

Federal Labor Relations Authority
Quarterly Digest Report: July 1, 2019 – September 30, 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: SSA, 71 FLRA 205 (2019) (Member Abbott concurring; Member DuBester dissenting)

This case concerned a grievance alleging that the Agency failed to pay a Schedule A, term employee, who was paid at the General Schedule (GS)-5 level pursuant to signed agreements, at the GS-8 level for her performance of higher-graded duties over several years. The Arbitrator sustained the grievance in a bench decision and ordered that the grievant should be given a GS-8 rating and be paid retroactively. The Authority found that the grievance was not arbitrable because it concerned classification and was, therefore, barred by 5 U.S.C. § 7121(c)(5). Accordingly, the Authority vacated the Arbitrator's award in its entirety.

Member Abbott wrote separately to concur with the § 7121(c)(5) application and to note that the grievance was also not arbitrable because it sought to force a conversion of the grievant's excepted-service status to that of the competitive service, which is beyond the power of an arbitrator.

Member DuBester dissented, finding that the grievance did not concern a classification matter with the meaning of § 7121(c)(5) of the Statute. Rather, he found that the record demonstrated that the essential nature of the grievance concerned whether the grievant was entitled to a temporary promotion under the parties' collective-bargaining agreement for performing the established duties of a higher-graded position. Thus, he would not have vacated the award.

CASE DIGEST: *AFGE, Local 2076*, 71 FLRA 221 (2019) (Member DuBester concurring in part and dissenting in part)

In this case, the Authority clarifies how *Allen* factor (5)—i.e., whether the Agency “knew or should have known” that its action would not be sustained—applies in the context of minor disciplinary actions. The underlying grievance involved a disciplinary charge and fourteen-day suspension. The Arbitrator upheld the disciplinary charge and mitigated the penalty to a five-day suspension. The Union then filed a request for attorney fees, which the arbitrator denied with a non-coherent explanation. On exceptions, the Union argued the denial of attorney fees was contrary to law.

The Authority held that in determining whether an award of fees is warranted in the interest of justice under *Allen* category (5), arbitrators must evaluate the nature and strength of the evidence that was available to the agency and assess whether its penalty determination was reasonable. Furthermore, because the record does not permit the Authority to determine the proper resolution of the matter, the Authority remanded the case for further proceedings to assure that the resolution of a request for attorney fees is consistent with law.

Member DuBester wrote separately, agreeing with the decision to remand the award for resubmission to the Arbitrator because he failed to make specific findings as to whether an award of attorney fees is appropriate and disagreeing with the majority’s decision to modify the standard governing whether attorney fees are warranted under *Allen* category (5).

CASE DIGEST: *AFGE, Local 1633*, 71 FLRA 211 (2019) (Member Abbott concurring; Member DuBester concurring in part, and dissenting in part)

This case concerned grievants who successfully sought environmental differential pay for their duties. The Arbitrator awarded backpay, but denied the Union’s request for attorney’s fees because the parties’ agreement did not provide for attorney fees. The Authority issued a Federal Register notice soliciting briefs regarding whether and how the Authority should reevaluate its reliance on the *Allen* factors in attorney fee cases. Remanding the case to the Arbitrator to re-evaluate the request for attorney fees, the Authority clarified the applicable legal standard for an award of attorney’s fees in an arbitration proceeding under the Back Pay Act (BPA) in non-disciplinary cases, focusing on the “knew or should have known” and “clearly without merit” factors.

Member Abbott wrote separately in concurrence to note the central premise of the decision rested on the precarious definition by OPM of “unjustified or unwarranted personnel actions” and the Merit Systems Protection Board’s interpretation of 5 U.S.C. § 7701(g)(1). Congress would have to resolve other questions concerning attorney fees such as proportionality, the applicability of the *Laffey* matrix, and reasonableness of fees for in-house attorneys.

