

Federal Labor Relations Authority
Quarterly Digest Report: April 1, 2021 – June 30, 2021



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, Loc. 3368, 72 FLRA 158 (2021)*

The Arbitrator found that the Agency had just cause to suspend the grievant for two days for violating official-time rules in the parties' collective-bargaining agreement. The Union filed exceptions to the award based on nonfact, fair-hearing, essence and contrary-to-law grounds. The Authority found that the Union failed to establish that the award was deficient on any of these grounds and denied the Union's exceptions.

Member Abbott agreed with the outcome of the decision but stated in a personal footnote that key takeaway from this case is that Union officials are required to follow established rules on the request for and use of official time and that they may be disciplined when they fail to do so. Union officials are not insulated from discipline.

CASE DIGEST: *AFGE, Loc. 17, 72 FLRA 162 (2021) (Member Abbott concurring)*

The Arbitrator found that the Agency did not violate the parties' collective-bargaining agreement or § 7131 of the Federal Service Labor-Management Relations Statute by limiting official time to a negotiated contractual allocation. The Union filed exceptions to the award based on nonfact, essence and contrary-to-law grounds. The Authority found that the Union failed to establish that the award was deficient on any of these grounds and denied the exceptions.

Member Abbott concurred, noting the most significant take-away from this case, in his opinion, was the modernization of the Agency's time and attendance system and the mutual benefits to management and employees alike when improvements are implemented.

CASE DIGEST: *U.S. DHS, CBP, 72 FLRA 166 (2021)* (Chairman DuBester concurring)

The Agency failed to demonstrate extraordinary circumstances warranting interlocutory review. Accordingly, the Authority dismissed the exceptions, without prejudice.

Chairman DuBester concurred in the decision to dismiss the Agency's exceptions but noted his continued disagreement with the interlocutory standard.

CASE DIGEST: *U.S. Dep't of the Air Force, Edwards Air Force Base, Cal., 72 FLRA 168 (2021)* (Chairman DuBester concurring)

In this case, the Arbitrator found that the Agency violated the parties' agreement and an Agency policy when implementing a new performance-management system. As a remedy, the Arbitrator gave the Agency a six-month compliance deadline to take certain remedial measures. The Authority found that the Agency's two exceptions were based on a remedy that the Arbitrator did not award. Accordingly, the Authority denied the exceptions.

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

CASE DIGEST: *U.S. DHS, U.S. CBP, Laredo Sector, Laredo, Tex, 72 FLRA 171 (2021)* (Chairman DuBester dissenting)

The Arbitrator found that the Agency violated its own policy by temporarily revoking an agent's law enforcement status and assigning her to administrative duties during the pendency of a misconduct investigation – specifically pointing a service-issued firearm and a taser at a fellow agent. The Authority found that the Arbitrator's award was contrary to the Agency's policy because the award imposed a requirement which was not in the plain language of the policy. Therefore, the Authority granted the Agency's exceptions.

Chairman DuBester dissented. He found that the Arbitrator properly determined whether the Agency's decision satisfied the standard articulated in its policy.

CASE DIGEST: *AFGE, Loc. 2338, 72 FLRA 176 (2021)* (Member Abbott dissenting)

The Union filed a motion for reconsideration (motion) of the Authority's decision in *AFGE, Loc. 2338, 71 FLRA 1185 (2020)* (Member Abbott concurring), two days after the regulatory filing deadline. Because the Union did not demonstrate extraordinary circumstances for waiving the expired time limit, the Authority dismissed the motion as untimely filed.

Member Abbott dissented, believing the Union demonstrated extraordinary circumstances. Therefore, Member Abbott would have granted the Union's motion.

CASE DIGEST: *U.S. Dep't of HHS, Food & Drug Admin., San Antonio, Tex.*, 72 FLRA 179 (2021) (Chairman DuBester concurring)

The Agency filed exceptions to an award, arguing that it was based on a nonfact and failed to draw its essence from the parties' agreement. The Authority found that the Agency failed to demonstrate that the asserted nonfact was the "but for" reason the Arbitrator concluded the Agency violated the parties' agreement. The Authority also reaffirmed that mere disagreement with an arbitrator's interpretation does not demonstrate that an award fails to draw its essence from the parties' agreement.

Chairman DuBester concurred in the decision to deny the Agency's nonfact and essence exceptions.

