



United States  
Office of  
Personnel Management

Washington, DC 20415-2000

In Reply To:

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MEMORANDUM TO: MEMBERS  
EMPLOYEE & LABOR RELATIONS NETWORK

FROM: ANA A. MAZZI  
Deputy Associate Director  
Center for Workforce Relations & Accountability Policy

Subject: Case Listing Number 1090

**FEDERAL LABOR RELATIONS AUTHORITY DECISIONS**

61 FLRA No. 85;  
61 FLRA 447  
WA-RP-05-0002  
January 20, 2006

[Pension Benefit Guaranty Corporation and Independent Union of Pension Employees and NAGE.](#) IUPE filed a petition seeking an election among employees in a bargaining unit exclusively represented by NAGE. After NAGE won the election, IUPE filed objections to the election with the RD alleging, among other things, that the Agency had failed to timely grant IUPE equivalent status to NAGE and had failed to furnish IUPE with customary and routine facilities and services. Finding that the Agency's action had the potential to interfere with voters' free choice in the election, the RD set aside the election and directed a new election.

The FLRA granted NAGE's and the Agency's applications for review on the basis that the RD failed to notify the parties explicitly that IUPE had submitted a *prima facie* showing of interest and had achieved equivalent status. In reaching this decision, the FLRA clarified its case law on this issue by stating that if an RD determines under the Statute and the FLRA's regulations that a petitioning union has submitted a *prima facie* showing of interest and, therefore, has achieved equivalent status with the incumbent union, the RD must timely notify all of the appropriate parties of these determinations and that a notice of petition will be posted. The FLRA also found that the record did not provide a sufficient basis for determining whether the denial of facilities and services to IUPE had the potential for interfering with the free choice of voters. Accordingly, the FLRA set aside the RD's direction of a new election and remanded the matter to the RD to make further findings.

61 FLRA No. 86;  
61 FLRA 454  
0-AR-3983  
January 25, 2006

[AFGE, Local 171, Council of Prison Locals, Council 33 and United States Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, El Reno, Oklahoma.](#) The Arbitrator found that the Agency had just cause to remove the grievant. The FLRA stated that, under § 7122(a) of the Statute, it lacks jurisdiction to review an arbitration award "relating to a matter

described in section 7121(f)” of the Statute, which includes adverse actions, such as removals, that are covered under 5 U.S.C. § 4303 or § 7512. According to the FLRA, an award relates to a matter described in § 7121(f) when it resolves, or is inextricably intertwined with, a § 4303 or 7512 matter. Applying this principle, the FLRA dismissed the Union’s exceptions, finding that it did not have jurisdiction to review the arbitration award as the main issue of the grievance concerned the grievant’s removal and the other issues were inextricably intertwined with the grievant’s removal action.

61 FLRA No. 87;  
61 FLRA 456  
0-AR-3978  
January 30, 2006

[AFGE, Local 12 and United States Department of Labor](#). The arbitrator determined that a grievance challenging the termination of a temporary employee was not substantively arbitrable, and he dismissed the grievance. The FLRA denied the Union’s exceptions, finding that the arbitrator’s interpretation of the parties’ agreement as not providing the employee the right to appeal an adverse action through the negotiated grievance procedure did not fail to draw its essence from the agreement. In addition, the FLRA rejected the Union’s reliance on a different arbitrator’s decision and *Van Wersch*, finding that arbitration awards are not precedential and that *Van Wersch* did not apply.

61 FLRA No. 88;  
61 FLRA 459  
0-NG-2682/2685  
January 31, 2006

[NFFE, Locals 951 and 2152, International Association of Machinists and Aerospace Workers and United States Department of the Interior, Bureau of Land Management, California State Office, Sacramento, CA](#). This case was before the FLRA on remand from the United States Court of Appeals for the D.C. Circuit, where the court reversed the FLRA’s finding that the disputed proposals were not within the Agency’s duty to bargain and instructed the FLRA to direct the Agency to bargain. Consistent with the court’s decision, the FLRA found that the proposals, which required the Agency to provide the Union with copies of certain documents, were within the Agency’s duty to bargain and directed the Agency to bargain.

61 FLRA No. 89;  
61 FLRA 460  
BN-CA-04-0291  
January 31, 2006

[United States Department of Justice, Executive Office for Immigration Review, New York, New York and AFGE, Local 286](#). The FLRA upheld the Judge’s determination that the Agency violated § 7116(a)(1) and (5) of the Statute by engaging in a course of bad faith bargaining in the negotiation of the parties’ first collective bargaining agreement. Specifically, the FLRA found that substantial evidence in the record supported the Judge’s findings that the Agency: (1) failed to give specific dates for a second in-person bargaining session; (2) violated the parties’ ground rule that negotiations would take place at the Agency; and (3) refused to return to the bargaining table until e-mail negotiations progressed further.