Member DuBester dissented. He agreed with the decision to deny the Agency’s exceptions and to remand the award to the parties for resubmission to the Arbitrator to make specific findings as to whether an award of attorney fees is appropriate. But Member DuBester

strongly disagreed with the majority's modification of the standards used to determine entitlement to attorney fees in arbitration awards in which the grieved action is not disciplinary in nature because neither party raised the appropriateness of the *Allen* factors. Thus, Member DuBester found that reconsideration of the *Allen* factors was not ripe for review in this case.

CASE DIGEST: *U.S. Dep't of the Air Force, Davis-Monthan Air Force Base, Ariz.*, 71 FLRA 227 (2019) (Member DuBester concurring; Chairman Kiko dissenting)

This case concerned a grievant who had been denied multiple official time requests by the Agency. The grievances alleged that the Agency violated the parties' memorandum of agreement (MOA) since the time requests established "special situations" and provided sufficient information to allow the Agency to determine the reasonableness of the time requests. The Arbitrator found that, although the MOA did not define a "special situation," the grievant's increase in representational activity established a special situation, that the Agency was aware of the increase in representational activity, that the former labor relations officer of the Agency said that the time requests should have been approved, and so she found that the Agency violated the parties' collective-bargaining agreement (CBA) and MOA when it denied some of the official time requests made by the grievant.

Member DuBester concurred in the decision to deny the Agency's exceptions

In dissent, Chairman Kiko noted that the MOA did, in fact, define "special situations" as involving a "temporary change" to the agreed-upon schedule. The Chairman stated that the grievant's constant requests for more official time, nearly every day, could not plausibly be classified as a "temporary change." Accordingly, the Chairman would have found that the award failed to draw its essence from the CBA and the MOA.

CASE DIGEST: *Dep't of VA, Edith Nourse Rogers Memorial VA Med. Ctr., Bedford, Mass.*, 71 FLRA 232 (Member DuBester concurring)

This case concerned an Agency directing a social worker who spent 100% of her work time in a medical center to instead work half-time in the center and half-time traveling to patients' homes. The Arbitrator found the Agency violated Article 25 of the parties' agreement, which required reassignments to be seniority-based, and ordered the grievant restored to the position she held prior to the improper reassignment. On exceptions, the Agency argued that the award was contrary to law because it violated the Agency's management rights under § 7106(a) of the Federal Service Labor-Management Relations Statute. The Authority found an Agency argument about the effect of the remedy was inconsistent with the argument it made before the Arbitrator and refused to consider it. The Authority further found that the Arbitrator's awarded remedies did not excessively interfere with the Agency's management rights.

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

CASE DIGEST: *U.S. DOD, Domestic Elementary & Secondary Sch.*, 71 FLRA 236 (2019)
(Member Abbott concurring; Member DuBester dissenting)

The parties' collective-bargaining agreement requires the party invoking arbitration to do so "within twenty . . . days following the conclusion of the last stage in the grievance procedure." The last stage was mediation, and the Union did not attempt to move the dispute to arbitration until almost two years after mediation concluded. Nevertheless, the Arbitrator found the grievance procedurally arbitrable because the Union attempted to invoke arbitration *before* mediation. However, the Arbitrator failed to cite any authority or contractual wording that allowed him to disregard the agreement's explicit twenty-day invocation period. Thus, the Authority concluded that the Arbitrator's procedural-arbitrability determination failed to draw its essence from the parties' agreement.

Member Abbott concurred in the decision. He noted that all parties involved in the grievance-arbitration process would be well served to remind themselves that the Federal Service Labor-Management Relations Statute intends for grievances to be resolved expeditiously.

Member DuBester dissented. Applying the deferential standard owed to arbitrators when analyzing essence challenges, Member DuBester would have found that the Arbitrator properly interpreted the parties' agreement when the Arbitrator found that the Agency had acquiesced to the Union's actions to move the grievance to arbitration and had not shown that the Union's invocation of arbitration was untimely. Thus, Member DuBester would have denied the essence exception and reached the Agency's remaining exceptions.

