

**Federal Labor Relations Authority**  
**Quarterly Digest Report: January 1, 2021 – March 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:**     *Nat'l Weather Serv. Emps. Org.*, 72 FLRA 1 (2021) (Member DuBester dissenting in part)

This case concerned grievants who alleged that the Agency violated the parties' agreement and a 2011 Memorandum of Understanding (the MOU) by unilaterally reducing the operating hours of several Weather Station Offices (WSOs). The Arbitrator found that the denial of overtime pay was not a *de minimis* event and that the Agency had violated a contractual duty to bargain when reducing the grievants' overtime opportunities. As a remedy, the Arbitrator ordered the Agency to restore the affected WSOs to their pre-grievance operating hours and to pay any affected employees backpay for lost overtime. The Authority found that the Arbitrator did not exceed his authority by declining to consider the unstipulated unfair labor practice issue. The Authority also found that the Arbitrator's awarded remedy violated § 7106(a)(1) of the Federal Service Labor-Management Relations Statute because it did not reasonably and proportionally relate to the Agency's violation of the parties' agreement and the MOU. Accordingly, the Authority vacated the award.

Member DuBester dissented in part, finding that the status quo ante remedy was consistent with the parties' agreement and Authority precedent. Therefore, he would have denied the Agency's contrary-to-law exception.

**CASE DIGEST:**     *U.S. Dep't of Homeland Sec., U.S. Customs & Border Protection, El Paso, Tex.*, 72 FLRA 7 (2021) (Member DuBester dissenting in part)

With this case, we clarify the distinction between conditions of employment and working conditions. At issue in this case is whether an inspection memorandum issued by the Agency that required agents to refer specific individual to secondary inspection constituted a change in a condition of employment. On remand from the U.S. Court of Appeals for the District of Columbia Circuit, the Authority found that it was constrained to defer to the Arbitrator's factual findings that the inspection memo constituted a change to a condition of employment because the Agency did not challenge those findings in its arguments before us. Accordingly, the Authority upheld the award.

Member DuBester dissented in part, disagreeing with the majority's decision to narrowly define "working conditions" in the same flawed manner that was rejected by the D.C. Circuit. In Member DuBester's view, the majority failed to provide a plausible reason for discarding Authority precedent broadly defining this term in favor of a standard that will, in all likelihood, significantly restrict the scope of bargaining under the Statute.

**CASE DIGEST:**     *DOD, Dep't of Def. Educ. Activity*, 72 FLRA 15 (2021)  
(Member DuBester dissenting in part)

An Administrative Law Judge (Judge) found that the Respondent violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute by discontinuing personalized workplace package delivery to employees without first providing the Union notice of, and an opportunity to bargain over, the change. Because the Judge erred in concluding that this dispute affected employees' conditions of employment, the Authority found that he erred in concluding that the Respondent violated its duty to bargain.

Member DuBester dissented. In his view, the Judge properly found a direct connection between the mail delivery at issue and the work situation or employment relationship of unit employees, such that the matter concerned the employees' conditions of employment.

**CASE DIGEST:**     *U.S. Dep't of the Army, Fort Stewart & Hunter Army Airfield, Fort Stewart, Ga.*, 72 FLRA 45 (2021)

In this case, the Arbitrator issued a ruling that provided an updated briefing schedule but expressly declined to resolve any of the pending issues before him. The Authority dismissed the Agency's exceptions to the ruling, finding that the ruling did not constitute an award for purposes of filing exceptions under § 7122(a) of the Federal Service Labor-Management Relations Statute and § 2425.2(a) of the Authority's Regulations.

**CASE DIGEST:** *U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 72 FLRA 47 (2021) (Chairman Kiko dissenting in part, Member DuBester dissenting in part)

With this case, the Authority reiterated that an award of backpay requires a finding that the grievant was subject to an unjustified or unwarranted personnel action. The Agency reassigned the grievant, a corrections officer, to a different position, without the opportunity to work overtime, due to security concerns pending an investigation into the grievant's interactions with an inmate. The Union filed a grievance alleging that the Agency inappropriately denied the grievant overtime during the reassignment.