CASE DIGEST: *NTEU*, 72 FLRA 182 (2021)

The Arbitrator found that the Agency did not violate the parties' agreements or the Federal Service Labor-Management Relations Statute by unilaterally implementing a change to the way that it evaluates certain employees' performance. The Union challenged the award on essence, exceeded authority, and contrary-to-law grounds. The Authority denied the exceptions, finding that the Arbitrator's award was a plausible interpretation of the parties' agreements, the award responded to the issue framed by the Arbitrator, and her conclusions were consistent with the applicable standard of law and Authority precedent.

CASE DIGEST: *AFGE, Loc. 3525*, 72 FLRA 188 (2021) (Chairman DuBester dissenting).

Proposals requiring an agency to take actions before implementing a change will be deemed moot when implementation has already occurred.

Chairman DuBester dissented, finding that the Agency had not met its burden to demonstrate that the case was moot because implementation had occurred.

CASE DIGEST: *U.S. Dep't of VA, John J. Pershing Veterans Admin. Med. Ctr.*, 72 FLRA 191 (2021) (Chairman DuBester concurring)

The Authority denied the Union's motion for reconsideration of *U.S. Department of VA, John J. Pershing Veterans Administration Medical Center*, 71 FLRA 947 (2020) (then-Member DuBester dissenting). The Authority denied the request because the Union's arguments were mere disagreement with the Authority's decision and called for the Authority to make the dissent the decision of the Authority. Neither of these arguments demonstrate extraordinary circumstances warranting reconsideration. Accordingly, the Authority denied the motion.

Chairman DuBester agreed that the Union's motion failed to establish extraordinary circumstances, but reaffirmed his view that the Arbitrator had correctly found that the Agency waived its right to challenge the grievance's arbitrability.

CASE DIGEST: *U.S. Dep't of VA, 72 FLRA 194 (2021) (Chairman DuBester dissenting)*

In this case, the Authority reaffirmed that a grievance filed on behalf of all bargaining-unit employees alleging violations of the Fair Labor Standards Act is not a class action because there is only one “plaintiff” – the Union. Here, the Authority granted interlocutory review of the Agency’s exceptions to the Arbitrator’s award finding the grievance procedurally arbitrable. However, the Authority denied the exceptions because the Agency failed to establish that the Arbitrator’s procedural-arbitrability determination was contrary to § 7121(b)(1)(A) and (B) of the Federal Service Labor-Management Relations Statute or that it failed to draw its essence from the parties’ agreement.

Chairman DuBester dissented, finding that the interlocutory exceptions should be dismissed because they failed to raise a plausible jurisdictional defect.

CASE DIGEST: *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo., 72 FLRA 200 (2021) (Member Abbott concurring)*

The Arbitrator sustained a grievance challenging a probationary employee’s termination. The Agency filed exceptions to the award contesting the Arbitrator’s jurisdiction to resolve the grievance on contrary-to-law grounds. The Authority found that the Arbitrator did not have jurisdiction to resolve the grievance because a grievance concerning the termination of a probationary employee is excluded from the scope of the negotiated grievance procedure. Accordingly, the Authority set aside the award.

Member Abbott concurred, agreeing with the Authority’s decision to set aside the award, but wrote separately to emphasize that the grievance should never have been filed.

CASE DIGEST: *U.S. Dep't of Educ., 72 FLRA 203 (2021) (Chairman DuBester concurring)*

Two Arbitrators, resolving separate but related grievances, determined that an earlier Union-filed unfair-labor-practice (ULP) charge did not bar the grievances under § 7116(d) of the Federal Service Labor-Management Relations Statute. However, both Arbitrators placed their respective grievances in abeyance pending resolution of that ULP. The Authority granted interlocutory review and found that the grievances were not barred by § 7116(d) because they were based on different legal theories than the earlier-filed ULP charge. Thus, the Authority found that the Arbitrators erred in placing the cases in abeyance and remanded the matters to the parties for resubmission to the Arbitrators.

Chairman DuBester concurred with the decision that § 7116(d) did not bar the grievances.

CASE DIGEST: *U.S. Dep't of the Army, Moncrief Army Health Clinic, Fort Jackson, S.C.*, 72 FLRA 207 (2021) (Member Abbott concurring; Chairman DuBester dissenting)

The Authority granted interlocutory review of exceptions challenging a preliminary arbitrability award because resolution of the exceptions could obviate the need for further proceedings. Because the Arbitrator found a grievance seeking personal relief for employees arbitrable under an article stating it could *not* be used for grievances seeking personal relief, the arbitrability determination conflicted with the plain wording of the parties' agreement, and the Authority granted the Agency's essence exception.

Member Abbott concurred, writing separately to address the Chairman's insistence that the Authority should only consider interlocutory exceptions when they raise a plausible jurisdictional defect.