CASE DIGEST: *U.S. Dep't of the Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, 71 FLRA 240 (2019) (Member DuBester Concurring)

This case concerned a grievant who had been suspended by the Agency for ten days due to off-duty misconduct while on temporary duty overseas. The Agency reduced the suspension to seven days but denied the grievance. The Arbitrator found that, while there was a nexus between the off-duty misconduct and the efficiency of the service, the suspension was excessive when compared to other suspensions for the same charge and considering the grievant's otherwise exemplary work history. The Arbitrator directed the Agency to reduce the suspension to five days and provide two days backpay. Before the Authority, the Agency argued that the award was contrary to Executive Order (EO) 13839, the Back Pay Act (BPA), and the Agency's right to discipline under §7106(a). The Authority found that EO 13839 did not retroactively apply to the collective-bargaining agreement (CBA). The Authority dismissed as unsupported the BPA exception. The Authority also found that the award was reasonably and proportionally related to the violation of the CBA and that the Agency failed to show how a two-day mitigation excessively interfered with a § 7106(a) management right. Accordingly, the Authority concluded that the award was not contrary to law and denied the Agency's exceptions.

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

CASE DIGEST: *U.S. DHS, U.S. CBP*, 71 FLRA 243 (2019) (Member Abbott concurring)

This case concerned the Arbitrator's finding that the Agency violated the parties' collective-bargaining agreement when it required an employee to undergo medical examinations without a Union representative present. The Arbitrator directed the Agency to establish procedures to inform bargaining-unit employees and independent medical examiners of an employee's right to have a Union representative present during such examinations. The Authority rejected the Agency's contrary-to-law, public-policy, and nonfact exceptions, finding that the award did not require the Agency to exercise control over the medical examiners. The Authority found that, to the extent that the award applied to individuals other than the grievant, the Arbitrator exceeded his authority, and clarified the remedy accordingly.

Member Abbott concurred with the Authority's disposition of the exceptions and noted that the Agency's contrary-to-law and public-policy exceptions were inconsistent with concessions made by the Agency and that the Agency's nonfact exception failed to dispute a central fact. Therefore, he noted that the Agency could have obviated the need for its exceptions if it negotiated with the Union by solely focusing on the exceeds-authority exception.

CASE DIGEST: *Exp.-Imp. Bank of the U.S.*, 71 FLRA 248 (2019) (Member DuBester dissenting)

This case concerned the Union's petition requesting an FLRA Regional Director (RD) to clarify the bargaining-unit status of several Agency positions. The Union represents a bargaining unit of non-professional employees at the Agency. Before the RD, the parties stipulated that some of the positions at issue are not "professional" within the meaning of 5 U.S.C. § 7103(a)(15)(A). However, the parties disputed whether seven positions are professional or non-professional. The RD concluded that the seven positions are non-professional, and she directed the employees occupying those positions – and the other stipulated non-professional employees – to be included in the unit.

On an Agency-filed application for review, the Authority found that the RD failed to apply established law. In this regard, the record demonstrated that the employees occupying the seven positions possess the requisite judgment and knowledge to constitute professional employees under § 7103(a)(15)(A). Accordingly, the Authority directed the RD to exclude those positions from the unit. As for the stipulated non-professional employees, the Authority noted that they significantly outnumbered the employees already in the unit – calling into question the Union's majority status. Applying the "majority standard" in this context, the Authority directed the RD to conduct an election to determine whether the affected employees desire to be represented by the Union.

Member DuBester dissented. He determined that the RD properly relied on record evidence to conclude that employees in the positions at issue were not excluded from the bargaining unit as professional employees. Additionally, Member DuBester concluded that the inclusion of employees in the disputed and stipulated positions who had previously been improperly excluded from the unit does not call into question the Union's majority support, and

therefore does not warrant directing the RD to conduct an election. Accordingly, he would deny the Agency's petition for review.

CASE DIGEST: *AFGE, Nat'l Council of EEOC Locals, No. 216*, 71 FLRA 300 (2019)
(Member DuBester Concurring in part and dissenting in part)

This case concerns the Agency's declaration that three Union proposals concerning the Agency's disciplinary table of penalties are nonnegotiable. After the Agency's declaration of nonnegotiability on August 3, 2018, the Union attempted to "withdraw" and amend the three proposals on August 27, 2018. When the Union asked for a declaration of nonnegotiability on the new proposals, the Agency declared it had already declared the proposals nonnegotiable on August 3. The Union filed a petition for review of the amended proposals on September 6, 2018. The Authority found that the Union's amended proposals were not substantive modifications and that the petition for review filed on September 6 was untimely and dismissed the petition.

