

**Federal Labor Relations Authority**  
**Quarterly Digest Report: January 1, 2020 – March 31, 2020**



*The following case digests are summaries of decisions/orders issued by the Federal Labor Relations Authority, with a short description of the issues and facts of each case. Descriptions contained in these case digests are for informational purposes only, do not constitute legal precedent, and are not intended to be a substitute for the opinion of the Authority.*

**CASE DIGEST:** *U.S. Dep't of VA, John J. Pershing Veterans Admin.*, 71 FLRA 511 (2020)

In this case, the Agency filed exceptions challenging an arbitrator's awarded remedy and his determination that the grievance was timely filed. Because the Agency could have – but did not – raise its arguments concerning the remedy at arbitration, the Authority found that §§ 2425.4(c) and 2429.5 of the Authority's Regulations barred the Authority from considering those arguments. Regarding the timeliness of the grievance, the Arbitrator did not state the filing date in the award. Under § 2425.4(a)(2) and (3) of the Authority's Regulations, the excepting party must ensure that its exceptions are self-contained and include supporting documentation. But the Agency did not provide the Authority any documentary evidence to support its alleged filing date. Accordingly, the Authority denied the Agency's exception as unsupported.

**CASE DIGEST:** *NAIL, Local 10*, 71 FLRA 513 (2020)

This case concerns the Arbitrator's application of the doctrine of collateral estoppel. The Arbitrator granted the Agency's motion to dismiss the Union's grievance on the ground that the Union was collaterally estopped from arguing that the grievants had been temporarily promoted to GS-12 positions. The Union argued that the award is based on a nonfact, is contrary to law, fails to draw its essence from the parties' collective-bargaining agreement, and that the Arbitrator exceeded his authority. The Authority denied the Union's first three exceptions because the Union did not demonstrate that the issue in this grievance differed from the issue in the prior grievance. The Authority denied the Union's exceeded-authority exception because the award responds to the issue framed by the Arbitrator.

**CASE DIGEST:** *U.S. Dep't of Educ.*, 71 FLRA 516 (2020) (Member DuBester concurring)

In this case, the Agency filed a motion to dismiss alleging that the grievance was barred under § 7116(d) of the Federal Service Labor-Management Relations Statute (Statute) by an earlier-filed unfair labor practice (ULP) charge addressing the same issues. Although the Arbitrator concluded that the Union could not simultaneously pursue its ULP charge and its grievance in different forums, he suspended the Union's grievance pending resolution of the ULP charge instead of dismissing it. The Agency excepted to the Arbitrator's award, arguing that both § 7116(d) and the parties' agreement required the Arbitrator to dismiss the grievance. The Authority found that the Agency's exceptions were interlocutory, but that there were extraordinary circumstances warranting review. The Authority concluded that the grievance was not barred under § 7116(d) and remanded the matter to the parties for resubmission to the Arbitrator.

Member DuBester concurred in finding that § 7116(d) did not bar the grievance.

**CASE DIGEST:** *U.S. Dep't of the Army*, 71 FLRA 522 (2020) (Member DuBester dissenting)

In this case, the Arbitrator found arbitrable a grievance seeking to change employees' exemption status under the Fair Labor Standards Act (FLSA). The Authority granted interlocutory review. Because the FLSA grievance did not involve classification under § 7121(c)(5) of the Federal Service Labor-Management Relations Statute, the Authority denied the Agency's exceptions.

Member 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 the Treasury, IRS*, 71 FLRA 527 (2020)

The Arbitrator found the Agency violated the parties' collective-bargaining agreement and several other agreements when a management panel who reviewed the grievant's receipt of a performance award considered the grievant's admitted misconduct and tax noncompliance. The Authority found that the Arbitrator's award was contrary to the Department of the Treasury Appropriations Act of 2016 (Appropriations Act) because the award required the Agency to grant the performance award despite the panel's determination that denying the award was necessary to protect the integrity of the service. The Authority also found the award did not draw its essence from one of the parties' agreements because the award evidenced a manifest disregard of the unambiguous wording of that agreement. Accordingly, the Authority vacated the award.

