

DELRS | 2024
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FLRA Case Law Update
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U.S. DOD, OHIO NAT'L GUARD, 71 FLRA 829 (2020)
MEMBER KIKO DISSENTING

- Authority affirmed ALJ's finding that the Agency violated the Statute by stating it was not bound by the Statute and disavowing the parties' CBA
- Sixth Circuit affirmed. 21 F.4th 401 (6th Cir. 2021)
- Appealed to the Supreme Court: Ohio Adjutant Gen.'s Dep't v. FLRA, 143 S. Ct. 1193, 1201 (2023)
- The National Guard functions as a federal agency covered by the Statute when employing and supervising dual-status technicians serving in their civilian role
- Laborers Int'l Union of N. Am., 73 FLRA 591 (2023) (Member Kiko concurring)

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NTEU V. FLRA, 45 F.4TH 121 (D.C. CIR. 2022)


- In USDA, 71 FLRA 986 (2020) (Member DuBester dissenting), the Authority issued a Policy Statement concluding that agency heads may review a collective bargaining agreement, pursuant to Section 7114(c)(2), when it is extended under a continuance clause, and that Section 7116(a)(7) does not bar agencies from enforcing regulations that became effective before the agreement's extension
- Court set aside the Policy Statement, concluding that extension of an agreement under a continuance clause does not permit agency-head review, and that agencies may not enforce conflicting regulations that became effective before the extension

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AFGE V. FLRA, 25 F.4TH 1 (D.C. CIR. 2022)


- In Dep't of Education, 71 FLRA 968 (2020) (Member DuBester dissenting), the Authority issued a Policy Statement concluding that an agency's duty to bargain is triggered only if a workplace change has a "substantial impact" on a condition of employment
- Court vacated the Policy Statement, concluding that the Authority's decision to replace the "de minimis" threshold with "substantial impact" was arbitrary and capricious



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AFGE V. FLRA, 24 F.4TH 666 (2022)


- In OPM, 71 FLRA 977 (2020) (Member DuBester dissenting), the Authority issued a Policy Statement concluding that "zipper clauses" – provisions that would foreclose or limit midterm bargaining during the term of a CBA – are a mandatory subject of bargaining
- Court vacated the Policy Statement on grounds that the Authority failed to adequately explain its underlying rationale – namely, that the Statute does not require midterm bargaining



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AFGE, NAT'L COUNCIL OF HUD LOCS., COUNCIL 222, AFL-CIO V. FLRA, NO. 22-5308 (D.C. CIR.)


- In U.S. Dep't of HUD, 70 FLRA 605 (2018) (Member DuBester dissenting), the Authority vacated seven prior decisions and held the grievance concerned classification and was, therefore, barred by the Statute
- The Authority moved to dismiss the case for lack of District Court jurisdiction. The Court granted the Authority's motion to dismiss all claims except the Leedom claim. After further briefing, the Court granted the Union's motion for summary judgment on that claim
- The Authority appealed to the D.C. Circuit, and oral arguments were held on 11/6/23



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87 FED. REG. 78014 (DEC. 21, 2022) (MC-33)
MEMBER KIKO DISSENTING


- NTEU filed a petition to amend § 2429.19 of the Authority's Regulations to provide that, once employees have authorized union-dues payroll deductions, they may revoke those authorizations only at yearly intervals.
- Authority granted petition and proposed to either amend or to revoke § 2429.19, and solicited comments
- Comment period closed; Authority reviewing.



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NTEU, 73 FLRA 428 (2022) (MC-34)
CHAIRMAN GRUNDMANN CONCURRING


- NTEU filed a petition to amend § 2427.2(a) of the Authority's Regulations to provide that the only non-union "lawful associations" that may ask the Authority for "general statements of policy or guidance or policy" are lawful associations "of federal employees"
- Authority denied petition, finding § 2427.2(a)'s wording and regulatory history, and statutory policies, supported broad access to the policy-statement process



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U.S. DOD EDUC. ACTIVITY, ALEXANDRIA, VIRGINIA 73 FLRA 398 (2022)
MEMBER KIKO DISSENTING