The Arbitrator found the grievance timely and partially sustained the grievance on the merits. The Agency excepted to the Arbitrator's award on the ground that his procedural arbitrability finding did not draw its essence from the parties' agreement, and that the award was contrary to the Back Pay Act (BPA). The Authority denied the Agency's essence exception because the Arbitrator's interpretation of the relevant provision of that agreement was plausible. However, the Authority vacated the award because the Arbitrator did not find that the Agency violated an applicable law, rule, regulation, or provision of the parties' agreement as required under the BPA.

Although Chairman Kiko joined in the decision finding the award contrary to the BPA, she dissented, in part. It was undisputed that the grievant became aware that he could not earn overtime in the new position at the time of the reassignment. Therefore, Chairman Kiko found that the Arbitrator's conclusion that the grievance-filing deadline was not triggered until a later meeting failed to draw its essence from the parties' agreement.

Member DuBester dissented in part, finding that the award was not contrary to the BPA. In his view, the award, considered as a whole, demonstrated that the Arbitrator found that the Agency's delay in reinstating the grievant violated both Article 6.b. and Article 30.g. of the parties' agreement.

**CASE DIGEST:** *AFGE, Loc. 446*, 72 FLRA 54 (2021) (Chairman Kiko concurring)

The Union filed two sets of exceptions to the arbitrator's award denying its grievance. The Authority dismissed the first set of exceptions because it but did not provide any supporting arguments and dismissed the second set as untimely.

**CASE DIGEST:** *U.S. Dep't of VA, Veterans Benefits Admin.*, 72 FLRA 57 (2021) (Member Abbott concurring; Chairman DuBester dissenting)

The Arbitrator found the grievance procedurally arbitrable because the parties' agreement permitted the Union to file a national grievance by either elevating a local grievance to the national level or by independently filing a national grievance—even when the national grievance pertains to similar matters as the previously filed local grievance. The Authority found that the Agency's nonfact exception failed to challenge a central fact underlying the award and that the

Agency's essence exception failed to raise any deficiencies in the Arbitrator's application of the parties' agreement. Therefore, the Authority denied the Agency's exceptions.

Member Abbott concurred in the decision, but wrote separately to highlight the issues that arise from permitting unions to file multiple grievances that concern the same set of factual circumstances or advance substantially similar legal theories.

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

**CASE DIGEST:**     *AFGE, Council 119*, 72 FLRA 63 (2021) (Member Abbott dissenting in part)

This case concerned the negotiability of three proposals related to the implementation of pilot programs, the compensability of loading/unloading files necessary to fulfill duty requirements, and details offered to bargaining unit employees. Because the Union did not make any argument that the proposal concerning the implementation of pilot programs fell within an exception to management rights under § 7106(b), the Authority dismissed the proposal. Additionally, the Authority found the proposal concerning compensable work to be contrary to law because the Union's failure to respond to the Agency's arguments resulted in a concession of the Agency's claims. Lastly, the Authority granted the Union's request to sever the proposal concerning details that are offered to bargaining unit employees. However, the Authority dismissed a severed portion of the proposal because the Union did not claim that it constituted either a negotiable procedure under § 7106(b)(2) or an appropriate arrangement under § 7106(b)(3). Lastly, it found the remaining portion to be outside the duty to bargain because it concerned conditions of employment outside the bargaining unit. Accordingly, the Authority dismissed the Union's petition as to all three proposals.

Member Abbot dissented in part because he did not agree with the majority's decision to consider the Union's severance request with regard to Proposal 3.

