returned him to regular duty. Shortly thereafter, the Union filed a grievance. The Arbitrator found that the Union timely filed that grievance.

On exceptions, the parties stipulated that the Arbitrator should resolve the issue of whether the Union timely filed the grievance. The Authority determined that the Arbitrator failed to resolve that issue and, instead, resolved an issue not before her. Accordingly, the Authority found that the Arbitrator exceeded her authority. In modifying the award to address this deficiency, the Authority found the grievance untimely under the parties' agreement and set aside the award.

Member DuBester dissented. Noting that the Arbitrator's finding that the grievance was timely was directly responsive to the issues stipulated by the parties, he would have denied the Agency's exceeded-authority exception.

Case Digest: *U.S. DOD, Educ. Activity*, 71 FLRA 900 (2020)

The Department of Defense Joint Travel Regulations (JTR) permit several management officials to authorize an evacuation of – and, correspondingly, evacuation allowances for – employees threatened by emergency circumstances. After a hurricane struck Puerto Rico, some of those officials elected not to authorize evacuation allowances. As a result, many of the affected employees evacuated at their own expense. However, one JTR-designated official was unaware that he had the authority to authorize an evacuation, and the Arbitrator found that the Agency abused its discretion because that official did not exercise his discretion to determine whether an evacuation was appropriate. Because the JTR does not require each of the several listed officials to independently assess whether an evacuation is appropriate, the Authority found that the Arbitrator’s award was inconsistent with the JTR’s plain wording. Accordingly, the Authority set the award aside.

Member Abbott concurred in the decision that the award is contrary to law, but emphasized that there are limits to the reach of parties’ negotiated grievance procedures under our Statute.

Member DuBester dissented, finding that the Arbitrator’s conclusion that the Agency abused its discretion was supported by the record and was not inconsistent with the JTR.

CASE DIGEST: *U.S. Dep’t of the Air Force, March Air Reserve Base, Cal.*, 71 FLRA 906 (2020) (Member DuBester concurring)

In this case, the Arbitrator found that the Agency violated the parties’ collective-bargaining agreement when it suspended the grievant for five days for charges of harassing behavior and failure to follow leave procedures. The Agency excepted on several grounds, including contrary to law, exceeds authority, ambiguous and contradictory, essence, and nonfacts. The Authority denied all of the Agency’s exceptions, finding that the Agency either failed to support its argument or failed to establish that the award was deficient on any of the stated grounds.

Member DuBester concurred, agreeing with the decision to deny the Agency’s exceptions.

CASE DIGEST: *USDA*, 71 FLRA 910 (2020)

During bargaining over their successor collective-bargaining agreement, the parties were unable to reach agreement on several articles, and the Agency requested the assistance of the Federal Service Impasses Panel (the Panel). After the Panel issued a decision and order, the Union filed a motion asking the Authority to stay the Panel’s order. The Authority denied the Union’s request because the Union did not demonstrate that a stay was appropriate under the circumstances of this case.

Member DuBester concurred in the decision to deny the request for a stay, but wrote separately to express his concerns regarding the majority's inconsistent characterizations of the Federal Service Impasses Panel's independence.

CASE DIGEST: *U.S. Dep't of HHS, Food and Drug Admin. & NTEU*, 71 FLRA 913 (2020)
(Member DuBester concurring)

This case involves a grievance filed by the Union alleging that the Agency violated the Federal Service Labor-Management Relations Statute and the parties' agreement when it failed to authorize the Union's email communications to bargaining-unit employees. Here, the Agency argues that the award is contrary to the Federal Service Labor-Management Relations Statute. As the Agency's assertion is incorrect, there is no justification for disturbing the award. Accordingly, the Authority denied the Agency's exception.

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

CASE DIGEST: *AFGE, Local 2145 and U.S. Dep't of VA, Med. Ctr., Richmond, Va.* 71 FLRA 916 (2020)

The Arbitrator issued an award denying the Union attorney fees before it had submitted a fee petition. Consistent with the Back Pay Act and its implementing regulations, the Authority modified the award to strike the denial of attorney fees without prejudice to the Union's right to file a fee petition.

CASE DIGEST: *IBEW, Local 1002*, 71 FLRA 930 (2020)

The Union requested that the Authority reconsider its decision in *IBEW, Local 1002 (IBEW)*, 71 FLRA 779 (2020) and stay implementation of that decision. In *IBEW*, the Union filed a petition for review containing Union proposals that were not substantively changed from ones that had previously been alleged to be nonnegotiable by the Agency. The Authority determined that, because the Union's proposals contained only minor modifications from those previously declared nonnegotiable, the Union failed to file a timely petition, and the Authority dismissed the petition. Because the Union's arguments in its motion for reconsideration attempted to relitigate the Authority's conclusions in *IBEW* and otherwise failed to establish any extraordinary circumstances warranting reconsideration, the Authority denied the motion and the stay request.

CASE DIGEST: *U.S. Dep't of Transp., FAA*, 71 FLRA 932 (2020) (Member DuBester dissenting in part)

In this case, the Authority found that the Arbitrator's award did not provide a sufficient basis for determining whether the Agency had a duty to bargain. Because the record did not provide sufficient clarity regarding whether employees' job duties changed as a result of the reassignment at issue, the Authority remanded the case to the parties to allow the Arbitrator to make sufficient factual findings.

Member DuBester dissented in part, finding that a remand was unnecessary because the Arbitrator made sufficient findings to support his conclusion that the Agency had a duty to bargain.