Member DuBester dissented, finding that the award enforced the requirement that the Agency take into account employees' conduct and Federal tax compliance – as required by the Appropriations Act – in a manner consistent with the standards and procedures established by the parties for this purpose

**CASE DIGEST:** *U.S. Dep't of VA, John J. Pershing VA Med. Ctr.* 71 FLRA 533 (2020)

The grievance alleged that the grievant's retirement was not voluntary because he had been coerced into retiring when he was served with a removal letter. The Arbitrator found that the grievant's retirement should be considered a removal, and she ordered reinstatement with backpay. On exceptions, the Agency argued that the grievance was substantively not arbitrable because the grievant elected to pursue the matter through Equal Employment Opportunity procedures. The Authority found that the grievance related to a removal. Under § 7121 of the Federal Service Labor-Management Relations Statute, the Authority lacks jurisdiction to resolve exceptions to awards relating to removals. Accordingly, the Authority lacked jurisdiction and dismissed the exceptions.

**CASE DIGEST:** *AFGE, Local 2846*, 71 FLRA 535 (2020)

The Arbitrator found that the Agency did not violate the parties' collective-bargaining agreement when it rated the grievant's performance, and she denied the grievance. The Authority dismissed the Union's contrary-to-law and essence exceptions because the Union failed to raise its arguments before the Arbitrator. The Authority denied the Union's remaining exceptions because the Union did not demonstrate that the award was impossible to implement or that a central fact underlying the award was clearly erroneous.

**CASE DIGEST:** *DOJ, Federal BOP, U.S. Penitentiary McCreary, Pine Knot, Ky.*, 71 FLRA 538 (2020) (Member DuBester concurring)

An FLRA Administrative Law Judge (the Judge) found that the Agency committed an unfair labor practice (ULP) under § 7116(a)(1) and (5) of the Federal Labor-Management Relations Statute (the Statute) when it denied the Union's attorneys access to the prison lobbies for observing shift changes to gather information in connection with pending grievances. In its exceptions, the Agency argued that the Judge denied it due process by sustaining the charges on a theory not argued at the hearing and that the Judge's decision violated the management right to determine internal security practices. The Authority found that the Agency was afforded adequate notice by the General Counsel's complaint, that the Agency had a reasonable opportunity to litigate the issues at the hearing, and that the surrounding circumstances demonstrated that the Agency violated the Statute by preventing the Union's attorneys from observing shift changes at the Agency's lobbies. Accordingly, the Authority denied the Agency's exceptions.

Member DuBester concurred with the Decision to adopt the Judge's recommended decision and to deny the Agency's exceptions.

**CASE DIGEST:** *Bremerton Metal Trades Council*, 71 FLRA 569 (2020)

This case concerned whether employees were entitled to compensatory time in lieu of premium pay for certain overtime assignments. Arbitrator Stephen Douglas Bonney found that, under federal law, employees were not entitled to compensatory time for the assignments at issue. The Union filed an essence exception, which the Authority denied as unsupported.

**CASE DIGEST:** *SSA & AFGE, Local 1164*, 71 FLRA 580 (2020) (Member DuBester concurring).

The sole issue in this case is whether the grievance is procedurally arbitrable. The Arbitrator found that the grievance was arbitrable because the parties “mutually consented” to an extension of the deadline for arbitration contained in their agreement. We find that the Agency failed to demonstrate that the award was deficient, because its exceptions are merely disagreements with the Arbitrator’s interpretation of the parties’ agreement.

Member DuBester concurred in the Order denying the Agency’s exceptions.