**CASE DIGEST:**     *NTEU, Chapter 66*, 72 FLRA 70 (2021) (Chairman DuBester concurring; Member Abbott dissenting)

The Arbitrator denied the Union's grievance – alleging that the grievants were entitled to higher pay during the first two weeks of a detail – on the basis of an arrangement between the Union president and Agency management. Before the Authority, the Union argued that the arbitrator exceeded his authority and that the award failed to draw its essence from the parties' national agreement. The Authority denied the Union's exceptions, finding that the Arbitrator resolved the issue before him and did not err by relying on the arrangement between the parties to resolve the dispute.

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

Member Abbott dissented, concluding that the arbitrator exceeded his authority and that the award did not draw its essence from the collective-bargaining agreement (CBA) because the arbitrator did not resolve the issue or apply the relevant CBA Article.

**CASE DIGEST:** *AFGE, Loc. 1770*, 72 FLRA 74 (2021) (Chairman DuBester concurring)

In this case, the Authority reminds the federal labor-management relations community of the first-in-time requirement for choice-of-forum provisions. The Arbitrator found a Union-filed grievance was not arbitrable under § 7116(d) of the Federal Service Labor-Management Relations Statute due to a later-filed Unfair Labor Practice (ULP) charge. Because the grievance was filed first, it is not barred by the later-filed ULP under § 7116(d) of the Statute. Therefore, the Authority vacated the award as contrary to law and remanded the matter to the parties for resubmission to arbitration before a mutually agreed upon arbitrator for a decision on the merits of the grievance.

Chairman DuBester concurred, agreeing with the decision to set aside the award and remand the matter to the parties.

**CASE DIGEST:** *AFGE, Loc. 2338*, 72 FLRA 77 (2021) (Member Abbott concurring)

The Union requested that the Authority reconsider the decision in *AFGE, Local 2338*, 71 FLRA 1131 (2020) (*Local 2338*) (Member Abbott dissenting). In that case, the Authority denied the Union's exceptions challenging the Arbitrator's findings that exposure to asbestos was not raised in the grievance and that the grievants were not entitled to environmental differential pay for exposure to microorganisms.

The Authority denied the Union's motion for reconsideration, finding that the Union raised the same arguments the Authority considered and rejected in *Local 2338*, and did not otherwise establish extraordinary circumstances warranting reconsideration.

Member Abbott concurred with the Authority's determination that the Union did not establish circumstances warranting reconsideration. However, Member Abbott reaffirmed his position that the matter should have been remanded to the Arbitrator to address the Union's claims concerning asbestos exposure.

**CASE DIGEST:** *NLRB*, 72 FLRA 80 (2021) (Member Abbott dissenting in part)

The Arbitrator found that a grievance concerning the Union's 2019 information request for the Agency's fiscal year (FY) 2019 budget materials was not barred by an earlier-filed unfair-labor-practice (ULP) charge concerning the Union's 2018 information request for the Agency's FY 2018 budget materials under 5 U.S.C. § 7116(d). The Agency filed exceptions to the award on nonfact and contrary-to-law grounds. The Authority found that the Agency did not demonstrate that the award was based on a nonfact. And because the grievance and the earlier-filed ULP charge did not arise from the same factual circumstances, the Authority found

that the charge did not bar the grievance under § 7116(d). Accordingly, the Authority denied the exceptions.

Member Abbott dissented in part. Member Abbott agreed with the majority that the Agency's interlocutory exceptions warranted review because the Agency demonstrated extraordinary circumstances. Member Abbott also agreed that the award was not based on nonfacts. However, Member Abbott disagreed with the majority's contrary-to-law analysis and wrote separately to urge the Authority to further revise the standard for evaluating whether a grievance or ULP is barred by § 7116(d) of the Statute.

**CASE DIGEST:**     *AFGE, Nat'l VA Council 53*, 72 FLRA 85 (2021) (Chairman DuBester dissenting)

During the renegotiation of the parties' collective-bargaining agreement, the Agency requested the assistance of the Federal Service Impasses Panel (FSIP). FSIP issued a decision and order resolving the impasse. The Union filed a motion requesting that the Authority stay FSIP's order. The Authority denied the Union's motion, finding that the case did not present unusual circumstances warranting a stay.