- Granting reconsideration of 71 FLRA 765 (2020) (Member DuBester dissenting)
- Clarified "essence" standard
- Based on D.C. Circuit opinion in National Weather Service Employees Organization v. FLRA, 966 F.3d 875 (D.C. Cir. 2020)



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U.S. DEP'T OF THE ARMY, ARMY MATERIEL COMMAND, ARMY SECURITY ASSISTANCE COMMAND, REDSTONE ARSENAL, ALA., 73 FLRA 356 (2022)
MEMBER KIKO DISSENTING


- Revisited standards for review of interlocutory exceptions
- Reversed U.S. Department of the Treasury, IRS, 70 FLRA 806 (2018) (Member DuBester dissenting)
- Reconsideration pending

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**CONSUMER FINANCIAL PROTECTION BUREAU
 73 FLRA 670 (2023) (CFPB I)**


- Revised management-rights test for arbitration cases involving CBA violations
- Does Arb's interpretation/application of CBA, and/or awarded remedy, affect a management right?
- Is CBA provision, as interpreted and applied, enforceable under Section 7106(b)?
- Does excepting party challenge remedy, separate and apart from CBA violation? If so,
- Does remedy "reasonably correlate" to the CBA provision, as interpreted and applied?

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U.S. MARINE CORPS, MARINE CORPS AIR GROUND COMBAT CTR., TWENTYNINE PALMS, CALIFORNIA, 73 FLRA 379 (2022)
MEMBER KIKO DISSENTING IN PART


- Temporary promotion vs. classification
- Reversed SBA, 70 FLRA 729 (2018) (Member DuBester dissenting)

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U.S. DHS, CBP, 73 FLRA 799 (2024)
 CHAIRMAN GRUNDMANN CONCURRING


- Agency failed to pay nightwork premiums, authorized by the Customs Officer Pay Reform Act (COPRA), to customs officers. Arb determined that the Agency was erroneously applying a Federal Employees Pay Act (FEPA) limitation called the "eight-hour rule" to COPRA-covered nightwork but found the Agency's failure to pay COPRA nightwork premiums did not constitute a repudiation of a settlement agreement
- Authority asked OPM for an advisory opinion on its regulations. OPM determined FEPA's eight-hour rule does not apply to leave payments for employees receiving COPRA nightwork pay. Based on that opinion, the Authority denied the Agency's contrary-to-law exceptions

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U.S. DHS, CBP, (cont.)


- Analysis of repudiation allegations
- The nature and scope of the alleged breach of the agreement – i.e., was the breach clear and patent?
- The nature of the agreement provision allegedly breached – i.e., did the provision go to the heart of the parties' agreement?
- Authority determined the Agency did not commit a clear and patent breach of the settlement agreement
- Concurrence: Authority should not be deciding for itself how important a contract provision is, relative to other provisions in the contract, when assessing whether a party has committed an unlawful repudiation

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**U.S. DOJ, FED. BOP, FED. CORR. INST.,
 ASHLAND, KY., 73 FLRA 775 (2024)**


- Agency gave grievant a breathalyzer test then reassigned him during subsequent investigation
- Union claimed Agency violated grievant's Weingarten (Section 7114(a)(2)(B)) right by not allowing Union rep to witness the breathalyzer test
- Arb found Agency failed to meet burden of showing "just cause," and directed Agency to return grievant to previous assignment and make him whole
- Authority remanded because record was unclear as to basis of Arb's just-cause finding, so Authority could not resolve Agency's non-fact exception

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AFGE, LOC. 987, 73 FLRA 722 (2023)


- Arb found grievance procedurally arbitrable, but denied it on the merits
- Union argued Arb exceeded his authority by addressing the merits
- Authority agreed, and set aside the award, because the parties' CBA "expressly and unequivocally" prohibited arbitrators from resolving a grievance's merits if they also ruled on arbitrability



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AFGE, LOC. 2053, COUNCIL 243, 73 FLRA 752 (2023)
CHAIRMAN GRUNDMANN CONCURRING


- Arb found grievance alleging failure to pay overtime under the Fair Labor Standards Act was untimely because it wasn't filed within the CBA's 14-day time limit
- Authority found award wasn't contrary to law, because arbitrators may permissibly find grievances untimely based on contractual time limits that are shorter than the FLSA filing period
- Chairman Grundmann concurred, noting the Arb's finding that there might be other forums for the Union to seek redress, and noting the Arb relied on several Authority decisions regarding timeliness of grievances that she might reconsider in a future, appropriate case