Chairman DuBester dissented, noting that he would not grant interlocutory review but that the Arbitrator's analysis and interpretation of the parties' agreement should survive the Agency's essence challenge.

CASE DIGEST: *U.S. Dep't of VA*, 72 FLRA 212 (2021) (Chairman DuBester concurring in part)

In this case, the Union filed a national grievance alleging that the Agency violated the parties' collective-bargaining agreement and various provisions of the Federal Service Labor-Management Relations Statute by submitting pre-hearing briefs to arbitrators in advance of arbitration hearings. The Arbitrator sustained the Union's grievance in its entirety. The Agency argued on exceptions that the award was contrary to law, failed to draw its essence from the parties' agreement, and that the Arbitrator was biased. The Authority concluded that the award was so unclear that it could not determine whether it was contrary to law and remanded the award to the parties for resubmission to the Arbitrator, absent settlement, for further findings. The Authority found it unnecessary to resolve the Agency's essence and bias exceptions at this time.

Chairman DuBester concurred in part. He agreed with the decision to remand the award concerning the issue of whether the Agency had a statutory duty to bargain with the Union over its use of pre-hearing submissions, but did not agree that the Agency's essence exception should not be resolved before remanding.

CASE DIGEST: *AFGE, Loc. 2338*, 72 FLRA 216 (2021) (Chairman DuBester concurring)

In this case, the Arbitrator denied the Union's request for attorney fees because he found that the Union failed to meet any of the bases set forth in the Back Pay Act (BPA). The Authority denied the Union's exceptions to the fee award, finding that the Union failed to establish that the Arbitrator's conclusions were contrary to the BPA or contrary to public policy.

Chairman DuBester concurred in the decision to deny the exceptions.

CASE DIGEST: *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 72 FLRA 219 (2021) (Chairman DuBester concurring; Member Kiko concurring)

In this case, the Authority considered the Union's motion for reconsideration of the Authority's decision in *U.S. Department of VA, John J. Pershing VA Medical Center (VA)*, 71 FLRA 1141 (2020) (then-Member DuBester dissenting). In *VA*, the Authority had concluded that the grievance was contrary to 38 U.S.C. § 7422 and not substantively arbitrable. However, the Authority granted the Union's motion for reconsideration because it found that it erred in its legal conclusion when it held that the grievance was excluded from the negotiated grievance procedure pursuant to 38 U.S.C. § 7422(b). The Authority considered the merits of the Agency's additional exceptions that were not considered in *VA*. The Authority denied in part, and dismissed, in part, the Agency's exceptions.

Chairman DuBester agreed that the motion for reconsideration should be granted. He also agreed that the Agency's exceptions should be denied in part, and dismissed, in part.

Member Kiko agreed with granting the motion for reconsideration because of the Agency's failure to either obtain a § 7422 determination *or* argue that a previous § 7422 determination applied to the grievance.

CASE DIGEST: *NLRB*, 72 FLRA 226 (2021) (Member Abbott concurring; Chairman DuBester dissenting in part)

The Arbitrator found that the Agency violated a contractual duty to bargain because it changed a condition of employment by terminating the health services contract which provided employees with access to health service units at their workplace. The Arbitrator also found that the Agency violated the parties' agreement by cancelling the health services contract.

The Authority found that the Agency did not have a contractual duty to bargain because the elimination of the health service units did not change a condition of employment. The Authority also found that the Arbitrator's finding of a separate contractual violation drew its essence from the parties' agreement because she properly used a past practice to find that the parties' agreement required the Agency to provide employees with access to the health service units. However, the Authority vacated the remedy requiring reimbursement of the employees' medical expenses because it did not reasonably and proportionally relate to the Agency's violation of the parties' agreement. Therefore, the Authority vacated the award, in part.

Member Abbott concurred, emphasizing that a health service unit is a convenience and that the Federal Service Labor-Management Relations Statute does not make such a convenience a condition of employment that must be funded by taxpayers.

Chairman DuBester dissented in part, finding that the Agency's provision of health care services to its employees affects their working conditions and that the remedy directed by the Arbitrator was not contrary to law. Moreover, he noted that the majority's application of the new

standard for determining whether a change affects employees' working conditions improperly limits the scope of bargaining because the new standard lacks a plausible rationale.

CASE DIGEST: *U.S. DHS, U.S. CBP, Del Rio, Tex.*, 72 FLRA 236 (2021)
 (Chairman DuBester concurring; Member Abbott concurring;
 Member Kiko dissenting)

In this case, the Arbitrator found that the Agency violated the parties' agreement by using "catch-all" phrases to assign job duties to employees that are not regular and recurring to their work unit. The Authority denied the Agency's essence, nonfact, and management-rights exceptions because they did not establish any deficiencies in the award. However, because the Arbitrator awarded attorney fees before the Agency had an opportunity to respond to a petition for attorney fees, the Authority set aside the portion of the award that granted attorney fees and remanded the case to the parties for resubmission to the Arbitrator.

