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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 1092

FEDERAL LABOR RELATIONS AUTHORITY DECISIONS

61 FLRA No. 100;
SF-RP-05-0026;
March 28, 2006

U.S. Department of the Army, Parks Reserve Training Center, Dublin, California and International Association of Fire Fighters, Local F-305, AFL-CIO. The Union, exclusive representative of a unit of non-supervisory firefighters at the Activity, filed a petition seeking to clarify the unit to include the two individuals who encumber the existing position of supervisory firefighter (Captains). The Regional Director (RD) concluded that the Captains should be included in the unit because they are not supervisors within the meaning of § 7112(b)(1) of the Statute, as defined in § 7103(a)(10) of the Statute. In reaching this conclusion, the RD, applying FLRA case law, found that although the Captains do engage in supervisory authority that requires the consistent exercise of independent judgment, they do not spend a preponderance of their employment time exercising supervisory authority. The FLRA denied the Activity's application for review of the RD's decision, finding that: (1) there is not an absence of precedent concerning the definition of "preponderance" or "employment time" in relation to § 7103(a)(10) of the Statute; (2) the RD did not apply the wrong legal standard in interpreting § 7103(a)(10); and (3) the RD did not fail to apply appropriate precedent.

61 FLRA No. 101
O-MC-22
April 18, 2006

National Association of Agriculture Employees and U.S. Department of Homeland Security, Bureau of Customs and Border Protection and AFGE, AFL-CIO and NTEU and AFGE, National Border Patrol Council, AFL-CIO and National Association of Plant Protection and Quarantine Office Support Employees. The National Association of Agricultural Employees (NAAE) filed a motion for a stay of the RD's Decision and Order directing an election in *U.S. Dep't of Homeland Security, Bureau of Customs and Border Protection, et al.*, WP-RP-04-0067. In [*U.S. Dep't of Homeland Security, Bureau of Customs and Border Protection*](#), 61 FLRA 485 (2006), 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. In its motion, NAAE states that it has appealed the FLRA’s denial of its application for review insofar as it concerns the unit status of Agriculture Specialists under § 7103(a) (15) to the U.S. Court of Appeals for the Ninth Circuit.

Applying the standards used by appellate courts to evaluate requests to stay district court orders, the FLRA denied NAAE’s motion for a stay. Specifically, the FLRA determined that NAAE had not demonstrated that success of its court appeal is likely or probable because § 7123(a)(2) of the Statute precludes judicial review of appropriate unit determinations under § 7112. The FLRA also determined that NAAE’s claims of irreparable harm if relief is denied are completely speculative. Moreover, the FLRA found that NAAE’s contentions as to the absence of harm to other parties, or non-parties, as a result of granting a stay, compared to the harm it would suffer if a stay is denied, are similarly unsupported and speculative. Finally, the FLRA determined that the public interest would be better served by allowing employees expeditiously to choose their exclusive representative.

FEDERAL SERVICES IMPASSES PANEL DECISIONS

05 FSIP 52
April 4, 2006

Department of Justice, Federal Bureau of Prisons, Federal Detention Center, Miami, Florida and Local 501, AFGE, AFL-CIO. The impasse before the Panel concerned the Agency’s decision not to establish a 4/10 compressed work schedule (CWS) program for employees in the Correctional Services Department as proposed by the Union. The Panel ordered the Union to withdraw its CWS proposal, finding that the Agency met its burden of establishing that an adverse impact is likely to occur. In reaching its conclusion, the Panel noted the Union’s concession that implementation of its proposed 4/10 CWS would increase the costs of overtime and premium pay. The Panel also stated that even if the Union’s lower cost figure is accepted, the increase is substantially more than the reasonable administrative cost relating to the process of establishing a compressed work schedule permitted under the Federal Employees Flexible and Compressed Work Schedules Act.

05 FSIP 132
April 7, 2006

Government Printing Office, Washington, D.C. and Fraternal Order of Police, Lodge 1. The current workday of Agency police officers is 8 hours, which includes a 30-minute paid time period for lunch. In bargaining over a successor collective bargaining agreement, the Agency proposed to change this schedule to an 8-hour workday with a 30-minute unpaid lunch. The Union’s proposal requires that the parties reopen pay negotiations to discuss the impact of this change. The Panel ordered the parties to follow the Agency’s proposal, finding that increasing the length of the workday by one-half hour would enhance the Agency’s internal security and that such a schedule is consistent with the work hours of its other employees and those of police forces it works with most closely. The Panel also found that the parties’ 2004 wage negotiations will result in employees receiving a 40-percent increase in salary over the 4-year term of the agreement, which does not contain a reopener provision.

05 FSIP 136
April 7, 2006

Department of Justice, Federal Bureau of Prisons, U.S. Penitentiary Allenwood, White Deer, PA and Local 307, AFGE, AFL-CIO. The impasse before the Panel concerned where and when employees within the secure perimeter of the facility should be permitted to smoke outdoors. The Agency, relying on security needs

of the institution, proposed limiting smoking to certain areas and certain times. The Union's proposal would allow employees to be able to smoke anywhere within the secure compound as long as they remain at least 25 feet from building entrances and to request a duty-free lunch.

