69 FLRA No. 58

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 154
(Union)

0-AR-5150

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DECISION

May 31, 2016

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella concurring)

I. Statement of the Case

Arbitrator Robert T. Simmelkjaer awarded the Union attorney fees under the Back Pay Act (BPA).[1] We must decide whether the fee award (award) is contrary to law. There are two substantive questions before us.

The first question is whether the award of attorney fees is contrary to law. Because both parties agree, and we find, that the Arbitrator applied the incorrect statutory requirement in finding that attorney fees were "warranted in the interest of justice" under 5 U.S.C. § 7701(g)(1), the answer is yes.

The second question is whether we should remand the award to the Arbitrator for further findings. Because the award contains findings sufficient to enable the Authority to assess the Arbitrator's legal conclusions, the answer is no.

[1] 5 U.S.C. § 5596.

II. Background, Merits Award, and Award

The grievant is a border patrol officer. As a result of an administrative error, the Agency skipped over the grievant for an overtime-shift assignment, in violation of the parties' collective-bargaining agreement. The Agency then offered the grievant the next available overtime shift. The grievant did not agree with that remedy and filed a grievance requesting six hours of overtime pay for the missed overtime assignment. The parties could not resolve the grievance and submitted the matter to arbitration.

In the underlying merits award, the Arbitrator sustained the grievance and found that the Agency violated the parties' agreement when it skipped over the grievant for the overtime-shift assignment. The Arbitrator concluded that the Agency's failure to give the grievant the overtime assignment "constituted . . . an unjustified and unwarranted personnel action that directly resulted in the loss of pay to the [g]rievant" under the BPA.[2] As a remedy, the Arbitrator awarded the grievant six hours of overtime pay. No exceptions were filed to the merits award, and it is not before us. Subsequently, the Union filed an attorney-fee application with the Arbitrator asking for approximately $34,000 in attorney fees pursuant to the BPA.

Arbitrating the attorney-fee application, the parties disputed whether an award of attorney fees was warranted in the interest of justice under § 7701(g)(1)[3] and the criteria established by the Merit Systems Protection Board (MSPB) in *Allen v. U.S. Postal Service*.[4] Under the legal framework relied on by the Arbitrator, attorney fees may be awarded in accordance with § 7701(g)(1), if, in pertinent part: "the payment of fees by the Agency is warranted in the interest of justice; and . . . the fees are reasonable."[5] Attorney fees are warranted "in the interest of justice" under *Allen* if at least one of the following criteria, as pertinent here, is met:

> (1) the agency engaged in a prohibited personnel practice; (2) the agency's actions are clearly without merit or wholly unfounded or the employee is substantially innocent of the charges brought by the agency; . . . [or] (5) the agency knew or should have known that it would not prevail on the merits when it brought the proceeding.[6]

[2] Award at 25 (quoting Merits Award).
[3] 5 U.S.C. § 7701(g)(1).
[4] 2 M.S.P.R. 420 (1980); *see also AFGE, Local 3294*, 66 FLRA 430, 430 n.3 (2012) (*Local 3294*).
[5] Award at 5 (quoting Art. 28, § 9 of the parties' agreement).
[6] *Id.* at 6-7 (quoting *Allen*, 2 M.S.P.R. at 434-35).

The Union claimed that attorney fees are warranted in the interest of justice under the first, second, and fifth *Allen* criteria. The Agency claimed that attorney fees are not warranted in the interest of justice. Specifically, with respect to the first *Allen* criterion, the Agency argued that the Union did not provide any evidence that the Agency committed a prohibited personnel practice as defined in 5 U.S.C. § 2302(b).

The Arbitrator found that the Union satisfied § 7701(g)(1)'s interest-of-justice requirement because, in his view, the Union met the first *Allen* criterion. Although the Arbitrator found that the Union did not provide any evidence that the Agency committed a prohibited personnel practice as defined in § 2302, the Arbitrator "*nevertheless* found that [the Agency] . . . committed" "a prohibited personnel practice."[7] According to the Arbitrator, the term "prohibited personnel practice" is "defined by the [BPA]" rather than by § 2302,[8] and "the missed overtime opportunity constituted . . . an unjustified and unwarranted personnel action."[9] The Arbitrator, therefore, concluded that "[this] finding . . . suffices" to meet the interest-of-justice requirement under § 7701(g)(1).[10]

Dealing with the other two *Allen* criteria that were at issue, the second and the fifth, the Arbitrator rejected the Union's reliance on both. He concluded that "the Union did not meet the evidentiary standards set forth in *Allen* [criteria] . . . two . . . and five."[11]

The Arbitrator therefore granted the Union's request for attorney fees. However, he reduced the amount of the fees. He agreed with the Agency that the requested attorney fees did not meet § 7701(g)(1)'s reasonableness requirement, and determined that the Union was only entitled to approximately $17,000 – exactly half of the requested amount.