Chairman DuBester concurred in the decision to deny the Agency's exceptions, in part, grant the Agency's exception concerning the award of attorney fees, and to remand to the parties.

Member Abbott concurred in the decision and wrote separately to emphasize that contracts have consequences. Because the Agency did not argue that it agreed to a provision that is beyond the scope of what the Agency can legally agree to, Member Abbott believed he was constrained to conclude that the Agency violated the parties' agreement.

Member Kiko dissented because she found the award failed to draw its essence from the parties' agreement. Because the Agency determined that passenger processing would be a regular and recurring cargo-unit duty, consistent with its contractual discretion to create and design work units, the Agency did not violate the parties' agreement and Member Kiko would set aside the award.

CASE DIGEST: *U.S. Dep't of VA, Med. Ctr., Kan. City, Mo.* 72 FLRA 243 (2021)
 (Chairman DuBester dissenting)

The Arbitrator found that the Agency violated the parties' collective-bargaining agreement and a memorandum of understanding when it stopped participating in labor-management meetings. The Agency excepted to the award as failing to draw its essence from the parties' agreement and being contrary to Executive Order No. 13,812 (EO 13,812). The Authority granted the exceptions, finding that the executive order, and implementation guidance from the Office of Personnel Management, allowed the Agency to nullify a provision in the parties' agreement that was based on an earlier executive order rescinded by EO 13,812. The Authority also noted that, because the relevant provision in the agreement was entirely voluntary, ceasing participation in the meetings did not constitute abrogation.

Chairman DuBester dissented, finding that the Arbitrator reasonably concluded that the Agency violated the parties' agreements.

CASE DIGEST: *AFGE, Council 170*, 72 FLRA 250 (2021) (Chairman DuBester concurring)

Because the Agency failed to support its argument that the Union's three proposals are nonnegotiable, the Authority determined that the Agency waived its arguments pursuant to the Authority's Regulations.

Chairman DuBester concurred in the Order directing the Agency to bargain over the Union's proposals.

CASE DIGEST: *U.S. DHS, U.S. CBP, U.S. Border Patrol, El Paso Sector, El Paso Tex.*, 71 FLRA 253 (2021) (Member Abbott dissenting in part)

The Arbitrator found that the Agency violated the parties' agreement by retaliating against the grievant for pursuing grievances on behalf of herself and other employees. The Agency filed several exceptions to the award, including an argument challenging whether the Arbitrator exceeded his authority by reaching an issue that was not before him. After acknowledging that the Union withdrew the issue of assignment trading at arbitration, the Arbitrator made findings and awarded remedies concerning assignment trading. Therefore, the Authority granted the Agency's exceeded-authority exception, in part, and set aside those findings and remedies. However, the Authority denied the Agency's remaining exceptions for failing to establish that the award was otherwise deficient.

Member Abbott dissented in part, reaching a different conclusion on the Agency's ambiguity exception.

CASE DIGEST: *USDA, Forest Serv., Albuquerque Serv. Ctr., Human Res. Mgmt., Albuquerque, N.M.* 72 FLRA 261 (2021) (Chairman DuBester dissenting)

This case concerned the Union's application for review of an FLRA Regional Director's (RD's) decision finding, among other things, that certain Human Resources employees were excluded from a bargaining unit because they were "engaged in personnel work in other than a purely clerical capacity" within the meaning of § 7112(b)(3) of the Federal Service Labor-Management Relations Statute. In making that finding, the RD applied the analysis set forth in the Authority's decision in *U.S. Department of VA, Kansas City VA Medical Center, Kansas City, Missouri (Kansas City VA)*, 70 FLRA 465 (2018) (then-Member DuBester dissenting). On review, the Authority found that the Union failed to demonstrate that the Authority should reconsider *Kansas City VA*. Therefore, the Authority denied the application for review.

Chairman DuBester dissented, stating that he would grant the Union's application for review and reconsider *Kansas City VA*.

