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Personnel Management

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In Reply To:

Your reference:

DATE: June 2, 2006

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MEMORANDUM TO: MEMBERS
NETWORK ON EMPLOYEE & LABOR RELATIONS

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

SUBJECT: Case Listing Number 1093

FEDERAL LABOR RELATIONS AUTHORITY DECISIONS

61 FLRA No. 102; [*AFGE, Local 12 and U.S. Department of Labor*](#). The FLRA denied the Union's
61 FLRA 549 fair hearing, nonfact and essence exceptions to an arbitration award, not
0-AR-4044 otherwise described.
April 27, 2006

61 FLRA No. 103; [*AFGE, Local 331 and U.S. Department of Veterans Affairs, VA Maryland*](#)
61 FLRA 550 [*Health Care System*](#). The Arbitrator denied the grievance, finding that the
0-AR-4007 Agency did not violate the parties' collective bargaining agreement by failing to
May 2, 2006 provide the Union with the office space it requested and that the Agency's
failure to timely respond to the grievance did not result in harmful error to the
Union. The Union filed an exception, alleging that the Arbitrator erred in
applying the MSPB's harmful error rule. The FLRA denied the Union's
exception, finding that although the Arbitrator was not required to apply the
harmful error rule in this case, nothing in law, rule, or regulation precludes an
arbitrator from applying the harmful error rule in cases where its application is
not required.

61 FLRA No. 104; [*U.S. Department of the Interior, National Park Service, Pictured Rocks National*](#)
61 FLRA 552 [*Lakeshore, Munising, Michigan and NFFE, Local 2192*](#). This matter was before
0-AR-3964 the FLRA on the Union's motion for reconsideration of the FLRA's decision in
May 3, 2006 [*61 FLRA 404 \(2005\)*](#). In that case, the FLRA concluded that 16 U.S.C. § 18g
was not violated because in the situation where it was undisputed that the
Agency did not have the funding to hire the same number of seasonal employees
as it had hired in previous years, volunteers who performed work previously
performed by seasonal employees did not displace those employees. The FLRA
denied the Union's motion for reconsideration, finding that the FLRA did not
raise *sua sponte* the argument that the Agency's use of volunteers did not
constitute the displacement of employees under applicable statutes and that the
Union failed to demonstrate that the FLRA's construction of § 18g renders the
parties' agreement meaningless.

61FLRA No. 105;
61 FLRA 554
0-NG-2837
May 2, 2006

[*NTEU and U.S. Department of the Treasury, IRS, Washington, D.C.*](#) The 3 provisions in dispute involved formulas for rating and ranking applicants for vacant positions. Specifically, the provisions specified the number of points that would be given to applicants for different types of performance-related awards. The FLRA found that the provisions were outside the duty to bargain because they were contrary to 5 C.F.R. § 300, which provides that employment practices must be based on a job analysis of the particular position or positions to be filled. According to the FLRA, the provisions apply without regard to the demands of the specific occupations and are not designed to apply to a particular position or group of positions.

61 FLRA No. 106;
61 FLRA 558
0-AR-4022
May 4, 2006

[*National Association of Air Traffic Specialists, NAGE, SEIU and U.S. Department of Transportation, FAA.*](#) The Arbitrator found that the Agency violated the parties' collective bargaining agreement and Memorandum of Agreement (MOA) by denying certain employees the use of duty time to pursue career transition activities after they received RIF notices. However, the Arbitrator denied the Union's request for a monetary remedy, finding that the agreement and MOA entitled employees to duty time to engage in activities but not pay. The FLRA denied the Union's exception that the award was contrary to law, finding that neither 49 U.S.C. § 40122(g)(2), the Back Pay Act, nor the Supreme Court decision or Authority decisions relied on by the Union provided a basis for a monetary remedy.

61 FLRA No. 107;
61 FLRA 560
0-AR-4046
May 4, 2006

[*AFGE, Local 2437 and U.S. Department of Veterans Affairs, Medical Center, Dallas, Texas.*](#) The Arbitrator denied the grievance alleging that the Agency violated the parties' collective bargaining agreement, memorandums of understanding and Agency policies in terminating the two grievants. 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 grievance alleged that the Agency improperly terminated the grievants. The FLRA also stated that even if the Union was correct that the grievance concerned matters other than the removals themselves, the claimed violations of the parties' agreements and Agency rules were inextricably intertwined with the removals.