Based on the Arbitrator's finding regarding the first *Allen* criterion, the Agency filed an exception to the fee award, the Union filed an opposition to the Agency's exception, and the Agency sought leave to file, and filed, a response to the Union's opposition.

III. Preliminary Matters

A. The Union files untimely exceptions to the award.

In its opposition, the Union concedes – in agreement with the Agency – that the Arbitrator "erred in his attorney fee[] award . . . when he conflated the evidentiary requirements of the [BPA] with the statutory standards delineated for [p]rohibited [p]ersonnel [p]ractice[s in §] 2302."[12] But the Union also claims that the Arbitrator erred because: he "did not set forth sufficiently specific findings or provide sufficiently specific reasons" for his reasonable-attorney-fee determination under the BPA;[13] he "made conclusory statements with minimal explanation with respect to whether the Union met the criteria for the interest of justice standard" regarding *Allen* criteria two and five;[14] and "an award of attorney fees is warranted in the interest of justice because the Agency knew or should have known that it would not prevail with regard to the underlying grievance which sought a backpay remedy."[15]

To the extent that these claims challenge the award's validity, they are exceptions[16] and are untimely. In this regard, § 7122(b) of the Federal Service Labor-Management Relations Statute states that exceptions to an arbitrator's award must be filed "during the [thirty]-day period beginning on the date the award is served on the party."[17] Section 2429.23(d) of the Authority's Regulations provides that the "[t]ime limit[] established in . . . [§] 7122(b) may not be extended or waived."[18] Here, the Union did not file exceptions to the award during the thirty-day period after the award was served on the parties.[19] Therefore, we dismiss the Union's exceptions as untimely.

[7] *Id.* at 25 (emphasis added).
[8] *Id.*
[9] *Id.*
[10] *Id.* at 27.
[11] *Id.* at 29.
[12] Opp'n at 3.
[13] *Id.*
[14] *Id.* at 4.
[15] *Id.* at 9.
[16] *See, e.g., U.S. DOJ, Fed. BOP, Fed. Corr. Inst. Miami, Fla.*, 66 FLRA 1046, 1048 (2012).
[17] 5 U.S.C. § 7122(b).
[18] 5 C.F.R. § 2429.23(d).
[19] Opp'n at 3, 28.

B. We will assume, without deciding, that the Agency's response is properly before us.

After the Union filed its opposition to the Agency's exceptions, the Agency requested leave to file – and did file – a response to the Union's opposition. The Agency seeks to strike as untimely the portions of the Union's opposition that constitute exceptions to the award. Section 2429.26(a) of the Authority's Regulations states, in pertinent part, that the "Authority . . . may in [its] discretion grant leave to file other documents as [it] deem[s] appropriate."[20] Because consideration of the Agency's response would not alter our decision concerning the timeliness of the Union's exceptions, we assume, without deciding, that the response is properly before us.[21]

We disagree with our colleague's assertion that "there is no justification" to only assume, without deciding, that the Agency's response is properly before us.[22] To the contrary, consistent with established tenets of judicial decision making "general[ly,] . . . an opinion should address only the issues that need to be resolved to decide the case."[23] Consequently, as here, "[t]hat an issue has been raised by the parties does not mean that it must be addressed in the opinion *if it is not material to the outcome*" of the decision.[24] Moreover, because the Authority in appropriate circumstances "assumes without deciding" matters without using the particular phrase "assume without deciding,"[25] our colleague's assertion that the Authority has assumed, without deciding, facts or matters only "forty nine . . . times"[26] in its history greatly understates the Authority's adherence to this widely recognized judicial practice.