CASE DIGEST: *Indep. Union of Pension Emp. for Democracy & Just.*, 72 FLRA 281 (2021) (Chairman DuBester dissenting in part; Member Abbott dissenting in part)

In this case, the Authority reminds federal-sector arbitrators and agency and union practitioners that when addressing issues concerning interference with management rights under § 7106 of the Federal Service Labor-Management Relations Statute, it is imperative to specify which management right is at issue. Here, the Arbitrator found that the Agency did not unlawfully repudiate the parties' agreement by terminating a special-achievement-awards program, because two provisions interfered with management's rights. The Authority affirmed the Arbitrator's conclusion that a provision, which mandated a percentage of awards funds to be allocated for the special-achievement-awards program, interfered with management's right to determine its budget. However, the Authority set aside the Arbitrator's conclusion that another provision interfered with the right to "determine the criteria for awarding employees" because that is not an enumerated right under § 7106.

Chairman DuBester partially dissented, finding that the Arbitrator erred by concluding that Article 3, Section 2(D) of the parties' collective-bargaining agreement interferes with management's right to determine its budget. In Chairman DuBester's view, this provision does not interfere with this management right because it does not dictate the amount the Agency must allocate towards its overall awards budget, but instead merely determines the portion of this budgeted amount that will be devoted to a particular type of award.

Member Abbott dissented in part because he could not join the majority in their conclusion that the Arbitrator failed to identify a management right under § 7106 that was impacted by Article 3, Section 2(A). Accordingly, Member Abbott believed the Arbitrator *did* identify a management right impacted by Section 2(A) and would have denied the Union's exception.

CASE DIGEST: *U.S. Dep't of VA*, 72 FLRA 287 (2021) (Member Abbott concurring)

This case concerned the Agency's implementation of a presidential executive order (EO) about official time. The Arbitrator found that a continuance-clause extension of the parties' agreement occurred before the EO was prescribed, so the Agency's repudiation of the parties' official-time provisions and enforcement of the EO violated the agreement, the Federal Service Labor-Management Relations Statute (the Statute), and the EO itself. On exceptions from the Agency, the Authority found that § 7116(a)(7) of the Statute prohibited the Agency from enforcing the EO while conflicting provisions of the agreement were in effect. And the Authority rejected arguments that the Agency had the obligation or the power to enforce the EO in the same manner as a statute, or a government-wide regulation that was prescribed before the agreement's term began.

Member Abbott concurred, emphasizing that the decision was consistent with *USDA, Office of General Counsel*, 71 FLRA 986 (2020) (then-Member DuBester dissenting).

CASE DIGEST: *U.S. DHS, U.S. CBP, El Paso, Tex.*, 72 FLRA 293 (2021) (Member Kiko concurring; Member Abbott concurring)

The Arbitrator sustained the Union’s grievance alleging that the Agency violated the parties’ master agreement by using an inapplicable standard to deny two hours of official time. The Agency filed exceptions to the award on nonfact, essence, and contrary-to-law grounds. Because the Agency did not establish that the award was deficient, the Authority denied the Agency’s exceptions.

Member Kiko agreed that the Agency’s exceptions failed to establish that the award was deficient. However, Member Kiko wrote separately to address issues arising from the parties’ failure to clarify the term “reasonable,” as applied to official time.

Member Abbott concurred, agreeing with the majority and the points raised in his colleague’s concurrence. However, he wrote separately to emphasize the parties’ waste of taxpayer money pursuing a grievance that only provided a minimal benefit to one individual.

CASE DIGEST: *NATCA*, 72 FLRA 299 (2021)

The Arbitrator found that the Agency did not violate the parties’ collective-bargaining agreement when it converted an employee’s sick-leave request to an approved leave-without-pay request because he had insufficient accrued sick leave. In its exceptions, the Union argued that Article 25 of the parties’ agreement required the Agency to grant the employee annual leave instead. The Arbitrator found that Article 25 only applied to employees who had accrued sufficient sick leave to cover their sick-leave requests. Because the Union failed to show that this interpretation failed to draw its essence, the Authority denied the Union’s exception.

CASE DIGEST: *Ass’n of Admin. Law Judges, IFPTE*, 72 FLRA 302 (2021)
(Member Abbott concurring)

The Arbitrator found that the Agency did not violate the parties’ collective-bargaining agreement or § 7116(a)(1) or (5) of the Federal Service Labor-Management Relations Statute (the Statute) when it gave the Union notice of its intent to reduce the maximum size of office space for Administrative Law Judges and requested to bargain over the change. The Union filed exceptions to the award on contrary-to-law, essence, and exceeded-authority grounds. The Authority found that the Union failed to establish that the award was deficient on any of those grounds and denied the exceptions.

Member Abbott concurred, agreeing with the majority’s decision to deny the Union’s exceptions. However, because Member Abbott believed the Sidebar unavoidably conflicted with 5 U.S.C § 7106(a) of the Statute, he wrote separately.

