

**Federal Labor Relations Authority**  
**Quarterly Digest Report: October 1, 2021 – December 31, 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:** *U.S. Dep't of VA*, 72 FLRA 494 (2021) (Chairman DuBester concurring)

The Authority dismissed the Agency's essence exception to the Arbitrator's interim award because it did not demonstrate extraordinary circumstances warranting interlocutory review.

Chairman DuBester concurred in the decision to dismiss the exception without prejudice.

**CASE DIGEST:** *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Aliceville, Ala.*, 72 FLRA 497 (2021) (Chairman DuBester dissenting)

Because the Arbitrator's procedural-arbitrability determination disregarded the plain wording of the parties' negotiated grievance procedure, the Authority granted the Agency's essence exception and vacated the award.

Chairman DuBester dissented, finding that the Arbitrator's procedural-arbitrability determination was a plausible interpretation of the parties' agreement.

**CASE DIGEST:** *AFGE, Loc. 1741*, 72 FLRA 501 (2021) (Member Abbott dissenting)

The Arbitrator denied the Union's grievance as procedurally non-arbitrable because it lacked the specificity required under the parties' collective-bargaining agreement. The Union filed exceptions to the award on essence, exceeds-authority, fair-hearing, and contrary-to-law grounds. The Authority found that the award was not deficient on any of those grounds and denied the exceptions.

Member Abbott dissented, as he would have vacated the Arbitrator's award to the extent that it dismissed the Union's grievance for lacking specificity.

**CASE DIGEST:** *U.S. Dep't of the Army, Moncrief Army Health Clinic, Fort Jackson, S.C.*, 72 FLRA 506 (2021) (Chairman DuBester dissenting)

The Union requested that the Authority reconsider its decision in *U.S. Department of the Army, Moncrief Army Health Clinic, Fort Jackson, S.C.*, 72 FLRA 207 (2021) (*Moncrief*) (Member Abbott concurring; Chairman DuBester dissenting). Because the Union's motion did not establish extraordinary circumstances warranting reconsideration, the Authority denied it.

Chairman DuBester dissented, noting his continued disagreement with the majority's decision in *Moncrief* to vacate the Arbitrator's arbitrability award.

**CASE DIGEST:** *Dep't of the Navy, Commander, Navy Region Mid-Atl.*, 72 FLRA 510 (2021) (Chairman DuBester dissenting)

This case concerned the Agency's application for review of an FLRA Regional Director's (RD's) decision finding that a consolidation of seven bargaining-units was not appropriate under § 7112(d) of the Federal Service Labor-Management Relations Statute (the Statute) because the Agency's petition did not identify a union who is the exclusive representative for all seven bargaining-units. On review, the Authority found that a petition for consolidation may be granted where some units are exclusively represented by various union locals and other units are exclusively represented by those locals' national organization. Therefore, because consolidation can be granted over the objection of the union as long as the petitioned-for unit is appropriate, the Authority granted the application for review and remanded the petition to the RD.

Chairman DuBester dissented, finding that the RD properly applied Authority precedent to deny the Agency's application.

**CASE DIGEST:** *U.S. Dep't of VA*, 72 FLRA 518 (2021) (Chairman DuBester concurring)

The Agency argued that the award failed to draw its essence from the parties' agreement, was based on nonfacts, and was contrary to the Federal Service Labor-Management Relations Statute. The Authority dismissed one of the Agency's exceptions because it was barred by §§ 2425.4(c) and 2429.5 of the Authority's Regulations. The Authority denied the remainder of the Agency's exceptions because they failed to demonstrate that the award was deficient.

Chairman DuBester concurred in the decision to dismiss the Agency's exceptions in part, and deny them in part.

**CASE DIGEST:** *U.S. Dep't of HHS*, 72 FLRA 522 (2021) (Chairman DuBester concurring)

In this case, the Arbitrator found that the Agency violated the parties' collective-bargaining agreement and the Federal Service Labor-Management Relations Statute by failing to promptly start and stop dues withholding, and ordered the Agency to refund

improperly withheld dues to an employee, remit to the Union dues not properly withheld, and grant affected bargaining-unit employees a waiver from reimbursement of dues not properly withheld. The Agency filed exceptions on contrary-to-law, exceeds-authority, and essence grounds. The Authority found that the Agency failed to establish that the award was contrary to law and denied or dismissed several of the exceptions. However, the Authority determined that the Arbitrator's findings were insufficient to enable the Authority to resolve one of the Agency's essence exceptions, and remanded the case for further action consistent with its decision.

Chairman DuBester concurred in the decision to dismiss the Agency's exceptions in part, deny them in part, and remand in part.

**CASE DIGEST:**     *U.S. Dep't of the Air Force, Scott Air Force Base, Ill.*, 72 FLRA 526 (2021) (Chairman DuBester concurring)

The Authority dismissed, in part, and denied, in part, exceptions to a merits arbitration award that required the Agency to abide by a contractual commitment that employees' scheduled, required training would occur during their normally assigned shifts unless special circumstances necessitated otherwise. The Authority also denied an exception contending that an attorney-fee award was premature because it was issued before the merits award was final and binding.