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U.S. DOJ, FED. BOP, FED. CORR. INST., ENGLEWOOD, COLO., 73 FLRA 762 (2023)


- Arb awarded hazard-pay differential (HPD) to correctional employees because they worked with inmates who had COVID-19
- Authority relied on AFGE, Local 3601, 73 FLRA 515 (2023), and Adams v. United States, 59 F.4th 1349 (Fed. Cir. 2023), to find HPD wasn't authorized, and set remedy aside
- Because Arb's underlying finding of a CBA violation was undisturbed, but Authority set aside the sole remedy, Authority remanded for an appropriate remedy, if any



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**U.S. DEP'T OF STATE, PASSPORT SERVS.,
73 FLRA 631 (2023)**


- Agency conceded violation of a settlement agreement and the CBA by failing to timely remove a letter of reprimand from grievant's eOPF
- Arb directed Agency to pay grievant \$2000 and establish a monitoring system to verify that it timely removes reprimands from employees' eOPFs
- Authority found \$2000 remedy violated sovereign immunity, and Arb exceeded authority by issuing monitoring-system remedy, because it awarded relief to people not encompassed within the grievance

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AFGE, LOC. 2031, 73 FLRA 769 (2023)
CHAIRMAN GRUNDMANN CONCURRING


- Union proposed restricting which personnel could perform "sharps-container" duties
- Because Agency failed to file timely statement of position, Authority looked to arguments Agency made in its allegation of nonnegotiability
- Authority found Agency's arguments insufficient to establish proposal was nonnegotiable, and directed Agency to bargain
- Chairman Grundmann concurred, questioning appropriateness of relying on arguments in allegations of nonnegotiability, but reserving the issue for a future, appropriate case

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AFGE, LOCAL 12, 73 FLRA 603 (2023)


- Applying KANG, 21 FLRA 24 (1986), Authority concludes that Union's proposal, under which Agency would be required to provide BUEs with 90-day acclimation period to adjust to newly-weighted performance standards, would excessively interfere with Agency's right to direct employees and assign work because it would prevent management from considering employees' acclimation-period performance when completing their summary rating if considering that performance would negatively impact the summary rating
- Authority also found that Union's proposal prohibiting the Agency from assigning any element of a performance-appraisal plan to account for more than 40% of the total rating was outside the duty to bargain because it was neither a negotiable procedure under Section 7106(b)(2) or an appropriate arrangement under Section 7106(b)(3)

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**DEP'T OF INTERIOR, NPS,
BLUE RIDGE PARKWAY, N.C., 73 FLRA 526 (2023)**
MEMBER KIKO CONCURRING


- After determining that Regional Director's decision raised an issue for which there is an absence of precedent, Authority directed the parties and interested persons to file briefs addressing question concerning decertification petition
- Upon reviewing the briefs, Authority concludes that Section 7111(f)(4) does not bar decertification petitions filed within twelve months of a labor organization's certification as the exclusive representative of a consolidated unit, regardless of whether the Authority conducted an election before issuing the certification
- But Authority finds that § 2422.12(b) of the Authority's Regulations bars such petitions, even where there was no election
- Because the decertification petition was filed within twelve months of the Union's consolidation certification, the Authority concludes the Regional Director did not err in dismissing the petition as untimely
- Member Kiko concurred, noting that the Authority's representation procedures require revisions to appropriately balance union interests with employees' right to self-determination

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EXECUTIVE ORDER 14119
MARCH 6, 2024


- Revokes E.O. 13812 and supersedes E.O. 13522
- Requires agencies covered by the Statute to:
 - Establish Labor-Management Forums (LMFs)
 - Engage in pre-decisional involvement in workplace matters
 - Evaluate and document, in consultation with Union representatives and OPM guidance, changes in employee satisfaction, manager satisfaction, and organizational performance resulting from LMFs
 - In consultation with Union representatives, submit (within 180 days) implementation plans for OPM certification (within 60 days), and faithfully execute certified plans

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CONTACT INFORMATION

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