IV. Analysis and Conclusions

A. The Arbitrator's award of attorney fees is contrary to law.

The Agency claims that the award is contrary to law.[27] Specifically, the Agency claims that the Arbitrator erred as a matter of law when he conflated the requirement for an award of backpay under the BPA[28] – that a grievant is affected by *an unjustified or unwarranted personnel* action[29] – with the requirement for an award of attorney fees under § 7701(g)(1) and the first *Allen* criterion[30] – that an agency engaged in a *prohibited personnel practice*.[31] As indicated above, the Union concedes that the Arbitrator "erred in his attorney fee[] award . . . when he conflated the evidentiary requirements of the [BPA] with the statutory standards delineated for [p]rohibited [p]ersonnel [p]ractice[s in §] 2302."[32]

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo.[33] In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[34] In making that assessment, the Authority defers to the

[20] 5 C.F.R. § 2429.26.
[21] *See, e.g., U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Jesup, Ga.*, 69 FLRA 197, 199 (2016) (citing *AFGE, Local 3911, AFL-CIO*, 68 FLRA 564, 567 (2015)).
[22] Concurrence at 9.
[23] Fed. Judicial Ctr., *Judicial Writing Manual: A Pocket Guide for Judges* 17 (2d ed. 2013); *see also, e.g., Sheriff v. Gillie*, No. 15–338, 2016 WL 2842453, at *3 (U.S. May 16, 2016) ("Assuming, *arguendo*, that special counsel do not rank as 'state officers,' we hold, nevertheless, that their use of the Attorney General's letterhead does not offend [15 U.S.C.] §1692e."); *Bruce v. Samuels, Jr.*, 136 S. Ct. 627, 630 n.3 (2016) ("We assume without deciding that a mandamus petition qualifies as a 'civil action' or 'appeal' for purposes of 28 U.S.C. § 1915(b)."); *NASA v. Nelson*, 562 U.S. 134, 138 (2011) ("We assume, without deciding, that the Constitution protects a privacy right of the sort mentioned in [two Supreme Court decisions]."); *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 798 n.14 (1984) ("Thus, we assume without deciding that the material respondents seek is privileged, and do not consider the arguments of amici that no privilege is applicable here.").
[24] Fed. Judicial Ctr., *Judicial Writing Manual* 14 (Sylvan A. Sobel ed., 1991) (emphasis added).
[25] *See, e.g., AFGE, Local 1399*, 54 FLRA 1143, 1152 (1998) ("assuming *arguendo*"); *id.* ("even if we were to assume, *arguendo*"); *U.S. Dep't of the Treasury, BEP, Wash., D.C.*, 53 FLRA 222, 231 (1997) ("[e]ven if we were to assume"); *NAGE*, 52 FLRA 1374, 1377 (1997) ("even if . . ., which we need not decide"); *U.S. Dep't of Transp., FAA, Wash., D.C., & Mich. Airway Facilities Sector, Belleville, Mich.*, 44 FLRA 482, 493 (1992) ("we need not decide whether . . . because we conclude . . ."); *NTEU*, 43 FLRA 1442, 1445 (1992) ("It is unnecessary to decide . . . because even if . . . ."); *POPA*, 39 FLRA 783, 821 (1991) ("[e]ven assuming for the sake of argument"); *W. Div. Naval Facilities Eng'g Command*, 35 FLRA 19, 24 (1990) ("assum*ing*, without deciding" (emphasis added)); *U.S. Dep't of HUD, Wash., D.C.*, 34 FLRA 307, 310 (1990) ("even assuming"). We note that none of the preceding examples are found in a "dissenting opinion[or] published administrative law judge['s] decision[]." Concurrence at 10 n.12.
[26] Concurrence at 10.
[27] Exceptions at 3.
[28] *Id.*
[29] 5 U.S.C. § 5596.
[30] Exceptions at 10.
[31] 5 U.S.C. 7701(g)(1); *Allen*, 2 M.S.P.R. at 434-35.
[32] Opp'n at 3.
[33] *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).
[34] *U.S. DOD, Dep'ts of the Army & the A.F., Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).

arbitrator's underlying factual findings,[35] unless a party demonstrates that the findings are deficient as nonfacts.[36]