Chairman DuBester concurred, but noted his continued disagreement with the test set forth in *U.S. DOJ, Federal BOP*, 70 FLRA 398 (2018) (then-Member DuBester dissenting), for evaluating whether an award impermissibly affects a management right.

**CASE DIGEST:**     *U.S. Dep't of the Navy Commander, Navy Region Mid-Atl., Naval Weapons Station Earle*, 72 FLRA 533 (2021) (Chairman DuBester concurring)

The Agency filed a contrary-to-law exception to the Arbitrator's award granting a year of backpay for two grievants' temporary assignment to higher-graded positions. Because a backpay remedy for a temporary, noncompetitive promotion that exceeds 120 days is inconsistent with 5 C.F.R. § 335.103(c), the award is contrary to law. Accordingly, the Authority granted the Agency's exception and modified the award.

Chairman DuBester concurred. He noted his continued disagreement with the standard applied by the majority to determine whether a grievance regarding an employee's entitlement to a temporary promotion concerns classification within the meaning of 5 U.S.C. § 7121(c)(5), but agreed that the grievance in this case did not concern classification.

**CASE DIGEST:**     *NTEU*, 72 FLRA 537 (2021) (Chairman DuBester concurring)

After Congress passed the Administrative Leave Act of 2016 (the Act), and the Office of Personnel Management issued implementing regulations, the Agency informed the Union that employees would no longer be eligible for administrative leave when severe weather caused closures of child-care facilities, as provided for in parties' collective-bargaining agreement. The

Arbitrator denied the Union's grievance challenging the Agency's change in policy. Finding that the Act permitted the Agency to discontinue granting administrative leave for child care in weather-and-safety circumstances, the Authority denied the Union's exceptions.

Chairman DuBester concurred in the denial of the Union's exceptions.

**CASE DIGEST:** *U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 72 FLRA 541 (2021) (Member Abbott concurring; Chairman DuBester concurring in part and dissenting in part)

The Arbitrator faulted the Agency's improper selection process but also found the evidence insufficient to show that the grievant should have been selected. On exceptions, the Authority found that: (1) the Arbitrator exceeded his authority by resolving an information-request dispute that was not part of the grievance; (2) the awarded backpay and front pay were contrary to law; and (3) the Agency's other challenges lacked merit.

Member Abbott concurred and wrote separately to express his view that the Union's request was simply an evidentiary matter that should have been resolved before the hearing.

Chairman DuBester concurred with the majority in that the monetary remedies were contrary to law and that the Agency's essence exception and management-rights argument lacked merit. However, he dissented from the majority's conclusion that the Arbitrator exceeded his authority. In his view, the Union expressly submitted the information-request issue to the Arbitrator and, therefore, the Arbitrator acted within his authority by addressing it.

**CASE DIGEST:** *SSA, Off. of the Gen. Couns.*, 72 FLRA 554 (2021)

The Agency challenged the Arbitrator's determination that the grievance was procedurally arbitrable on essence grounds. The Authority found that the Arbitrator's procedural-arbitrability determination did not represent a plausible interpretation of the parties' agreement and set aside the award.

**CASE DIGEST:** *NTEU*, 72 FLRA 556 (2021) (Member Abbott concurring; Chairman DuBester dissenting)

This case concerned the negotiability of two proposals pertaining to the assignment of Contractor Management Module (the Module) work to bargaining-unit employees (BUE) and the evaluations of BUEs assigned Module work. The Agency argued that the proposals were outside the duty to bargain because they were covered by the parties' agreement. The Authority found that both proposals concerned the same subject matter as certain provisions in the parties' agreement. Moreover, because the Union failed to demonstrate that the proposals were not covered by the parties' agreement, the Authority found that the proposals were outside the duty to bargain. Accordingly, the Authority dismissed the Union's petition as to both proposals.

Chairman DuBester dissented, finding that the proposals were not covered by the parties' agreement because the pertinent provisions of the agreement did not address how the new

module's adoption would be implemented or affect employees. In his view, the parties should be allowed to clarify these matters through the bargaining process rather than their negotiated grievance procedure.

Member Abbott concurred with the decision, but wrote separately to address several concerns that he had with both the Authority's covered by doctrine and the new standards advanced by the dissent. Rather than radically changing the covered by doctrine, he believed that the doctrine simply must be expanded to preclude those matters that were discussed by the parties during negotiations but were, for whatever reason, not included as a provision in the final agreement.

**CASE DIGEST:**     *AFGE, Loc. 2516, 72 FLRA 567 (2021)*

The Arbitrator denied the Union's grievance because the evidence failed to sufficiently demonstrate that the Agency violated the parties' collective-bargaining agreement or law. The Union filed exceptions to the award on nonfact, contrary-to-law, contrary-to-agency-regulation, contradictory, and essence grounds. The Authority found that the award was not deficient on any of those grounds and denied the exceptions.

