



United States  
Office of  
Personnel Management      Washington, DC 20415-2000

In Reply To:

Your reference:

1

1

MEMORANDUM TO:      MEMBERS  
                                 NETWORK ON LABOR-MANAGEMENT RELATIONS

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

Subject:                    Case Listing Number 1091

**FEDERAL LABOR RELATIONS AUTHORITY DECISIONS**

61 FLRA No. 92;      [United States Department of Homeland Security, Bureau of Customs and Border Protection and AFGE, AFL-CIO and NAAE and NTEU and AFGE, National Border Patrol Council, AFL-CIO and National Association of Plant Protection and Quarantine Office Support Employees.](#) The FLRA denied NAAE's application for review of the RD's decision that: (1) Agriculture Specialists are not "professional employees" within the meaning of § 7103(a)(15) of the Statute; and (2) NAAE's petitioned-for-unit – comprised of Agriculture Specialist and Agriculture Technician employees of CBP – was not appropriate. The FLRA determined that, with regard to each finding, NAAE had not demonstrated that the RD failed to follow established law or committed a clear and prejudicial error concerning substantial factual matters.

61 FLRA 485  
WA-RP-04-0067;  
0100; 0101  
WA-RP-05-0018  
February 3, 2006

61 FLRA No. 93;      [AFGE, Local 1612, Council of Prison Locals and United States Department of Justice, Federal Bureau of Prisons, United States Medical Center for Federal Prisoners, Springfield, Missouri.](#) The Arbitrator denied a grievance contesting a 7-day suspension imposed on the grievant for being absent without leave from work for approximately two weeks. In reaching this finding, the Arbitrator rejected the union's claim that the grievant was entitled to leave without pay under the Family and Medical Leave Act (FMLA). The Union filed an exception, claiming that the Arbitrator failed to find that the agency violated the FMLA by not providing employees, including the grievant, with training regarding their entitlements and responsibilities under the FMLA. The Authority denied the Union's exception, finding that the union failed to cite any particular section of the FMLA that the award violates and that the agency met its requirement of providing information about the types of leave available to employees.

61 FLRA 498  
0-AR-3952  
February 9, 2006

61 FLRA No. 94;  
61 FLRA 503  
0-AR-3969  
February 10, 2006

[United States Department of Homeland Security, United States Immigration and Customs Enforcement and AFGE, National Immigration and Naturalization Service Council, Local 1917.](#) In 2004, the Arbitrator conducted an arbitration hearing concerning the 7-day suspension given to the grievant in 1997. The Arbitrator was appointed pursuant to procedures contained in the parties' 1997 collective bargaining agreement. The Agency asserted that the Arbitrator lacked jurisdiction because the parties had renegotiated their agreement in 2000, which included a different arbitral selection process. As relevant here, the Arbitrator found that he was properly appointed. The FLRA denied the Agency's exceptions, concluding that the 1997 agreement procedures to select arbitrators applied despite the delay in actually arbitrating the grievance. In reaching this conclusion, the Authority found that all (but one) actions involving the filing and processing of the grievance occurred under the 1997 agreement and that the parties had a past practice of using the 1997 agreement procedures in circumstances such as those in this case.

61 FLRA No. 95;  
61 FLRA 507  
0-AR-4003  
February 10, 2006

[AFGE, Local 12 and United States Department of Labor, OSHA, Washington, D.C.](#) The Arbitrator denied a grievance alleging that the Agency violated the parties' collective bargaining agreement and a settlement agreement by not placing the grievant in an Occupational Safety and Health position when she completed the Agency's Career Enhancement Program. The FLRA denied the Union's exceptions alleging that the Arbitrator improperly relied on certain provisions of the settlement agreement. Applying the deferential "essence" standard, the FLRA found that the award does not fail to draw its essence from the disputed provisions of the parties' settlement agreement.

61 FLRA No. 96;  
61 FLRA 510  
0-AR-3962  
February 10, 2006

[AFGE, Local 2328 and U.S. Department of Veterans Affairs, Medical Center, Hampton, VA.](#) The Arbitrator denied a grievance alleging that the Agency violated the parties' collective bargaining agreement by implementing a compressed work schedule involving 12.5 hour tours without prior notification to the Union. The FLRA denied the Union's exceptions alleging that the award fails to draw its essence from the agreement and is based on nonfacts. According to the FLRA, the Arbitrator did not err in concluding that the implementation of the compressed work schedule did not constitute a change in conditions of employment requiring notice or that there was no past practice of limiting tours to 12 hours in duration.

61 FLRA No. 97;  
61 FLRA 515  
CH-CA-04-0303  
February 10, 2006

[United States DOJ, BOP, Federal Correctional Institution and AFGE, Local 607, AFL-CIO.](#) The Judge dismissed a complaint alleging that the Respondent violated § 7116(a)(1) and (2) of the Statute when a Lieutenant made a certain comment to an employee. The FLRA upheld the Judge's conclusion, finding that the Judge did not err in his factual findings or credibility determinations and that the GC's evidence did not establish disparate treatment.

61 FLRA No. 98;  
61 FLRA 530  
WA-RP-05-0031  
February 14, 2006

[United States Department of the Navy, Mid-Atlantic Regional Maintenance Center, Norfolk, VA and IFPTE, AFL-CIO.](#) The Activity filed a petition seeking a determination that transferred employees, who were previously represented in four separate bargaining units, constitute a single bargaining unit. Before the RD, the parties, in a stipulation, waived a hearing in this matter and the right to file an application for review of the RD's decision. The RD found that the Activity is a new activity and issued a new certification stating that IFPTE is the exclusive representative of the employees who were transferred to the Activity. IFPTE filed a petition for review, challenging the RD's finding that the activity

is a new activity. The FLRA dismissed IFPTE's application for review, finding that IFPTE clearly and unmistakably waived its right to file the application for review in this case.