The threshold requirement for an award of attorney fees under the BPA is a finding that the grievant was affected by an unjustified or unwarranted personnel action, which resulted in a withdrawal or reduction of the grievant's pay, allowances, or differentials.[37] The BPA further requires, in pertinent part, that an award of attorney fees must satisfy the standards established under § 7701(g), which pertains to attorney-fee awards by the MSPB.[38] As relevant here, a prerequisite for an award under § 7701(g)(1) is that the award of attorney fees must be warranted in the interest of justice.[39]

The Authority resolves whether an award of fees is warranted in the interest of justice in accordance with § 7701(g)(1) by applying the criteria established in *Allen*.[40] In *Allen*, the MSPB listed five broad categories of cases where an award of attorney fees is warranted in the interest of justice.[41] Only the first category – that the Agency engaged in a prohibited personnel practice – is at issue here.[42] The prohibited personnel practices referenced by *Allen* and § 7701(g)(1) are listed at 5 U.S.C. § 2302(b).[43] They include, for example, discrimination, coercive political activity, obstruction of employment competition, nepotism, and whistleblower retaliation.[44]

Here, the Arbitrator erred as a matter of law when he conflated the requirement for an award of backpay under the BPA with the requirement for an award of attorney fees under § 7701(g)(1).[45] In this regard, the Arbitrator found that the Union did not present any evidence that the Agency engaged in any of the prohibited personnel practices listed under § 2302(b), but he "*nevertheless*" found the Agency committed a "prohibited personnel practice."[46] Specifically, the Arbitrator concluded that an "unjustified and unwarranted personnel action"[47] under the BPA "suffices" to meet § 7701(g)(1)'s "prohibited personnel action" requirement.[48]

But, as set forth above, the requirement of a "prohibited personnel practice" under § 7701(g)(1)[49] and the first *Allen* criterion is a distinct and additional requirement to the requirements for an award of attorney fees – including the requirement of "an unjustified or unwarranted personnel action" – under the BPA.[50] As the Agency argues and the Union concedes, the Arbitrator failed to apply the correct statutory requirement in finding that attorney fees were "warranted in the interest of justice."[51] And the Union did not establish – or even allege – that the Agency engaged in a prohibited personnel practice under § 2302(b). Accordingly, the award of attorney fees is contrary to law.

B. We deny the Union's request to remand the award to the Arbitrator for further findings.

To cure the fee award's defects, the Union requests that the Authority "remand the matter to the parties for resubmission to the Arbitrator for a fully articulated, reasoned decision on whether attorney fees are warranted in the interest of justice."[52]

When granting or denying attorney fees, an arbitrator must set forth specific findings supporting his or her determinations on each pertinent statutory requirement under § 7701(g).[53] Generally, if an award does not contain the specific findings necessary to enable the Authority to assess an arbitrator's legal conclusions, and those findings cannot be derived from the record, then the attorney-fee issue will be remanded to the parties for resubmission to the arbitrator, absent settlement, so that the requisite findings can be made.[54]

In this case, however, a remand is not appropriate. As discussed in section IV.A. above, the first *Allen* criterion – that the Agency engaged in a prohibited personnel practice – is unquestionably not

[35] *Id.*
[36] *NAGE, Local R4-17*, 67 FLRA 4, 6 (2012) (citing *U.S. Dep't of the A.F., Tinker A.F. Base, Okla. City, Okla.*, 63 FLRA 59, 61 (2008)).
[37] *U.S. Dep't of the Navy, Commander, Navy Region Haw., Fed. Fire Dep't Naval Station Pearl Harbor, Honolulu, Haw.*, 64 FLRA 925, 928 (2010) (citing *U.S. DOD, Def. Distrib. Region E., New Cumberland, Pa.*, 51 FLRA 155, 158 (1995)).
[38] *Id.*
[39] *Id.*
[40] 2 M.S.P.R. at 434-35; *see also Local 3294*, 66 FLRA at 430 n.3.
[41] *Local 3294* at 430 n.3 (citing *Allen*, 2 M.S.P.R. at 434-35).
[42] Exceptions at 3-4.
[43] 5 U.S.C. § 7701(g)(1); *Allen*, 2 M.S.P.R. at 434-35.
[44] 5 U.S.C. § 2302(b)(1)-(13).
[45] Award at 25.
[46] *Id.* (emphasis added).
[47] *Id.*
[48] *Id.* at 27.
[49] 5 U.S.C. § 7701(g)(1).
[50] *Id.* § 5596(b)(1)(A)(ii); *U.S. Dep't of the Army, U.S. Army Corps of Eng'rs, St. Louis Dist., St. Louis, Mo.*, 65 FLRA 642, 645 (2011) ("The [BPA] *further requires* that an award of fees must be . . . in accordance with standards established under 5 U.S.C. § 7701(g)." (emphasis added)).
[51] 5 U.S.C. § 7701(g)(1).
[52] Opp'n at 3.
[53] *AFGE, Local 1592*, 66 FLRA 758, 759 (2012).
[54] *Id.*; *see also AFGE, Local 44, Nat'l Joint Council of Food Inspection Locals*, 67 FLRA 721, 723 (2014) (Member Pizzella dissenting).