**CASE DIGEST:** *U.S. Dep’t of VA, Health Resources Center, Topeka, Kan.*, 71 FLRA 583 (2020)

In this case, the Arbitrator found that the Agency failed to terminate the grievant before the end of her probationary period and, as a result, denied her the due process to which she was entitled as a tenured employee. The Agency filed exceptions, but the Authority found that it lacked jurisdiction under § 7122(a) of the Statute because the award related to a matter described under § 7121(f). Specifically, the Authority found that the issue raised at arbitration, i.e., whether the grievant had completed her probationary period, was inextricably intertwined with a removal matter that could have been reviewed by the MSPB and, on appeal, by the Federal Circuit. Accordingly, the Authority dismissed the exceptions.

**CASE DIGEST:** *AFGE, Local 2228 and U.S. Dep’t of the Air Force, 28th Force Support Squadron (AFGSC), Ellsworth Air Force Base, S.D.*, 71 FLRA 586 (2020) (Member Abbott concurring)

This case concerned the negotiability of one proposal. The Authority found that the Union failed to timely file its petition, and dismissed it.

**CASE DIGEST:** *SSA, Office of Hearings Operations & IFPTE, Ass’n of Admin. Law Judges*, 71 FLRA 589 (2020) (Member DuBester dissenting in part)

This case involves another alleged violation of the telework provision in the parties’ agreement. The Agency denied the grievant’s telework request because the grievant did not

satisfy the requirement to schedule a reasonably attainable number of cases for hearing per month. The Arbitrator found that the Agency violated the parties' agreement when it denied the grievant's telework request, and ordered the Agency to allow the grievant to telework if he scheduled an average of forty-seven cases for hearing per month and to have a collegial conversation with the grievant before restricting telework in the future. The Authority found that the award is contrary to law, in part, because it excessively interferes with management's rights to direct employees and assign work.

Member DuBester dissented in part. He would find that, under applicable Authority precedent, the award is not contrary to law.

**CASE DIGEST:** *U.S. Dep't of VA, Cent. Ark. Veterans Healthcare Sys. Cent.*, 71 FLRA 593 (2020) (Member DuBester concurring)

This case concerned grievants who successfully sought environmental-differential pay because they worked in close proximity to high-hazard microorganisms. The Arbitrator found that the grievants are frequently exposed to biohazardous waste, needles, and other sharp objects that may contain high-hazard microorganisms. He also found the grievants' training, protective equipment, and position descriptions to be deficient and, therefore, sustained the grievance and awarded backpay, with interest. The Agency challenged the award as being contrary to 5 U.S.C. § 5343(c)(4) and 5 C.F.R. § 532.511. However, the Agency failed to demonstrate that the grievants are not frequently exposed to objects that may contain high-hazard microorganisms. Furthermore, the Agency failed to demonstrate that the Arbitrator was biased or that the award was based on nonfacts. Accordingly, the Authority denied the Agency's exceptions.

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

**CASE DIGEST:** *U.S. DHS, CBP, U.S. Border Patrol, El Paso Sector*, 71 FLRA 597 (2020) (Member DuBester dissenting)

This case concerned the Arbitrator's finding that the Agency's delay in investigating the grievant for his admitted misconduct amounted to "gross procedural error" for purposes of awarding attorney fees under the Back Pay Act. The Authority determined that the length of the Agency's investigation did not cause the grievant to suffer prejudice and burden that amounted to gross procedural error under 5 U.S.C. § 7701(g)(1). Accordingly, the Authority set aside the Arbitrator's fee award as contrary to law. However, because the record was sufficient to do so, the Authority evaluated the Union's other arguments alleging that attorney fees were warranted in the "interest of justice" under § 7701(g)(1). As none of the other raised interest-of-justice criteria were satisfied, the Authority concluded that attorney fees were not warranted.

Member DuBester dissented, finding that the Arbitrator's conclusion that the Agency committed gross procedural error under the circumstances of this case was consistent with applicable precedent.