Chairman DuBester dissented. He found that the majority failed to distinguish the circumstances in this case from those present in *SSA*, 71 FLRA 763 (2020), in which the majority found that a stay of a Panel decision and order was appropriate.

**CASE DIGEST:**     *U.S. Dep't of VA, John J. Pershing VA Med. Ctr, Poplar Bluff, Mo.*, 72 FLRA 88 (2021) (Chairman DuBester concurring)

The Agency filed an exception to a procedural-arbitrability determination of a grievance contesting the removal of the grievant from federal employment. Because the award related to a removal matter under § 7121(f), and such matters are reviewable by the Merit Systems Protection Board or the United States Court of Appeals for the Federal Circuit, the Authority concluded that it lacked jurisdiction under § 7122(a) of the Statute and dismissed the Agency's exception.

**CASE DIGEST:**     *AFGE, Loc. 3342*, 72 FLRA 91 (2021)

The Arbitrator denied the Union's grievance alleging that the Agency violated the parties' collective-bargaining agreement by denying requests for administrative leave during an office power outage. The Authority denied the Union's exception because it did not establish that the award failed to draw its essence from the parties' agreement.

**CASE DIGEST:** *U.S. Dep't of the Navy Commander, Navy Region Haw., Fed. Fire Dep't*, 72 FLRA 94 (2021) (Chairman DuBester dissenting)

The Arbitrator issued an award of attorney fees under the Back Pay Act (BPA) without an accompanying backpay award. The Authority granted the Agency's contrary-to-law exception, finding that the Arbitrator's award of attorney fees was not authorized by the BPA, and that the award had no other statutory authorization.

Chairman DuBester dissented. Under the particular circumstances of this case, where the Arbitrator found that the grievants were entitled to backpay but was unable to calculate the amount of backpay owed to the grievants because of the Agency's actions, Chairman DuBester would conclude that the fee award is not contrary to the BPA.

**CASE DIGEST:** *U.S. Dep't of Transp., Merch. Marine Acad.*, 72 FLRA 97 (2021) (Member Abbott concurring; Chairman DuBester dissenting)

The Arbitrator found that the Agency did not have just cause to remove an employee or to assign him to other duties during the pendency of a misconduct investigation. The Agency filed an exception to the portion of the award relating to the reassignment. The Authority held that it lacked jurisdiction because the reassignment was inextricably intertwined with the grievant's removal, a matter described in § 7121(f) of the Federal Service Labor-Management Relations Statute.

Member Abbott concurred, agreeing that the Authority did not have jurisdiction in this matter. However, Member Abbott wrote separately noting the award runs counter to several mandates that have established the federal government as a model employer.

Chairman DuBester dissented, finding that resolution of the reassignment grievance was not inextricably intertwined with resolution of the removal grievance such that the Authority was divested of jurisdiction over the reassignment matter.

**CASE DIGEST:** *U.S. Dep't of the Interior, Nat'l Park Serv., U.S. Park Police*, 72 FLRA 103 (2021) (Chairman DuBester concurring)

The Union requested that the Authority reconsider its decision in *U.S. Department of the Interior, National Park Service, U.S. Park Police*, 71 FLRA 1121 (2020) (*Park Police*) (then-Member DuBester dissenting). In *Park Police*, the Authority granted the Agency's contrary-to-law exception after concluding that the Arbitrator's award reinstated an unlawful practice and required the Agency to retain that unlawful practice until the completion of bargaining. Because the Union's arguments in its motion for reconsideration attempted to relitigate the Authority's conclusions in *Park Police* and otherwise failed to establish any extraordinary circumstances warranting reconsideration, 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 concluded that the Agency violated its duty to bargain.