Member DuBester dissented with respect to the majority's conclusion regarding Proposal 7. He found that amended Proposal 7 significantly changed the original proposal because it created a new and independent standard by which to measure the appropriateness of a disciplinary penalty and also included substantial revisions to clarify the proposal. Thus, Member DuBester would find the petition timely as to Proposal 7.

CASE DIGEST: *U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 71 FLRA 304 (2019) (Member DuBester concurring)

This case concerned the Agency's suspension of the grievant for fourteen days. The grievance alleged that the suspension was not for just cause and, thus, violated the parties' agreement. The Arbitrator found that the Agency lacked just cause for the suspension, and he reduced it to a one-year letter of reprimand. In an exception, the Agency argued that the just-cause finding failed to draw its essence from the parties' agreement because the Arbitrator considered extraneous factors in deciding to reduce the penalty. The Authority found that the Arbitrator's considerations were properly rooted in the wording of the parties' agreement. Therefore, the Authority concluded that the award did not fail to draw its essence from the agreement, and denied the Agency's exception.

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

CASE DIGEST: *Dep't of the Treasury, IRS, Office of the Chief Counsel*, 71 FLRA 281 (2019)
(Chairman Kiko dissenting)

An FLRA Administrative Law Judge (the Judge) found that the Agency violated § 7116(a)(1), (5), and (8) of the Federal Service Labor Management Relations Statute (the Statute) by failing to respond to the information request under § 7114(b)(4) within a reasonable amount of time, here, seven weeks. In its exceptions, the Agency argued that the complaint did

not allege that it untimely responded to the information request, only that it had not “acknowledged” the request. The Authority found that the Agency was afforded adequate notice by the General Counsel’s complaint, that the Judge did not err, and that the surrounding circumstances demonstrated that the Agency violated the Statute by failing to respond to the information request within a reasonable time. Accordingly, the Authority denied the Agency’s exceptions.

Chairman Kiko dissented. She disagreed with the majority’s decision and would have set aside the Judge’s recommended decision because the Agency timely furnished the requested information under the circumstances.

CASE DIGEST: *NTEU and U.S. Dep’t of the Treasury, Internal Revenue Service.*, 71 FLRA 307 (2019) (Member DuBester concurring)

This case concerned the negotiability of a proposal that would allow employees on flexible schedules to earn credit hours, on federal holidays, during the same hours as the employee’s normal tour of duty. The issue before the Authority was whether the proposal was non-negotiable as it conflicted with the Federal Employees Flexible and Compressed Work Schedules Act (the Act) and Office of Personnel Management (OPM) guidance on the topic. The Authority found that the proposal conflicted with the Act’s definition of credit hours, as informed by persuasive OPM guidance, and was therefore non-negotiable.

Member DuBester concurred in the Order dismissing the Union’s petition.

CASE DIGEST: *U.S. Dep’t of VA, Member Servs. Health Res. Ctr.*, 71 FLRA 311 (2019)

In this case, the Arbitrator determined that the Agency violated a provision in the parties’ collective-bargaining agreement that requires breaks for employees who use a particular computer-like screen for over one hour. The Arbitrator rejected the Agency’s more restrictive interpretation that employees must have continuously stared at the screen for over one hour in order to qualify for a break because the clear and unambiguous contract language did not include such a requirement. On exceptions, the Agency argued that the Arbitrator’s interpretation was implausible. The Authority denied the Agency’s essence argument because the Arbitrator’s interpretation was consistent with the plain language of the agreement.