61 FLRA No. 90;  
61 FLRA 476  
0-AR-3953  
January 31, 2006

[United States Department of Commerce, PTO, Arlington, VA and POPA](#). The Arbitrator sustained an employee’s grievance concerning the employee’s removal, finding that the Agency had impermissibly discriminated against the employee on the basis of disability. The FLRA stated that, under § 7122(a) of the Statute, it lacks jurisdiction to review an arbitration award “relating to a matter described in section 7121(f)” of the Statute, which includes adverse actions, such as removals, that are covered under 5 U.S.C. § 4303 or § 7512.

According to the FLRA, an award relates to a matter described in § 7121(f) when it resolves, or is inextricably intertwined with, a § 4303 or 7512 matter. Here, the FLRA dismissed the Agency's exception, finding that that it does not have jurisdiction over exceptions to an award involving a "mixed case" – an adverse action coupled with an allegation of discrimination. According to the FLRA, the matter in the arbitration case – the grievant's removal for unacceptable performance under § 4303 and the grievant's affirmative defense of disability discrimination – is a matter that is inextricably intertwined with the grievant's removal under § 4303.

61 FLRA No. 91;  
61 FLRA 480  
0-NG-2824  
February 1, 2006

[NAGE, Local RI-100 and United States Department of the Navy, Naval Submarine Base, Groton, CT.](#) The proposals were made in response to the Agency's reorganization.

**Proposal 1** - A proposal that, in circumstances that do not constitute an emergency situation, would prohibit management from assigning duties unless or until the PD is amended to include the specific duties is outside the duty to bargain because it affects management's right to assign work.

**Proposal 2** – The FLRA stated that proposals that do not address the particular change proposed by the Agency are outside the duty to bargain. This proposal concerns statistical data relied on to develop performance standards and, according to the FLRA, nothing in the record indicates that the changes in working conditions due to the reorganization concern performance standards. Therefore, according to the FLRA, this proposal is outside the duty to bargain.

**Proposal 3** – The FLRA found that this proposal incorporates a requirement contained in Proposal 1 – requiring the Agency to amend the PD – and, therefore, the negotiability of Proposal 3 is inextricably intertwined with the negotiability of Proposal 1. As a result, the FLRA concluded that because it found Proposal 1 outside the duty to bargain, Proposal 3 is also outside the duty to bargain.

#### **MERIT SYSTEMS PROTECTION BOARD DECISIONS**

DA0432050337-I-1  
2006 MSPB 23  
February 16, 2006

[Harris v. Department of Defense.](#) General personal difficulties do not constitute good cause for waiving a filing deadline at MSPB (in this case, seeking employment and attempting to prevent the foreclosure of her home).

DC3443050092-A-1  
2006 MSPB 26  
February 22, 2006

[Jacobsen v. Department of Justice.](#) 38 U.S.C. § 4324(c)(4) does not include prevailing party and interest of justice requirements and thus it is left to the Board's discretion whether to award reasonable attorney fees, expert witness fees, and other litigation expenses in USERRA cases.

CH3443040710-I-1  
2006 MSPB 25  
February 22, 2006

[Brasch v. Department of Transportation.](#) The USERRA standard for discrimination claims is found at 38 U.S.C. §§ 4311(a) and 4311(c)(1); *Sheehan v. Department of the Navy*, 240 F.3d 1009 (Fed. Cir. 2001), overruled cases that required the use of the Title VII burdens of proof in analyzing USERRA claims and *Brasch* sets out the method of analysis of a USERRA discrimination claim

under *Sheehan*; discriminatory motivation under USERRA may be established by direct evidence or may be inferred from such considerations set out in the decision; the standard for retaliation claims is found at 38 U.S.C. §§ 4311(b) and (c)(2); the test for reprisal in *Warren v Department of the Army*, 804 F.2d 654 (Fed. Cir. 1986), does not apply to USERRA retaliation claims.

CH844E050353-I-1  
2006 MSPB24  
February 22, 2006

*Ballenger v. Office of Personnel Management*. The relevant position for determining whether an appellant is entitled to disability retirement is the position to which he was last officially assigned before filing his disability retirement application.