61 FLRA No. 108;
61 FLRA 562
AT-CA-04-0349
May 4, 2006

[*U.S. Department of the Navy, Naval Air Station, Pensacola, Florida and AFGE, Local 1960.*](#) The Judge concluded that the Agency violated § 7116(a)(1) of the Statute by denying the Union's request to meet with unit employees who are firefighters working twenty four-hour shifts. Finding that the employees are in a nonduty status during the periods when they are not required to perform work, such as a lunch break, the Judge rejected the Agency's argument that the employees cannot be solicited for Union membership during their shifts because they do not have any nonduty periods. Noting that § 7131(b) of the Statute requires that union solicitation be performed when employees are in a nonduty status, the FLRA upheld the Judge's conclusion. According to the FLRA, where employees have been assigned periods of time during which the performance of job functions is not required (i.e., paid free time), such time falls within the

meaning of the term “nonduty status” as used in § 7131(b), and solicitation of membership during such time is permissible. The FLRA also found that 5 U.S.C. § 5545(b)(2) establishes how the employees’ basic rate of pay is to be calculated and does not, contrary to the Agency’s argument, demonstrate that the employees are in a duty status during their entire shifts.

61 FLRA No. 109;
61 FLRA 571
0-AR-4000
May 4, 2006

AFGE, Local 2145 and U.S. Department of Veterans Affairs, Hunter Homes McGuire Medical Center, Richmond, Virginia. The grievant, a nurse in the cardiac catheterization laboratory (CCL), submitted a report to a supervisor stating that she believed a physician provided improper treatment to a patient who later died. A few weeks later, the grievant was detailed and, subsequently, permanently reassigned to the emergency room (ER). The grievant filed a EEOC complaint concerning her detail to the ER, which included an assertion that the grievant suffered harassment based on her whistleblowing activities. Three months later, the grievant filed a grievance alleging that she was detailed and then permanently reassigned in retaliation for her EEOC and WhistleBlower Protection Act (WPA) claims. The Arbitrator, relying on the fact that the EEOC complaint was filed first, determined that § 7121(d) of the Statute precluded him from resolving any issues related to the grievant’s detail and permanent reassignment, including the grievant’s WPA claim. In addition, the Arbitrator, relying on a determination by the Under Secretary for Health in a prior case that a reassignment of a nurse involved professional competence and conduct, found that the Agency’s decision to detail and reassign the grievant was outside the negotiated grievance procedure because it was made pursuant to 38 U.S.C. § 7422, not § 7106 of the Statute.

The FLRA found that the Arbitrator properly concluded that the portion of the grievance concerning the detail was precluded under § 7121(d). However, the FLRA set aside the Arbitrator’s finding that the grievant’s WPA claim and claims relating to the grievant’s permanent reassignment are precluded by § 7121(d). Specifically, the FLRA stated that § 7121(d) of the Statute provides that when an employee affected by a prohibited personnel practice under 5 U.S.C. § 2302(b)(1) has raised the matter under a statutory procedure, such as an EEOC complaint, the employee may not file a written grievance under the negotiated grievance procedure concerning the same matter. The FLRA determined that as both the EEOC complaint, which was filed first, and the grievance concerned the grievant’s detail to the ER, the complaint and the grievance concerned the same “matter” within the meaning of § 7121(d) of the Statute. However, the FLRA found that because the EEOC complaint did not include the grievant’s permanent reassignment, the Arbitrator erred in finding that this matter was precluded from review pursuant to § 7121(d). With regard to the Union’s WPA claim, the FLRA stated that although § 7121(d) provides that matters involving claims under 5 U.S.C. § 2302(b)(1) may be filed under the negotiated grievance procedure or a statutory procedure, reprisal for whistleblowing activities is a prohibited personnel practice within the meaning of 5 U.S.C. § 2302(b)(8), not 5 U.S.C. § 2302(b)(1). Therefore, according to the FLRA, the Arbitrator erred in finding that the WPA claim was precluded under § 7121(d).

The FLRA also remanded the award for explanation of the basis of the Arbitrator’s finding that the grievance, to the extent it concerns the grievant’s reassignment, is excluded from the negotiated grievance procedure pursuant to

§ 7422. In this regard, the FLRA concluded that it was unable to determine whether the Arbitrator erred in finding that the Agency's § 7422 determination in the prior reassignment case applied to subsequent similar cases. Finally, the FLRA denied the Union's essence and exceeded authority exceptions and its contentions that the award is contrary to § 7106 and the WPA.

61 FLRA No. 110;
61 FLRA 578
0-AR-4051
May 4, 2006

[AFGE and U.S. Department of Defense, Defense Threat Reduction Agency](#). The FLRA denied the Union's procedural arbitrability exception to an arbitration award, not otherwise described.