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

CASE DIGEST: *U.S. Dep’t of VA, Veterans Benefits Admin.*, 71 FLRA 315 (2019) (Member DuBester concurring)

This case concerned an agency’s late response to a show-cause order (SCO). The Authority’s Office of Case Intake and Publication issued an SCO after the Agency filed incomplete exceptions prior to midnight on the thirtieth day after an arbitrator served the award,

and then continued to file portions of the exceptions after midnight and continuing for another two weeks. The Authority found that the response to the SCO was late; therefore, the entire exceptions were dismissed without a merits-based review.

Member DuBester concurred in the decision to dismiss the Agency's exceptions for the sole reason that they were untimely filed.

CASE DIGEST: *NFFE, Local 1998, IAMAW*, 71 FLRA 317 (2019) (Member DuBester concurring)

This case involved the negotiability of three proposals related to selecting employees for temporary-duty assignments and granting them compensatory time off for travel between Agency offices for those assignments. The Agency argued that the two proposals related to compensatory time off were outside the duty to bargain because they are specifically provided for by federal law and regulation, and that the proposal concerning temporary-duty assignments was covered by an existing agreement. The Authority found that the first two proposals were not negotiable because the Union failed to contest the Agency's specifically-provided-for argument. However, as the only issue that the Agency raised with regard to the other proposal was a bargaining-obligation dispute, that dispute was not properly before the Authority. Accordingly, the Authority dismissed the Union's petition as to all three proposals.

Based on the record before the Authority, Member DuBester concurred in the decision to dismiss the Union's petition.

CASE DIGEST: *U.S. Dep't of State, Passport Servs.*, 71 FLRA 327 (2019) (Member DuBester concurring; Chairman Kiko dissenting)

This case concerned a disagreement over whether the Union filed the grievance at the wrong step and, if so, whether that procedural error rendered the grievance not arbitrable. The Agency argued that the Arbitrator's award that found the grievance arbitrable failed to draw its essence from the parties' agreement because the Arbitrator ignored his own finding that the Union had filed the grievance at the wrong step. The Authority found that the award was not irrational, unfounded, implausible, or in manifest disregard of the agreement, and therefore denied the exception.

Based on the circumstances of the case, Member DuBester concurred in the decision to deny the Agency's exception.

Because the Arbitrator agreed with the Agency's interpretation of the parties' negotiated grievance procedure, Chairman Kiko would have found that the Arbitrator's reliance on equitable considerations to find the grievance arbitrable failed to draw its essence from the parties' agreement. Accordingly, she dissented.

CASE DIGEST: *Dep't of VA, Nashville Reg'l Office*, 71 FLRA 322 (2019) (Member Abbott concurring; Member DuBester dissenting)

This case concerned a grievance alleging that the Agency violated the Privacy Act by releasing unredacted performance appraisals of Union representatives, without their consent, to an Agency attorney in connection with the litigation of a grievance (the performance-standards grievance). The Arbitrator held that the Agency violated the parties' agreement and the Privacy Act because the release of the performance appraisals was unauthorized. The Authority found that § 552a(b)(1) of the Privacy Act permitted the release of the appraisals to the Agency's attorney because the attorney needed the unredacted performance appraisals to prepare the Agency's defenses in the performance-standards grievance. Accordingly, the Authority held that the Agency did not violate the Privacy Act and vacated the Arbitrator's award in its entirety.

Member Abbott wrote separately, in concurrence, to note in the circumstances of this case there was no release of information that would trigger the Privacy Act. Further, disputes arising under the Privacy Act do not fall within the meaning of a "grievance" under Section 7103(a)(9)(C)(ii) of the Statute because Privacy Act violations do not affect conditions of employment. Consequently, he would have found that the Arbitrator and the Authority had no jurisdiction over the grievance and that the grievants' only recourse was to utilize the Privacy Act's exclusive remedial scheme.

Member DuBester dissented. Applying the standard of review applicable to contrary-to-law exceptions, he would defer to the Arbitrator's factual findings supporting his conclusion that the Agency's attorney did not need the Union's unredacted performance appraisals to prepare the Agency's defense in the performance-standards grievance. Accordingly, he would deny the Agency's exception that the award was contrary to the Privacy Act, and would consider the Agency's remaining exceptions.