applicable. In this regard, the Arbitrator found that the Union did not present any evidence that the Agency engaged in any of the prohibited personnel practices listed under § 2302(b),[55] and the Union does not challenge that finding.

In addition, as discussed in Section III.A. above, the Union failed to file timely exceptions to the Arbitrator's determination that fees were not warranted in the interest of justice under the second and fifth *Allen* criteria. That determination therefore stands unchallenged. Accordingly, because the award contains findings sufficient to enable the Authority to assess the Arbitrator's legal conclusions, insofar as those conclusions are properly challenged before us, we deny the Union's remand request.

V. Decision

We grant the Agency's contrary-to-law exception, and set aside the award of attorney fees.

[55] Award at 25.

Member Pizzella, concurring:

I agree that the Arbitrator's award of attorney fees is contrary to law and that the exceptions filed by the Union in its opposition are untimely and should be dismissed.

But as singer/songwriter Jimmy Buffet once observed (perhaps while wasting away in Margaritaville): "Indecision may or may not be my problem."[1]

The Federal Service Labor-Management Relations Statute (the Statute) calls upon members of the Authority to act decisively to "*resolve* exceptions to arbitrator's awards,"[2] to bring "disputes" to closure,[4] and to "provide leadership in establishing policies and guidance."[4] Put simply, one of the primary responsibilities of the Authority is to make *decisions*.

Therefore, I am baffled why my colleagues are so hesitant to *decide*, one way or the other, whether to accept and consider the Agency's response which was filed to respond directly to the odd, untimely exceptions filed by the Union *after* the Arbitrator ruled in its favor. Section 2429.26(a) of the Authority's Regulations states that the Authority "may in [its] discretion grant leave to file other documents as [the Authority] deem[s] appropriate."[5] It seems "appropriate" to me that the Authority should use our discretion to accept and consider the Agency's response. I would go so far as to conclude that there is no justification *not* to do so under these circumstances.

But, as I have noted recently, I am concerned how frequently the majority uses two techniques, either independently or in conjunction with each other, to avoid addressing questions that should be resolved for the parties and to give clear guidance to the labor-management-relations community on how to proceed in other cases in the future.[6] One favorite technique of the majority is to remand cases back to an arbitrator to give the arbitrator a second chance to arrive at a result that is more to their liking.[7] The other technique is to "assume, without deciding"[8] any fact or matter that avoids making a difficult call.[9]

In this case, my colleagues needlessly invoke the latter technique to *assume* that the Agency's response may be considered. This is not a hard call. Either the Agency's request complies with § 2429.26(a) or it does not. If the request complies, then the Agency's response should be considered; if it does not comply, then the Agency's response should not be considered. I happen to believe that the circumstances are appropriate here to accept and consider the Agency's response because, after all, it was merely responding to the odd, unexpected argument made by the Union in response to the Agency's exceptions.

The Authority goes out of its way to deny supplemental submissions whenever a party fails to comply with § 2429.26(a).[10] But here, there is no question that the Agency properly invoked § 2429.26(a) and requested permission to file its response. And the majority apparently believes the issues raised by the Agency are at least somewhat significant because it devotes two paragraphs to discussing the response and § 2429.26(a). Therefore, the Authority ought to be willing to take the time to make a decision, one way or the other, and to fully explain when, and under what circumstances, we will use our "discretion [under § 2429.26(a) to] grant leave to file other documents."[11]

That is our responsibility, and I see no reason not to provide that clear guidance here.