**CASE DIGEST:** *AFGE, Nat'l Council of EEOC Locals No. 216*, 71 FLRA 535 (2020)

This case concerned the negotiability of ground-rules proposals to govern mid-term bargaining. Initially, the Authority found that a proposal that appeared only in an attachment to the petition for review was not before the Authority for a decision. Further, the Authority found that the Union permissibly modified the wording of its proposals at the post-petition conference.

Proposal 1 required the Agency's chair to provide a list of negotiators to the Union, or to designate another employee to provide that list. The Authority found that Proposal 1 was outside the duty to bargain because it affected management's right to assign work under § 7106(a)(2)(B). Proposal 2 concerned a wholly discretionary process that, based on the Union's statement of intent, the Authority found was essentially meaningless and, consequently, nonnegotiable. Proposal 3 addressed when the Agency would pay for travel and per diem for negotiations, and how the parties would resolve negotiation impasses. The Authority found that Proposal 3 was covered by the parties' collective-bargaining agreement. Proposal 4 prohibited the use of transcripts and recording devices for negotiation sessions, but permitted the parties to take notes. The Authority found that Proposal 4 concerned a mandatory subject of bargaining and was negotiable. Accordingly, the Authority dismissed the petition, in part, and ordered the Agency to bargain, upon request, over Proposals 2 and 4.

Member DuBester dissented to the majority's decision in regard to Proposals 1, 2, and 3. He found that Proposal 1 does not affect management's right to assign work because it imposes no obligations beyond those required by the Federal Service Labor-Management Relations Statute. As to Proposal 2, he found it concerned a discretionary process for assigning duties to bargaining-team members, and the Agency failed to demonstrate that it affected management's rights. And he found that Proposal 3 was not covered by the parties' agreement.

**CASE DIGEST:** *Arkansas Army Nat'l Guard & Ass'n of Civilian Technicians*, 71 FLRA 612 (2020)

Regional Director Richard S. Jones (the RD) issued a Decision and Order and Direction of Election, denying a request by the incumbent union – Laborers' International Union of North America, Local 1776 (LIUNA) – that he reconsider his determination that the Association of Civilian Technicians (ACT) made an adequate showing of interest warranting an election. LIUNA filed an application for review with the Authority, requesting that the Authority order the RD to revisit the issue of the adequacy of ACT's showing of interest and issue a stay of the order of election. The Authority denied LIUNA's application for review because the RD's decision on the adequacy of the showing of interest is not subject to review under the Authority's

Regulations, and LIUNA did not otherwise demonstrate a basis for review. Consequently, the Authority denied the request for a stay as moot.

**CASE DIGEST:** *U.S. Dep't of HUD & AFGE, Council 222*, 71 FLRA 616 (2020) (Member DuBester concurring)

The Arbitrator found that the Agency violated § 7116(a)(1), (5), and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by failing to provide the information contained in the Union's eight part information request and, therefore, failed to bargain in good faith. In its exceptions, the Agency argued that that the Union failed to establish a particularized need for all eight parts of the information request and that the information request is moot. The Authority found that the Union established a particularized need with its third and final information request and that the Union's information request is not moot because the Agency failed to demonstrate that the unfair-labor-practice will not recur. Accordingly, the Authority denied the Agency's exceptions.

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

**CASE DIGEST:** *U.S. DOJ, Fed. BOP, Fed. Corr. Inst. Tallahassee, Fla.* (2020) (Member DuBester concurring)

Where the parties' agreement requires that bargaining-unit employees be given "first consideration" for overtime, except in "emergency" situations, an arbitrator's award premised on a reasonable and plausible finding that there was no emergency does not make the remedy – awarding overtime to bargaining-unit employees who would have received the assignment – contrary to management's right to assign work.

Member DuBester concurred in the decision to deny the Agency's essence exception. Member DuBester also would find, applying the abrogation standard, that the award did not impermissibly encroach on a management right.