CASE DIGEST: *NFFE, Loc. 1953*, 72 FLRA 306 (2021)

The Arbitrator denied the Union's grievance challenging the Agency's order requiring dual-status Air Reserve Technicians to wear military uniforms while working in civilian status. The Union filed exceptions to the Arbitrator's award on contrary-to-law grounds. The Authority found that the award was not contrary to law and denied the exception.

CASE DIGEST: *U.S. Dep't of the Treasury, IRS*, 72 FLRA 308 (Member Abbott concurring; Chairman DuBester dissenting)

The Authority held that § 132(f) of the Internal Revenue Code (Tax Code) is not a law affecting conditions of employment, because it has only an incidental impact on working conditions of employees. Accordingly, the Authority found that the Arbitrator did not have jurisdiction to address whether the Agency was permitted to withhold taxes, under the Tax Code, when retroactively reimbursing employees' transit-subsidy payments.

Member Abbott concurred, agreeing that the Arbitrator did not have jurisdiction. Member Abbott wrote separately to discuss the outer edge to the reach of the Statute.

Chairman DuBester dissented, finding that the Arbitrator clearly had jurisdiction to resolve the Union's grievance, which alleged that the Agency violated the Federal Service Labor-Management Relations Statute by failing to comply with the remedial terms of earlier arbitration awards. The Arbitrator's analysis of whether the Back Pay Act required taxation of the payments the Agency owed to employees pursuant to the awards – and his reference to the relevant tax code provisions in answering that question – did not divest him of jurisdiction over the dispute.

CASE DIGEST: *U.S. Dep't of Educ., Fed. Student Aid*, 72 FLRA 316 (2021)
(Chairman DuBester concurring)

In an email, the Arbitrator notified the parties that he was placing the arbitration in abeyance pending resolution of a related unfair-labor-practice charge. The Agency excepted to the Arbitrator's email on several grounds. Because the Agency conceded that none of its exceptions would obviate the need for further proceedings, the Authority dismissed the exceptions as interlocutory.

Chairman DuBester concurred, finding that the Agency's exceptions failed to allege a plausible jurisdictional defect and, therefore, did not demonstrate extraordinary circumstances warranting interlocutory review.

CASE DIGEST: *U.S. Dep't of the Air Force, Warner Robins Air Logistics Ctr.*, 72 FLRA 319 (2021) (Chairman DuBester dissenting)

The Authority denied the Union's motion for reconsideration of *U.S. Department of the Air Force, Warner Robins Air Logistics Center*, 71 FLRA 758 (2020) (then-Member DuBester dissenting), because the Union did not demonstrate extraordinary circumstances warranting

reconsideration. The Authority found that the Union's arguments were mere disagreement with the Authority's decision, and therefore, did not demonstrate extraordinary circumstances warranting reconsideration.

Chairman DuBester dissented, noting that the Union's motion explained that the earlier-filed equal employment opportunity complaint and the grievance concerned different matters. Therefore, he would grant the Union's motion.

CASE DIGEST: *U.S. Dep't of VA, John J. Pershing VA Med. Ctr, Poplar Bluff, Mo.*, 72 FLRA 323 (Chairman DuBester concurring)

The Arbitrator issued an award finding that the Agency violated the terms of the parties' agreement by wrongfully denying requests for use of official time. The Authority concluded, however, that the Agency failed to demonstrate that the Arbitrator's award was contrary to law or otherwise deficient. Accordingly, the Authority denied its exceptions to the award. The Authority also dismissed the Agency's exceptions to the supplemental award implementing the remedy, because the Agency had the opportunity to present its arguments to the Arbitrator but did not do so.

Chairman DuBester concurred in the decision to deny the Agency's exceptions to the award and dismiss its exceptions to the supplemental award.

CASE DIGEST: *Indep. Union of Pension Emps. for Democracy & Just.*, 72 FLRA 328 (2021)

The Arbitrator found that the Union's grievance was untimely and must be dismissed. The Union filed exceptions to the award on contrary-to-law grounds. The Authority found that the Union failed to demonstrate that the award was contrary to law and denied the exception.

CASE DIGEST: *Ass'n of Admin. Law Judges, IFPTE*, 72 FLRA 330 (2021)
(Chairman DuBester concurring; Member Abbott dissenting in part)

Because the Arbitrator erroneously concluded that he lacked the authority to award the requested relief, the Authority found the award contrary to law, in part, and remanded the matter to the parties for further action consistent with the decision.

Chairman DuBester concurred that the award was contrary to law, in part, and in the order remanding the matter to the parties.