After determining that it had jurisdiction to resolve the dispute, the Panel stated that the smoking policy should be changed to require management to designate no more than one smoking area outside each housing unit at least 25 feet from building entrances. According to the Panel, this approach accommodates the needs of correctional officers without a duty-free lunch period. Using the Agency's proposal as the basis for resolving the dispute, the Panel ordered the adoption of the following wording:

Outdoor Smoking: Smoking shall be permitted by staff in no more than one area outside each housing unit. The outside smoking areas shall be designated by management, and shall be at least 25 feet from any entrance. In addition, shelters will be constructed to provide a measure of protection from the elements at the following marked designated staff smoking areas: 1. Inside compound by the Lieutenants' Office; 2. Outside the powerhouse; and 3. Outside the central warehouse. Staff will only be permitted to utilize these areas before work; after work; while on their 30 minute duty-free lunch break; or during the course of performing work (e.g., getting mail, etc.) for short durations (e.g., 5 minutes).

06 FSIP 1
April 7, 2006

Department of the Navy, Naval Air Station North Island, San Diego, CA and Local 77, IFPTE, AFL-CIO. Due to budgetary concerns, the Agency proposed to discontinue cash sales (serving of meals) to civilian employees represented by the Union at the Navy Galley. The Panel ordered the parties to adopt the Agency's proposal, finding that the change appears to be part of the Department-wide initiatives to eliminate or reduce expenditures that do not directly support military readiness. The Panel also determined that the primary mission of the Galley is to feed enlisted personnel, and that the prices charged for meals are significantly less than their actual cost. According to the Panel, these considerations outweigh the impact on bargaining unit employees, particularly given the variety of nearby eating establishments, and the fact that employees have the option of bringing their own food if the available alternatives do not meet their personal nutrition or budgetary requirements.

MERIT SYSTEMS PROTECTION BOARD DECISIONS

CH315H05072011
2006 MSPB 72
April 7, 2006

Steinhoff v. Department of Veterans Affairs. Because the agency did not terminate the appellant's appointment until the end of the appellant's tour of duty on his last day of probation, the Board held that the appellant had completed his probationary period. The appellant was denied his right to minimum due process, specifically the right to respond prior to removal. The agency was ordered to cancel the appellant's removal and to restore the appellant with back pay, interest on back pay, and other benefits.

PH0752040154I2
2006 MSPB 74
April 7, 2006

Wirzberger v. Department of the Treasury. The Board held that an appellant's bipolar disorder prior to issuance of the initial decision did not justify filing of her petition for review one year after the initial decision became final. The Board considered that the delay was significant and the appellant was not

incapacitated between the issuance of the ID and the filing of her untimely PFR. Neither did the appellant's pro se status during part of this time and her inability to afford legal representation alone warrant waiving the filing deadline.

SF075205086511
2006 MSPB 76
April 10, 2006

Hanna v. U.S. Postal Service. The Board held that it was inappropriate to dismiss a constructive suspension appeal as untimely filed because the jurisdictional and timeliness issues are "inextricably intertwined," i.e., resolution of the timeliness issue depends on whether the appellant was subjected to an appealable action. Because of a grievance settlement that constituted "full and final settlement of all issues and disputes pertaining to the grievance," the appellant waived his right to challenge the agency action before the Board. The appellant was placed on notice of the dispositive jurisdictional issue and provided an opportunity to address the issue. He did not affirmatively disavow the grievances until he filed his appeal to the Board and thus is bound by the union's actions.

CH344305036311
2006 MSPB 79
April 11, 2006

Osis v. Department of Housing & Urban Development. The Board applied its decision in *Lee v. Department of Justice*, 99 M.S.P.R. 256 (2005), and held that neither the Back Pay Act, 5 U.S.C. § 5596, nor the Barring Act of 1940, 5 U.S.C. § 3702, limits the Board's authority to order compensation for violations that are the subject of USERRA claims. In *Lee* the Board held that it had the authority to hear and adjudicate USERRA claims without regard to whether the complaint accrued before, on, or after October 13, 1994, the date USERRA was enacted. However, the substantive provisions of USERRA are not retroactive, and the Board can enforce an employee's rights only as they existed at the time the claim accrued. The Board remanded this case to provide the appellant with an opportunity to establish additional USERRA claims that he may have.

SF075205045111
2006 MSPB 82
April 12, 2006

Stack v. U.S. Postal Service. The Board held that the agency's original penalty selection should not have been mitigated. The AJ sustained all of the agency's charges but not all of the underlying specifications. The Board remarked that the agency's penalty determination is entitled to deference and should be reviewed only to determine whether it is within the bounds of reasonableness. Although there were significant mitigating factors in this case, the Board pointed to the sustained misconduct, some of which was intentional, and the higher standard of conduct an agency has the right to expect from a supervisor.