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[1] http://www.goodreads.com/quotes/39973-indecision-may-or-may-not-be-my-problem.

[2] 5 U.S.C. § 7105(a)(2)(H) (emphasis added).

[4] *Id*. § 7101(a)(1)(C).

[4] *Id*. § 7105(a)(1).

[5] 5 C.F.R. § 2429.26(a).

[6] *See e.g. SSA*, 69 FLRA 271, 277 (2016) (*SSA*) (Dissenting Opinion of Member Pizzella).

[7] *Id*. at 277 (citing *U.S. DHS, U.S. CBP, El Paso, Tex.*, 69 FLRA 261, 268 (2016) (Dissenting Opinion of Member Pizzella)).

[8] Majority at 4.

[9] *SSA* at 277.

[10] *See U.S. Dep't of HUD*, 69 FLRA 213, 218 (2016) (Member Pizzella dissenting) (declining to consider submission because the request "merely repeats . . . arguments that the Agency already made"); *SSA, Region VI*, 67 FLRA 493, 496 (2014); *U.S. DOL*, 67 FLRA 287, 288 (2014).

[11] 5 C.F.R. § 2429.26(a).

The majority greatly exaggerates the Authority's past reliance on the assuming-without-deciding technique and its usefulness in administrative jurisprudence. Without a doubt, courts[12] occasionally take this approach, but they do so sparingly and on matters which must be resolved (i.e., questions of jurisdiction or standing) to reach the key issue before the court. It is interesting to note that, in the Authority's entire thirty-eight (38) year history, the Authority has used the "assume, without deciding" technique only forty-nine (49) times[13] − and thirty-one (31) of those assumptions have occurred in decisions made by this majority between 2009-2016). Historically, however, the Authority has been reluctant to use the technique and has not used it simply *to avoid* making a difficult decision. More often than not, the Authority has used the technique in negotiability cases[14] where there is no initial finder of fact or when required to avoid an "impasse."[15] Rarely was the technique used by the Authority (prior to 2009) to resolve exceptions to arbitration awards, such as in this case.

I do not believe that the Authority "facilitates and encourages the amicable settlement" of disputes when we fail to make decisions that ought to be made.[16]

Thank you.

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[12] *See* Majority at 5 nn.24-27. The majority's assertion that these numbers "greatly understate[] the Authority's adherence" to the assuming-without-deciding technique apparently relies on the inclusion of dissenting opinions and published administrative law judge decisions which have invoked any number of "assuming, without deciding" variations. *See, e.g.*, *AFGE, Local 2923*, 69 FLRA 286, 288 n.23 (2016) (Member DuBester *noting, separately*, that he "would assume, without deciding."); *Ass'n of Civilian Techs. Wichita Air Capitol Chapter*, 60 FLRA 342, 348 n.1 (2004) (*Dissenting Opinion* of Chairman Cabaniss) ("I assume without deciding"); *SSA, Bos. Region (Region 1), Lowell Dist. Off., Lowell, Mass.*, 57 FLRA 264, 272 (2001) (*Dissenting Opinion* of Member Wasserman) ("[t]he majority assumes without deciding"); *Pan. Canal Comm'n, Republic of Pan.*, 1996 WL 283196, *10 n.7 (1996) (*Decision of ALJ Garvin Lee Oliver*) ("I shall assume without deciding"); *NTEU, Chapter 243*, 49 FLRA 176, 212 n.3 (1994) (*Dissenting Opinion* of Member Armendariz). Those are not, however, Authority decisions.

[13] *See* Westlaw search "assume /3 deciding".

[14] *AFGE, Nat'l Council of Field Labor Locals*, 58 FLRA 616, 617 (2003); *NAGE, Local R1-203*, 55 FLRA 1081, 1093 (1999); *AFGE, Council of Locals No. 163*, 51 FLRA 1504, 1516 (1996).

[15] *NAIL, Local 7*, 63 FLRA 85, 86 (2009) ("For purposes of *resolving* this case, we assume, without deciding, ..." (emphasis added)); *see also NAIL, Local 5*, 67 FLRA 85, 89, 91 (2012).

[16] *See* 5 U.S.C. § 7101(a)(1)(C).