CASE DIGEST: *U.S. Dep't of HHS, Office of Civil Rights*, 71 FLRA 330 (2019) (Chairman Kiko concurring)

This case concerned the timeliness of the Agency's exceptions, which the Agency filed one day after the due date. The issue before the Authority was whether circumstances warranted equitably tolling the filing deadline. The Authority found that the Agency failed to demonstrate that extraordinary circumstances prevented it from timely filing its exceptions. Accordingly, the Authority dismissed the exceptions as untimely.

CASE DIGEST: *SSA and IFPTE, Ass'n of Admin. Law Judges*, 71 FLRA 333 (2019)

This case concerned whether the Privacy Act prohibited the Agency from disclosing redacted records related to misconduct allegations against the grievants. The grievance alleged that the Agency violated the parties' agreement by refusing to provide the requested information. The Arbitrator found that the request for the records was an informal information request under § 7114(b)(4) of the Federal Service Labor-Management Relations Statute; therefore, the Agency was required to disclose the requested information unless the Privacy Act otherwise prohibited

disclosure. The Arbitrator concluded that the Privacy Act did not prohibit disclosure, and that the Agency violated the parties' agreement by refusing to disclose the requested information.

On exceptions, the Agency raised nonfact and contrary to law arguments. The Authority denied the nonfact exception because it did not demonstrate that a central fact underlying the award was clearly erroneous. As to the contrary to law exception, the Authority found that the Privacy Act is subject to the Freedom of Information Act (FOIA) and that the redaction of documents to permit disclosure of nonexempt portions is appropriate under FIOA Exemption 6. The Authority further found that the Agency was required to disclose the information under FOIA Exemption 6 because the redacted disclosures would not be an unwarranted invasion of personal privacy. Accordingly, the Authority denied the contrary to law exception.

Member Abbott concurred in the decision to deny the Agency's exceptions because the Agency violated its agreement; therefore, he would not have reached any Privacy Act analysis.

Chairman Kiko dissented, finding that the Agency was not obligated to furnish any information under § 7114(b)(4) because the Agency never received a request from the Union or a Union representative. She would have set aside the award as inconsistent with § 7114(b)(4).

CASE DIGEST: *U.S. Dep't of the Air Force, Pope Air Force Base, N.C. & AFGE, Local 1770, 71 FLRA 338 (2019)*

This case originated in a grievance over the Agency's implementation of Alternative Work Schedules. Over the course of several years, the Arbitrator issued three awards, one sustaining the grievance, one finding the appropriate calculation of damages, and one granting attorney fees and costs. With respect to the fee award, the Arbitrator denied the Agency's request for an evidentiary hearing and awarded the Union all requested fees and costs. In its exceptions to the fee award, the Agency also raised exceptions to the earlier awards.

After dismissing the Agency's exceptions to the merits and damages awards as untimely, the Authority denied all of the Agency's exceptions to the fee award. First, the Authority denied as unsupported the Agency's argument that the fee award was contrary to law because the Arbitrator erred in determining the reasonableness of the fees. Next, the Authority found that the Agency's argument that it was denied a fair hearing constituted mere disagreement with the Arbitrator's evaluation of the evidence, and also denied the Agency's argument that the fee award was incomplete or ambiguous because the award was not impossible to implement. The Authority then rejected the Agency's argument that the Arbitrator exhibited bias, finding the mere fact that the Arbitrator found in favor of the Union did not demonstrate bias. Finally, the Authority rejected the Agency's argument that the fee award was contrary to public policy because the Agency failed to clearly demonstrate how the award violated an explicit and well-defined policy consideration.

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

CASE DIGEST: *AFGE, Local 2338*, 71 FLRA 343 (2019)

This case concerns a grievance claiming that the Agency violated the parties' agreement by failing to distribute overtime in a fair and equitable manner. The Arbitrator determined that the Agency violated the parties' agreement by not establishing or maintaining voluntary or involuntary overtime rosters for years, but he did not award backpay because he found that the Union did not present evidence showing which employees were available to work overtime and would have accepted the overtime work if it had been made available to them. The Authority found that the award was consistent with the Back-Pay Act (BPA) and Authority precedent because the Union failed to provide specific evidence showing which employees would have performed the overtime assignments at issue had the assignments been offered. The Authority also denied the Union's essence exception because the BPA is the only authority for a backpay award in this case, and the Union failed to cite to any contract provision supporting its claim that it is otherwise entitled to a backpay award.