61 FLRA No. 99;  
61 FLRA 533  
0-AR-3990  
February 16, 2006

[United States Department of Health and Human Services, FDA, N.J. District and NTEU, Chapter 290.](#) The Arbitrator found that the Agency did not fail to follow training policy, engage in age and/or gender discrimination, and/or retaliate against the grievant in not selecting the grievant for training. The Arbitrator did find that the Agency committed a *per se* violation of the EEOC's regulations when the supervisor sent an email to other management officials that was critical of the grievant, and he directed the Agency to provide EEO training to the grievant's supervisor. The Agency filed exceptions alleging that the Arbitrator exceeded his authority because the issue of a *per se* violation based on the email was not before him. The FLRA granted the Agency's exception and set aside the award.

### **FEDERAL SERVICES IMPASSES PANEL DECISIONS**

06 FSIP 10  
February 15, 2006

[Department of Veterans Affairs, Health Eligibility Center, Atlanta, GA and Local 518, AFGE, AFL-CIO.](#) The Panel ordered the parties to adopt the Union's proposal of replacing the existing glass panels on the sides of the cubicles on the 2<sup>nd</sup> and 4<sup>th</sup> floors with "spraylight" (i.e., frosted) glass panels. According to the Panel, the measure of privacy that will be afforded to employees by making this change outweighs the cost of the proposal.

05 FSIP 129  
February 15, 2006

[SSA, Gainesville Field Office, Gainesville, GA and Local 3509, AFGE, AFL-CIO.](#) The Panel made the following orders in resolving the parties' dispute concerning the relocation of the Gainesville Field Office:

1) Adopt the Agency's proposal regarding the floor plan. The Agency proposed to place the break room/interactive video training room on the southeast corner of the office; the storage room along the south wall; and the employee workstations in the southwest corner of the office. The Panel determined that the Agency's proposed floor plan allows more direct access from employees' workstations to the Front-end Interviewing and reception areas, and provides better lines of sight for purposes of supervision, than the Union's.

2) Adopt the Agency's proposal regarding elevator breakdowns. The Agency proposed that:

Appropriate arrangements will be made for employees who present medical certificates indicating they cannot or should not climb stairs in the event the elevator is not functioning. This may include but is not limited to assignment to another office, approving excused absence, or setting up an alternative work arrangement, etc. Medical certificates will not be required when the employee has already established obvious mobility impairment. In an emergency situation the office Physical Security Action Plan/Occupant Emergency Plan will be followed.

The Panel stated that the Agency's proposal meets employees' interests in the special circumstances it addresses without unduly limiting the Agency's flexibility to respond in the manner it deems most appropriate.

3) Adopt the agency's proposal regarding access to balconies. The Agency proposed that the southern balcony be available for breaks and lunches, and to provide that area with a table and chairs. In addition, the center two balconies on the north side of the building would be available to employees for breaks. According to the Panel, limiting employees' ability to eat lunch on the southern balcony makes sense because it is the largest balcony and nearest to the break room under the Agency's floor plan.

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

AT0330050118-I-1  
2006 MSPB 44  
March 13, 2006

*Letchworth v. Social Security Administration*. The Board cannot obtain jurisdiction over an appellant's sex discrimination claim through USERRA or VEOA; a preference eligible may not pursue a claim of violation of a veterans' preference statute or regulation through the VEOA administrative process in 5 U.S.C. § 3330a while also pursuing at the same time a claim for this same violation under any other law, rule, or regulation.

DC1221040495-B-1  
2006 MSPB 41  
March 10, 2006

*Gonzales v. Department of the Navy*. For whistleblowing purposes, the Board holds that under 5 U.S.C. § 2302(a)(2)(A)(ix) a personnel action includes the denial of the opportunity to earn overtime pay that the employee would otherwise have had and includes a shift change resulting in a loss of nighttime differential hours.

CB7121060008-V-1  
2006 MSPB 51  
March 6, 2006

*Gore v. Department of Labor*. The Board holds that it lack jurisdiction under 5 U.S.C. § 7121 to review an arbitration decision concerning an agency's flexiplace decisions; review of an arbitrator's award on such issues appears to lie with the Federal Labor Relations Authority.

SF0731050248-I-1  
2006 MSPB 42  
March 10, 2006

*Sazegari v. Office of Personnel Management*. In a footnote, the Board applies *Folio v. DHS*, 402 F.3d 1350, 1354-55 (Fed. Cir. 2005) and states that under 5 C.F.R. § 731.501, the Board is not prevented from considering the additional considerations that constitute the "nexus" between the specific factors of 5 C.F.R. § 731.202(b) and the additional considerations of 5 C.F.R. § 731.202(c); those specific factors and additional considerations form the basis of the general determination of whether the action will protect the integrity or promote the efficiency of the service.

AT0330030076-N-1  
CH3343010706-N-1  
2006 MSPB 54  
March 22, 2006

*Dean v. USDA & Olson v. DVA & OPM, Petitioner*. The Board denied OPM's request to stay enforcement of the Board's final decisions in *Dean v. Department of Agriculture*, 99 M.S.P.R. 533 (2005), and *Olson v. Department of Veterans Affairs*, 100 M.S.P.R. 322 (2005), pending the disposition of its petition for reconsideration of these decisions. In these cases, the Board held that the agencies violated the appellants' veteran's preference rights by selecting non-preference eligible applicants under the Outstanding Scholar Program for competitive service positions sought by the appellants.