Member Abbott dissented in part, finding it unnecessary to remand the matter to the parties. Instead, he would modify the award to include a cease and desist order. However, he would deny the Union's request for a retroactive bargaining order because it is inappropriate in the instant dispute.

CASE DIGEST: *NLRB*, 72 FLRA 334 (2021)

The Arbitrator issued an award finding arbitrable two grievances alleging bad-faith bargaining by the Agency. After a hearing on the merits, he issued a separate award sustaining one of the Union's allegations of bad-faith bargaining and denying, as moot, the Union's allegation that the Agency committed an unfair-labor practice (ULP) when it submitted permissive subjects of bargaining to the Federal Service Impasses Panel (FSIP). The Authority denied the Agency's exceptions to both awards and granted the Union's contrary-to-law exception to the merits award. Because the Arbitrator had jurisdiction to resolve the Union's ULP claims, the Authority found that the Arbitrator could determine whether the Agency brought permissive subjects of bargaining to FSIP. Accordingly, the Authority remanded the case for further proceedings.

CASE DIGEST: *U.S. DHS, U.S. CBP*, 72 FLRA 340 (2021) (Chairman DuBester concurring; Member Kiko concurring)

The Authority reaffirms that if there is a postponement in the determination of an issue or instructions to the parties to reach an agreement and determine remedies for the unresolved issues while the Arbitrator retains jurisdiction, then the Arbitrator's award is not final. Accordingly, the Agency's exceptions are considered interlocutory. Because we find that extraordinary circumstances do not warrant immediate review of the Agency's exceptions, we dismiss them.

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

Member Kiko concurred in the decision to dismiss the exceptions. Prior to dismissal, she would have first followed the Authority's standard practice of issuing an order directing the Agency to show cause why its decisions should not be dismissed as interlocutory.

CASE DIGEST: *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Dublin Cal.*, 72 FLRA 343 (2021) (Member Abbott concurring; Chairman DuBester dissenting, in part)

In this case, the Arbitrator found the grievance timely filed and that the Agency violated the parties' agreement by not equitably distributing overtime. The Authority found that the Arbitrator's arbitrability finding failed, in part, to draw its essence from the parties' agreement. Accordingly, the Authority granted the Agency's essence exception, in part, and denied the remaining exceptions.

Member Abbott concurred, joining in the decision and order because it sufficiently demonstrated that the Authority reject the Agency's only merits-based exception to the Arbitrator's decision. However, Member Abbott wrote separately regarding the key onus of the parties to not sleep on their rights and to safeguard their own interests.

Chairman DuBester dissented, finding that the majority failed to defer to the Arbitrator's undisturbed factual findings. And he would find that, applying those factual findings, her procedural-arbitrability determination was a plausible interpretation of the parties' agreement.

CASE DIGEST: *Nat'l Guard Bureau, Air Nat'l Guard Readiness Ctr.*, 72 FLRA 350 (2021) (Member Abbott concurring; Chairman DuBester dissenting, in part)

This case concerned a proposed nationwide unit of social workers. The Union filed a petition asking an FLRA Regional Director (RD) to order an election to determine whether the social workers wished to have the Union recognized as their exclusive representative. The RD found that the proposed unit was not appropriate because the social workers did not share a community of interest, and she dismissed the petition. The Union filed an application for review of the RD's decision.

The Authority agreed with dismissing the petition but rested its decision on a more basic ground. Because the social workers were employees of both the National Guard Bureau and the Adjutants General of their respective states, the Authority found that recognizing the proposed unit would create bargaining obligations that infringed on the sovereign immunity of every state in the union. Accordingly, the Authority denied the application for review and dismissed the petition for lack of jurisdiction.

Member Abbott concurred, noting his belief the Statute does not permit the FLRA to organize state employees, even when the alleged employer is a federal agency.

Chairman DuBester dissented in part, agreeing with the RD's conclusion that the social workers do not share a community of interest, but disagreeing with the majority that the Authority lacks jurisdiction over the Union's petition.

CASE DIGEST: *U.S. Dep't of the Army*, 72 FLRA 363 (2021) (Member Abbott concurring; Chairman DuBester dissenting)

The grievance in this case alleged that the Agency violated the Fair Labor Standards Act (FLSA), the Federal Employees Pay Act, the parties' collective bargaining agreement, and several federal regulations, and the grievance included a request for information. After the Arbitrator found the grievance arbitrable and resolved some of the FLSA issues, the Agency filed interlocutory exceptions. The Authority dismissed most arguments because they could not obviate the need for further proceedings. But the Authority granted interlocutory review of two contentions that could end the proceedings – one contesting the grievance's arbitrability, and the other challenging the Union's ability to pursue its grievance lawfully. Finding that both of those arguments lacked merit, the Authority denied them.