CASE DIGEST: *AFGE, Local 2145 & U.S. Dep't of VA, Med. Ctr., Richmond, Va.*, 71 FLRA 346 (2019)

This case concerned grievants who successfully sought compensation for time and expenses they incurred while traveling during non-duty hours for mandatory training. The Arbitrator found that the Agency violated the parties' agreement by not reimbursing the grievants for travel expenses and not granting them compensatory time. The Authority found that the Arbitrator properly denied the Union's request for interest on travel expenses. However, the Authority found that the Arbitrator prematurely denied the Union's request for attorney fees before the Union had had the opportunity to file its petition. Accordingly, the Authority denied the Union's exceptions in part and granted its exception to the Arbitrator's denial of attorney fees. The Authority set aside the portion of the award that denied attorney fees and remanded the attorney fee issue to the parties for resubmission to the Arbitrator.

Member DuBester concurred in the decision to deny the Union's exceptions in part and to remand the attorney fee issue. However, he reiterated his disagreement with the modification of the standards that the majority directed the Arbitrator to apply in determining entitlement to attorney fees.

CASE DIGEST: *SSA & AFGE Local 1122*, 71 FLRA 352 (2019) Member DuBester Concurring

In this case, the Arbitrator found the grievance was arbitrable nearly four years after arbitration was invoked, despite a provision in the parties' agreement that grievances must be heard within two-and-a-half years. He found that Article 25 of the parties' agreement created a mutual obligation to schedule and hold a hearing and the Agency failed to fulfil its share of that obligation. The Agency argued that the Arbitrator's finding failed to draw its essence from the parties' agreement. The Authority found that as the Agency merely disagreed with the

Arbitrator's conclusions regarding Article 25, the Agency did not demonstrate that the award fails to draw its essence from the parties' agreement. Accordingly, the Authority denied the Agency's exception.

Member DuBester concurred, finding that the Arbitrator's conclusion falls within the deferential standard governing essence challenges to awards.

CASE DIGEST: *DOD, Domestic Dependent Elementary & Secondary Sch., Fort Buchanan, P.R.*, 71 FLRA 359 (2019) (Member DuBester concurring)

This case concerned the Agency's motion for reconsideration (motion) of the Authority's decision in *DOD, Domestic Dependent Elementary & Secondary Schools, Fort Buchanan, Puerto Rico*, 71 FLRA 127 (2019) (*Fort Buchanan*) (Member DuBester dissenting). In *Fort Buchanan*, the Authority found that the Agency violated § 7116(a)(1), (5), and (6) of the Federal Service Labor-Management Relations Statute when it refused to implement a collective-bargaining agreement that the Federal Service Impasses Panel imposed on the parties. However, the Authority found that the Agency was not obligated to implement unlawful provisions of the imposed agreement. In addition, consistent with the parties' requests, the Authority remanded certain matters to the parties for further bargaining. Because the Agency's motion asked the Authority to answer legal questions that were inconsequential to the outcome in *Fort Buchanan*, the Authority denied the motion.

Member DuBester concurred with the Authority's denial of the motion for reconsideration.

CASE DIGEST: *SSA & AFGE, Local 3627*, 71 FLRA 355 (2019) (Member DuBester concurring).

This case arises from the Agency's denial of the grievant's request to telework remotely. The Arbitrator found the Agency had not violated the parties' agreement in any aspect, yet the award provided for a remedy of moving expenses to the grievant. The Agency filed exceptions arguing the award failed to draw its essence from the parties' agreement. The Authority found that the award failed to draw its essence from the parties' agreement because issuing a remedy despite finding no violation in a grievance alleging only a contractual violation cannot be rationally derived from the parties' agreement.

Member DuBester concurred. He found that, under the circumstances of this case, the award fails to draw its essence from the parties' agreement.