**CASE DIGEST:**     *Indep. Union of Pension Emps. for Democracy & Just., 72 FLRA 571 (2021) (Chairman DuBester concurring)*

The Agency requested that the Authority reconsider its decision in *Independent Union of Pension Employees for Democracy and Justice, 72 FLRA 281 (2021) (Chairman DuBester dissenting in part; Member Abbott dissenting in part)*. Because the Agency's motion did not establish extraordinary circumstances warranting reconsideration, the Authority denied it.

Chairman DuBester concurred that that the Agency did not demonstrate the extraordinary circumstances necessary to grant a motion for reconsideration.

**CASE DIGEST:**     *U.S. Dep't of the Army, Letterkenny Army Depot, Chambersburg, Pa., 72 FLRA 575 (2021), (Chairman DuBester concurring in part and dissenting part; Member Abbott dissenting in part)*

In this case, the Agency filed interlocutory exceptions to the Arbitrator's award finding that the grievance was arbitrable and that certain employees were wrongly classified as exempt under the Fair Labor Standards Act. The Authority dismissed the Union's exceptions and those of the Agency's exceptions that could not obviate the need for further proceedings, but granted interlocutory review of the Agency's remaining exceptions. Finding that the Agency's remaining exceptions did not establish that the award was deficient, the Authority denied them.

Chairman DuBester concurred in part, and dissented in part. He agreed with the decision to dismiss the Union's exceptions, and some of the Agency's exceptions, but on the basis that they failed to raise plausible jurisdictional defects. However, in his view, the remainder of the Agency's exceptions should have been dismissed because none raised plausible jurisdictional

defects, the resolution of which would advance the ultimate disposition of the case by ending the litigation.

Member Abbott dissented in part because he would find that the Arbitrator's award was deficient because the requisite findings were not made that would entitle the employees to be classified as non-exempt and therefore entitled to a remedy.

**CASE DIGEST:** *AFGE, Loc. 1633*, 72 FLRA 583 (2021) (Chairman DuBester concurring)

The Arbitrator prematurely denied attorney fees before the Union had an opportunity to submit a petition for fees and the Agency had an opportunity to respond. The Authority found this denial to be contrary to law.

Chairman DuBester concurred in the decision to grant the Union's exception and modify the award to strike the denial of attorney fees.

**CASE DIGEST:** *Int'l Bhd. of Boilermakers, Loc. 290*, 72 FLRA 586 (2021)  
(Chairman DuBester concurring; Member Abbott concurring)

The Authority concluded that the Arbitrator properly applied the standard for assessing whether a Union steward's conduct exceeded the bounds of protected activity.

Chairman DuBester concurred, noting that the Authority's existing standard for assessing protected conduct was adequate for resolving the Union's exception.

Member Abbott concurred, agreeing that the grievant's conduct was not protected under § 7102 of the Federal Service Labor-Management Relations Statute. However, he wrote separately because he believes there is an important distinction to be made between representational activity that occurs in more traditional "behind closed door" encounters and representational activity that occurs in the workplace.

**CASE DIGEST:** *AFGE, Loc. 1822*, 72 FLRA 595 (2021) (Chairman DuBester concurring)

The Arbitrator found that, even though the plain wording of a settlement agreement and negotiated agency rule did not require disabled-veteran employees to say whether the leave they were seeking for medical treatment concerned a service-connected disability, the Agency could impose that requirement as a condition of leave approval. Resolving the Union's exceptions, the Authority found that portion of the award failed to draw its essence from the settlement agreement and rule, and the Authority set aside the deficient portion of the award.

Chairman DuBester concurred, explaining that he concluded that the award was deficient on essence grounds for different reasons than the majority.

**CASE DIGEST:** *U.S. DOD, Domestic Dependent Elementary & Secondary Schs., 72 FLRA 601 (2021) (Chairman DuBester concurring)*

The Arbitrator issued an award finding the Federal Service Impasses Panel did not have jurisdiction to impose a collective-bargaining-agreement article upon the parties and that the Agency should not have implemented the resulting agreement. Because Panel orders are not directly reviewable, the Authority set aside the award as contrary to §§ 7119 and 7114 of the Federal Service Labor-Management Relations Statute.

Chairman DuBester concurred in the decision to set aside the award.

**CASE DIGEST:** *U.S. Dep't of VA, Veterans Health Admin., Consol. Mail Outpatient Pharmacy, Leavenworth, Kan., 72 FLRA 606 (2021) (Chairman DuBester concurring; Member Abbott concurring)*

Because the award directed whom the Agency could assign to escort Union representatives around its pharmaceutical facility, the Authority found that the award excessively interfered with management's right to determine personnel under the Federal Service Labor-Management Relations Statute. Accordingly, the Authority set aside the portion of the award that required only non-management employees to escort Union representatives visiting the Agency's facility.

Chairman DuBester concurred, finding that because the remedial award abrogated management's right to determine personnel, the remedy is contrary to law.