FEDERAL SERVICES IMPASSES PANEL DECISIONS

05 FSIP 114
April 25, 2006

[Department of Homeland Security, Border and Transportation Security Directorate, Bureau of Customs and Border Protection, Washington, D.C. and NTEU](#). The impasse before the Panel concerned bargaining over the impact and implementation of the Agency's decision to have employees provide after-hours work coverage. Specifically, the Union proposed that employees should be paid for the entire time they are assigned to after-hours duty ("standby duty") and the Agency proposed that employees be paid only for the time they are actually responding to calls and inquiries ("on-call status"). In addition, the Union proposed that seniority should be the sole basis in determining who would be assigned to an after-hours work shift and the Agency proposed that seniority should not be the only factor in making such decisions. The Panel ordered the parties to adopt both of the Agency's proposals. With respect to the first issue, the Panel found that employees affected by management's implementation of an after-hours work plan are not so restricted in their movements and activities as to warrant compensation for the entire duration of their assignments. In this regard, the Panel stated that employees are permitted to perform work from their home, their duty station, or at the closest Agency facility with mainframe access based on the employee's preference. With respect to the second issue, the Panel was persuaded that, in addition to seniority, management should have the flexibility to use job-related selection criteria when assigning after-hours tasks based on the knowledge, skills and abilities of specific employees.

05 FSIP 120
April 25, 2006

[Department of Homeland Security, Border and Transportation Security Directorate, Bureau of Customs and Border Protection, Washington D.C. and NTEU](#). The impasse before the Panel concerned the Agency's uniform policy. The Union proposed that the Agency allow "legacy" Customs Inspectors, Canine Enforcement Officers, and any other uniformed legacy Customs Officer to be permitted to wear cargo shorts in all Class 3 environments, which include land border passenger processing, cargo examinations, courier hubs, and mail facilities. The Agency, citing safety concerns and a desire to implement a consistent uniform policy for all inspection personnel, proposed that cargo shorts be an authorized trouser option in the Class 3 confined cargo environment only at the Southwest border locations, South Florida, and Puerto Rico. The Panel ordered the parties to adopt the Union's proposal, finding that the Agency had not demonstrated how permitting these employees to wear cargo shorts in all Class 3 environments would preclude it from presenting a more consistent, professional law enforcement appearance or compromise its ability to meet its mission.

MERIT SYSTEMS PROTECTION BOARD DECISIONS

- CB1214060009T1
2006 MSPB 92
April 19, 2006
- [*Special Counsel v. Department of Homeland Security & Knowles*](#). In response to an interlocutory appeal, the Board held that the ALJ properly granted an appellant's motion to intervene in a case involving a corrective action complaint against the appellant's employing agency. The Special Counsel argued that 5 U.S.C. § 1214 and the Board's implementing regulations make no provision for the permissive intervention of individuals, like the appellant, who allegedly benefited from the commission of a prohibited personnel practice. The Board found that the authority relied upon by the OSC did not prohibit such an individual from requesting intervention in a corrective action. In a separate analysis of the specific circumstances surrounding the motion, the Board determined that the motion met the criteria for permissive intervention.
- DC0752040233I1
2006 MSPB 118
May 8, 2006
- [*Batts v. Department of the Interior*](#). Board overturns AJ who mitigated removal to 30-day suspension of an Alternative Dispute Resolution Coordinator for two incidents of misconduct directed toward a female coworker (kissing and hugging); placing offender in another position to minimize contact with coworkers was proper interim relief.
- SF1221050218W1
2006 MSPB 123
May 10, 2006
- [*Scalera v. Department of the Navy*](#). Board reopens on its own motion and remands case to regional office for consideration of IRA (whistleblowing) appeal; AJ incorrectly ruled that the separated probationary employee made a valid election of forum by filing a grievance under an NGP; Board notes that probationary employees do not have NGP grievance rights and thus the NGP could not be a valid election of forum for a probationer seeking review of whistleblower issues.
- NY0752040279I2
2006 MSPB 124
May 11, 2006
- [*Dias v. Department of Veterans Affairs*](#). Board upholds removal of employee for AWOL charged when the agency denied the employee's request for leave without pay under the Family and Medical Leave Act of 1993 for failure to provide supporting documentation; employee was AWOL several weeks and had a history of discipline for similar offenses.
- DA0752050005I1
2006 MSPB 125
May 11, 2006
- [*Wallendorf v. Department of the Treasury*](#). Board overturns AJ and reopens case where appellant made a nonfrivolous allegation that her resignation was involuntary because she resigned based on the agency's misleading statements (agency told her she would lose her health insurance coverage if she didn't resign immediately).