CASE DIGEST: *U.S. Dep't of the Navy, Marine Corps Air Station, Cherry Point N.C. and IAMAW, Local Lodge 2296, AFL-CIO*, 71 FLRA 940 (2020) (Member Abbott concurring)

The Petitioner requested that the Authority reconsider *U.S. Department of the Navy Marine Corps Air Station Cherry Point, North Carolina (Cherry Point)*, in which the Authority upheld a Regional Director's decision that certain employees are within the express terms of the relevant unit certification and that their inclusion in the unit remains appropriate. In a motion for reconsideration (motion), the Petitioner again argues that the RD relied on an incorrect certification, and she submits evidence, for the first time on reconsideration, to support her argument. The Authority rejected the motion, finding that it raised the same arguments the Authority considered and rejected in *Cherry Point*, and did not otherwise establish extraordinary circumstances warranting reconsideration.

CASE DIGEST: *AFGE, Local 547*, 71 FLRA 943 (2020)

The Arbitrator denied the Union's grievance, finding that nonselection for positions outside of the bargaining unit was not substantively arbitrable. The Authority denied the Union's exception because it did not demonstrate that the award was contrary to law.

Member Abbott concurred with the denial of the reconsideration because the grievant did not establish circumstances warranting a review but wrote separately to emphasize the underlying case was wrongly decided.

CASE DIGEST: *U.S. Dep't of VA, J.J. Pershing VA Med. Ctr. & AFGE, Local 2338*, 71 FLRA 947 (2020) (Member DuBester dissenting)

With this case, we again remind the federal labor-relations community that procedural deadlines pursuant to a collective-bargaining agreement must be taken seriously. The Arbitrator found that the Agency had waived any timeliness objections by failing to raise them prior to arbitration. He further found that even in the absence of waiver, the fact that the grievance

alleged a continuing violation meant the Union could invoke arbitration at any time. The Authority found that the procedural arbitrability determinations failed to draw their essence from the parties' agreement because the Arbitrator added a requirement to the parties' agreement and ignored the clear language of Article 44. Accordingly, the Authority vacated the award.

Member DuBester dissented, finding that the Arbitrator's waiver determination was well supported and not precluded by the parties' agreement. Therefore, he would have denied the Agency's essence exception.

CASE DIGEST: *AFGE, Local 3854*, 71 FLRA 951 (2020)

The Arbitrator found that the Agency committed an unjustified and unwarranted personnel action by failing to pay the grievants environmental differential pay (EDP), but denied the grievants' request for backpay. The Union challenged that determination on contrary-to-law grounds. The Authority found that the denial of backpay was contrary to the Back Pay Act because the failure to pay EDP was a loss of differential to which the grievants were entitled.

CASE DIGEST: *U.S. Dep't of VA, VA Greater Los Angeles Healthcare Sys., Los Angeles, Cal.*, 71 FLRA 953 (2020) (Member DuBester concurring)

In this case, the Arbitrator sustained the grievance, determining the Agency did not have just cause to suspend the grievant. The Agency argues that the Arbitrator denied it a fair hearing by excluding certain proffered evidence, essence, and that the award of attorney fees is contrary to the Back Pay Act. The Authority denied the exceptions, finding the Agency's fair hearing argument constituted mere disagreement with the Arbitrator's evaluation of the evidence, that the Agency failed to support its essence argument, and that its contrary-to-law exception challenged a determination that the Arbitrator did not make in the award.

Member DuBester agreed that the Agency's exceptions should be denied. However, he would have considered the Arbitrator's email clarification of the award regarding the attorney fee issue.

CASE DIGEST: *Exp.-Imp. Bank of the U.S.*, 71 FLRA 957 (2020)

The Union filed a motion for reconsideration of the Authority's decision in *Export-Import Bank of the United States*, 71 FLRA 248 (2019) (*Export*) (Member DuBester dissenting). In *Export*, the Authority directed the Regional Director (RD) to conduct an election to determine whether certain stipulated non-professional employees desired to be represented by the Union. Addressing the Union's motion for reconsideration, the Authority found that it did not establish that the Authority erred in its conclusions of law and was merely attempting to relitigate the issued involved in *Export*. As such, the Authority denied the Union's motion.

Member DuBester dissented, finding that the majority erred by disregarding the RD's findings that seven positions were not excluded from the unit and by directing the RD to conduct an election. Accordingly, Member DuBester would grant the Union's motion.

CASE DIGEST: *NTEU*, 71 FLRA 962 (2020)

During bargaining, the Agency requested the assistance of the Federal Service Impasses Panel (the Panel). After the Panel asserted jurisdiction over the matter, the Union filed a motion requesting that the Authority stay the Panel proceeding. Because the case did not present unusual circumstances warranting a stay, the Authority denied the Union's motion.

Member DuBester concurred, agreeing with the decision to deny the Union's motion.

CASE DIGEST: *Indep. Union of Pension Emps. for Democracy & Justice*, 71 FLRA 965 (2020)

The Arbitrator found that the grievance was not arbitrable because the Union failed to actively pursue it during a defined six-month period as required by the parties' collective-bargaining agreement. The Union filed exceptions on nonfact, contrary-to-law, essence, and exceeds-authority grounds. The Authority found that the Union's arguments failed to demonstrate that the award was deficient and denied the exceptions.

CASE DIGEST: *Dep't of VA*, 71 FLRA 992 (2020) (Member Abbott dissenting)

In this case, the Agency contended that the Arbitrator erred by directing the Agency to make certain retroactive payments to employees and pay their "actual expenses" related to attendance at a training. However, the award did not direct any monetary relief. As such, the Agency's exceptions were based on a misunderstanding of the award, and the Authority denied them.

Member Abbott dissented, concluding that the Arbitrator's award was contrary to law because it excessively interfered with the Agency's § 7106(a) rights to determine its budget and to assign work. Additionally, Member Abbott dissented finding that the matters underlying the grievance fell outside the scope of the parties' CBA because they were specifically provided for by Federal statute.