**CASE DIGEST:** *U.S. Small Bus. Admin., Birmingham, Ala.*, 72 FLRA 106 (2021)  
(Chairman DuBester concurring)

Because the arguments disagreed with the weight that the Arbitrator accorded the evidence, and asserted an absence of facts rather than identifying a dispositive factual error, the Authority denied the Agency's nonfact exception.

Chairman DuBester concurred in the denial of the Agency's nonfact exception.

**CASE DIGEST:** *SSA, Office of Hearings Operations*, 72 FLRA 108 (2021)  
(Chairman DuBester dissenting in part)

This case involves a grievance regarding an Agency directive to schedule more hearings in order to meet a performance standard, and a subsequent reprimand for the grievant's failure to follow the directive. The Arbitrator found the Agency violated federal law and the parties' agreement because the directive was unreasonable and the discipline was neither warranted and reasonable nor for good cause. The Authority held that the award failed to draw its essence from the parties' agreement, in part, because the Arbitrator found a violation of a contract provision that was not at issue. The Authority also vacated portions of the award as contrary to law because the Arbitrator's attempt to prohibit the Agency from applying its performance standards excessively interfered with the Agency's management rights.

Chairman DuBester dissented, finding that the Arbitrator properly found a contractual violation based on the Agency's misapplication of a standard related to telework eligibility.

**CASE DIGEST:** *U.S. EPA*, 72 FLRA 114 (2021) (Chairman DuBester concurring;  
Member Kiko concurring; Member Abbott concurring)

The Arbitrator sustained two Union grievances alleging that the Agency violated the parties' agreement by denying official time for lobbying and travel. The Agency filed exceptions to the award on contrary-to-law and essence grounds. Because the Agency did not establish that the award was deficient on either ground, the Authority denied the Agency's exceptions.

Chairman DuBester concurred in the decision to deny 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 her concerns with the Union's official-time requests, and the Agency's approval of those requests.

Member Abbott also wrote separately, noting that he too agreed with the concerns addressed by Member Kiko in her concurring opinion.

**CASE DIGEST:**     *NTEU, Chapter 226*, 72 FLRA 122 (2021)

The Authority held that the Union's response to a procedural deficiency order was untimely because it was postmarked after the due date and that the illness of a party's representative and mailroom difficulties do not establish extraordinary circumstances warranting waiver of the expired deadline. Accordingly, the Authority dismissed the petition.

**CASE DIGEST:**     *U.S. Dep't of VA, Boise Veterans Admin. Med. Ctr.*, 72 FLRA 124 (2021)  
(Member Abbott concurring; Chairman DuBester dissenting in part)

The Authority concluded that the Arbitrator's findings -- that the grievants were exposed to bodily fluids, blood, and hazardous drugs and that safety procedures and protective equipment failed to practically eliminate the potential for injury -- were sufficient to demonstrate that the grievants were entitled to environmental-differential pay under 5 C.F.R. 532.511. The Authority concluded, however, that the Arbitrator exceeded her authority by ordering the Agency to conduct a comprehensive review of its safety procedures because that issue was not before her.

Member Abbott concurred to emphasize the appalling testimony, arguments, and practices of the Agency revealed in the record.

Chairman DuBester dissented in part, finding that the Arbitrator did not exceed her authority. He noted that the Agency placed the adequacy of its existing hazards and safety controls before the Arbitrator and specifically asked her to address the adequacy of its controls as part of her awarded remedies.

**CASE DIGEST:**     *NLRB*, 72 FLRA 133 (2021) (Chairman DuBester dissenting)

The Agency denied an employee's debt-waiver request because it found that she was not without fault for the overpayment that she received as the result of a premature promotion. An arbitrator found that the debt-waiver denial violated the parties' collective-bargaining agreement, and the Agency filed exceptions. The Authority found that when an agency is determining whether to grant a debt waiver under 5 U.S.C. § 5584, it has sole and exclusive discretion to determine whether there is fraud, misrepresentation, fault, or lack of good faith on the part of the employee requesting the waiver. Accordingly, the Authority held that the Agency's exercise of this discretion was not grievable, and set aside the award as contrary to law.