Member Abbott concurred, writing separately to express his opinion that the Authority should not limit consideration of interlocutory reviews to "extraordinary circumstances."

Chairman DuBester dissented, finding that none of the Agency's exceptions raised extraordinary circumstances warranting interlocutory review.

CASE DIGEST: *U.S. Dep't of VA., Nashville Reg'l Off., VA Benefits Admin.*, 72 FLRA 371 (2021) (Member Abbott concurring)

After regularly permitting the grievant – a disabled veteran – to take leave without pay (LWOP) for medical treatment, the Agency informed him that he would need to provide certain medical documentation to receive future approvals. Subsequently, the Agency charged him as absent without leave (AWOL). The Arbitrator found that the parties' agreement required the Agency to grant the grievant LWOP for his service-connected treatments, and that the Agency had impermissibly changed a past practice. On exceptions, the Agency argued that the award was contrary to an executive order requiring agencies to grant LWOP to disabled veterans under certain circumstances. Because no conflict existed between the award and the executive order, the Authority denied the exception.

CASE DIGEST: *Fraternal Ord. of Police, D.C. Lodge 1, NDW Labor Comm.*, 72 FLRA 377 (2021) (Member Abbott concurring)

The Union filed a petition for review (petition) concerning the negotiability of one proposal that would limit the chain of command for the Agency's civilian police force to civilian employees. The Authority found that the proposal affected management's rights to determine its organization under 5 U.S.C. § 7106(a)(1) and assign work under § 7106(a)(2)(B), and the Union did not demonstrate that the proposal was negotiable under 5 U.S.C. § 7106(b)(2) or (3). Therefore, the Authority found that the proposal was outside the duty to bargain and dismissed the petition.

Member Abbott concurred, agreeing that the Union's proposal was not negotiable. However, Member Abbott wrote separately to express his view that severance is not appropriate in this petition, or any petition.

CASE DIGEST: *U.S. DOD Educ. Activity*, 72 FLRA 382 (2021) (Member Kiko concurring; Member Abbott dissenting)

On remand from the U.S. Court of Appeals for the District of Columbia Circuit, the Authority found that the Agency's sole exception to the merits of the Judge's decision constituted an impermissible collateral attack on an earlier, and now final and binding, arbitration award.

Member Kiko concurred, agreeing that the Agency's exception constituted a collateral attack on a final and binding award. She wrote separately to note that, if the Agency is truly unable to comply with the award, the parties must work together to find an alternative means of satisfying the award.

Member Abbott dissented because, in his view, the Agency's arguments were defenses against the ULP, not collateral attacks on the Arbitrator's award.

CASE DIGEST: *AFGE, Loc. 3954*, 72 FLRA 403 (2021) (Member Abbott concurring)

The Arbitrator failed to address the merits of the Union's grievance alleging that the Agency committed an unfair labor practice because she found that the grievance was an improper collateral attack on another arbitrator's jurisdiction and moot. The Authority found that the Arbitrator's determination that the Union could not grieve the alleged violations was contrary to law.

Member Abbott concurred and wrote separately to highlight issues that arise when a union is permitted to file multiple grievances that concern the same factual matters and allege similar legal allegations.

CASE DIGEST: *U.S. Dep't of VA, Veterans Benefits Admin.*, 72 FLRA 407
(Chairman DuBester concurring; Member Kiko dissenting)

The Authority denied the Agency's motion for reconsideration of *U.S. Department of VA, Veterans Benefits Administration*, 71 FLRA 1113 (2020) (Chairman Kiko dissenting in part), because the Agency did not demonstrate extraordinary circumstances warranting reconsideration. The Authority found that the Agency's arguments were mere disagreement with and attempts to relitigate the Authority's conclusion, and therefore, did not demonstrate extraordinary circumstances warranting reconsideration.

Chairman DuBester concurred, agreeing with the order denying the Agency's motion for reconsideration and request for stay.

Consistent with her dissenting opinion in the underlying decision, Member Kiko would have granted the motion for reconsideration and set aside the award as contrary to the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017.

CASE DIGEST: *U.S. DHS, U.S. CBP, L.A., Cal.*, 72 FLRA 411 (2021)

The Arbitrator found that the Union's grievance filed on behalf of two grievants is not moot despite their voluntary retirements from the Agency, and the Agency filed exceptions. The Authority found that the Arbitrator exceeded her authority because, in determining that the grievance was not moot, she considered issues not specific to the two named grievants. Accordingly, the Authority set aside the award.