**CASE DIGEST:** *SPORT Air Traffic Controllers Org. & U.S. Dep't of the Air Force, Edwards Air Force Base, Cal.*, 71 FLRA 626 (2020) (Member DuBester dissenting).

This case involves a dispute over which collective-bargaining agreement (CBA) was in effect when the Agency denied official time. The Arbitrator found that the Agency lawfully implemented a new CBA and, thus, did not violate the Federal Service Labor-Management Relations Statute, Agency regulation, or the new CBA when it failed to schedule the twenty hours per week of official time to which the Union president was entitled under the previous CBA. Because the grievance and an earlier-filed unfair-labor-practice charge both raised the same issue concerning the Agency's implementation of the new CBA, the Authority found that the grievance was barred pursuant to § 7116(d) of the Federal Service Labor-Management Relations Statute.

Member DuBester dissented, finding that, under the unique circumstances of this case, § 7116(d) of the Statute would not bar the Union's grievance.

**CASE DIGEST:** *U.S. Dep't of the Navy, Marine Corps Air Station, Cherry Point N.C. and IAMAW, Local Lodge 2296, AFL-CIO*, 71 FLRA 630 (2020) (Member Abbott dissenting)

This case concerned the Petitioner's application for review of an FLRA Regional Director's (RD's) decision denying a petition to sever certain employees from a consolidated unit. The Union represents a bargaining unit of non-professional employees at the Agency. The RD found that the unit remained appropriate and no extraordinary circumstances warranted severing the employees from the unit. On review, the Authority found that the record supported the RD's factual findings and he did not fail to apply established law. Therefore, the Authority denied the application for review.

Member Abbott dissented and argued that the Authority should consider the merits of the Petitioner's petition because the interests, and rights, of bargaining unit employees must be vigorously protected under the Statute, which is premised on the notion that the right of employees to refrain from forming, joining, or assisting a union is afforded the same protection as an employees' right to form, join, or assist a union.

**CASE DIGEST:** *AFGE, Local 2338*, 71 FLRA 644 (2020)

The Union requested that the Authority reconsider its decision in *AFGE, Local 2338*, 71 FLRA 371 (2019) (*Local 2338*). In *Local 2338*, the Authority found that the Union did not establish that the Arbitrator's award failed to draw its essence from the parties' agreements or was ambiguous and impossible to implement. The Authority found that the Union's motion for reconsideration challenged a factual finding that the Authority did not make and did not otherwise establish extraordinary circumstances warranting reconsideration of *Local 2338*. Accordingly, the Authority denied the Union's motion.

**CASE DIGEST:** *SSA, Office of Hearings Operations & Ass'n of Admin. Law Judges, IFPTE*, 71 FLRA 646 (2020) (Member DuBester dissenting)

This case involves yet another dispute between the Agency and the Union involving the telework provision in the parties' agreement. The Arbitrator found that the Agency violated the parties' agreement when it denied the grievant's telework request based on his failure to schedule a "reasonably attainable" number of cases for hearing per month. The Arbitrator ordered the Agency to allow the grievant to telework for two days per week for thirty months if he scheduled an average of forty to forty-five cases for hearing per month. After those thirty months, the Arbitrator ordered the Agency to make an individualized determination of how many hearings were "reasonably attainable" in evaluating the grievant's telework requests, have a collegial conversation with the grievant before restricting telework in the future, and have a valid basis for



its “reasonably attainable” determination. Consistent with *SSA*, 71 FLRA 495 (2019) (Member DuBester dissenting in part), and *SSA, Office of Hearings Operations*, 71 FLRA 589 (2020) (Member DuBester dissenting in part), the Authority found that the award is contrary to law, in part, because it excessively interferes with management’s rights to direct employees and assign work.

Member DuBester dissented, finding that the remedy was not contrary to law.

**CASE DIGEST:** *SSA and Ass’n of Admin. Law Judges, IFPTE*, 71 FLRA 652 (2020)

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