Chairman DuBester dissented, noting that nothing in § 5584 indicated that Congress intended the Agency's exercise of its discretion to grant a debt waiver to be unfettered or unreviewable.

**CASE DIGEST:** *NFFE, Int'l Ass'n of Machinists and Aerospace Workers*, 72 FLRA 139 (2021) (Chairman DuBester concurring; Member Abbott concurring)

To resolve an unfair-labor-practice charge that the Agency filed against the Union, the parties entered into a settlement agreement. The Union filed a grievance alleging that the Agency breached the settlement agreement. Relying on Authority precedent, the Arbitrator ruled that he lacked jurisdiction over the grievance. The Union filed exceptions asserting the award was contrary to law. The Authority granted the exception, and vacated the award, finding that the Arbitrator failed to properly interpret and apply case law.

Chairman DuBester concurred, finding that the Arbitrator had jurisdiction over the grievance based on the terms of the settlement agreement and the parties' negotiated grievance procedure.

**CASE DIGEST:** *U.S. Dep't of the Air Force, Peterson Air Force Base, Colo.*, 72 FLRA 143 (2021)

The Arbitrator found that the Agency was not excused of its contractual obligation to provide a uniform allowance to dual-status technicians, notwithstanding that they received a uniform as part of their military reservist duties. The Authority found that the Agency failed to demonstrate how the award was based on nonfacts or contrary to 5 U.S.C. § 5901. Accordingly, the Authority denied the exceptions and upheld the award.

**CASE DIGEST:** *U.S. DHS, U.S. Citizenship & Immigration Servs.*, 72 FLRA 146 (2021) (Chairman DuBester dissenting in part)

The Arbitrator found that the Agency violated the parties' collective-bargaining agreement and the Federal Service Labor-Management Relations Statute when it denied a Union representative official time under the parties' agreement to attend a reasonable-accommodation meeting for a disabled employee. First, the Authority found that the Arbitrator exceeded his authority by making findings and directing a remedy that went beyond the scope of the issue he framed. Next, because the Arbitrator's findings were insufficient for the Authority to determine whether the award was deficient on two of the other grounds raised by the Agency's exceptions, the Authority remanded the award for further findings concerning the reasonable-accommodation meeting at issue.

Chairman DuBester dissented in part, finding that the Arbitrator's remedy directing the Agency to allow a Union representative to attend future reasonable-accommodation meetings on official time was within the scope of the framed issue.

**CASE DIGEST:** *NTEU*, 72 FLRA 151 (2021) (Member Abbott concurring)

The Arbitrator denied the Union's grievance alleging that the Agency violated the parties' agreement and the Federal Service Labor-Management Relations Statute (the Statute) when it failed to execute a Memorandum of Understanding (MOU) between the parties. The

Union filed exceptions to the award on contrary to law, nonfact, and essence grounds. Because the Arbitrator found that the Agency was not required to execute the MOU even though the parties had reached an agreement, the Authority found that the award was contrary to § 7114(b)(5) of the Statute and granted the Union's contrary-to-law exception.

Member Abbott concurred and wrote separately to discuss his concerns with the implications of the Authority's precedent on this matter and today's decision and the intent of § 7114(b)(5).

**CASE DIGEST:**     *USDA, Agric. Mktg. Serv.*, 72 FLRA 156 (2021) (Chairman DuBester concurring)

In this case, the Authority's Office of Case Intake and Publication dismissed the Agency's exceptions for failing to respond to a show-cause order. The Authority denied the Agency's motion for reconsideration of the Authority's dismissal order because the Agency was responsible for providing the Authority with the correct mailing address for service and the Agency could still receive mail amid COVID-19.

Chairman DuBester concurred with the order denying the Agency's motion for reconsideration.