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In Reply To:

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DATE: August 22, 2006

MEMORANDUM TO: MEMBERS
NETWORK ON EMPLOYEE & LABOR RELATIONS

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

Subject: Case Listing Number 1096

FEDERAL LABOR RELATIONS AUTHORITY DECISIONS

61 FLRA No. 119;
61 FLRA 618
0-AR-4012
July 13, 2006

[NTEU and U.S. Department of the Treasury, IRS](#). As relevant here, an arbitrator found that the agency's requirement that candidates for a Revenue Agent position must demonstrate knowledge in five specific areas of accounting (the five-knowledges requirement) violates 5 U.S.C. § 3808 and the parties' collective bargaining agreement because this requirement is a minimum educational requirement that is unnecessary to successful performance. Based on these findings, another arbitrator issued several remedies. Analyzing the merits award, the FLRA determined that in view of the Arbitrator's finding that the "five-knowledges" requirement can be satisfied through either education or experience, he erred in concluding that the "five-knowledges" requirement is a minimum educational requirement under § 3308. Therefore, according to the FLRA, the Arbitrator erred in finding the "five-knowledges" requirement inconsistent with § 3308. The FLRA also determined that the merits award affects management's right to make selections under § 7106(a)(2)(C) because the Arbitrator found that the parties' agreement precludes the Agency from using the five-knowledges requirement as a minimum qualification requirement. Accordingly, the FLRA set aside the merits award and consequently, the remedy award.

61 FLRA No. 120;
61 FLRA 625
0-AR-4013
July 18, 2006

[AFGE, Local 919 and U.S. Dept' of Justice, BOP, U.S. Penitentiary, Leavenworth, KA](#). The Arbitrator denied the grievance, which alleged that the grievants were entitled to hazard pay differential (HPD) and environmental differential pay (EDP). The Arbitrator found that exposure to second-hand smoke was not a hazard for which premium pay was available under 5 C.F.R. Part 550, Subpart I, HPD Appendix A and 5 C.F.R. Part 532, Subpart E, EDP Appendix A, and that while premium pay could have been available to employees if the Agency had requested OPM to amend HPD Appendix A pursuant to 5 C.F.R. § 550.903(b), the Agency had not done so and the Union had not made such a request. In addition, the Arbitrator found, as relevant here, that the Agency had not violated the article of the parties' agreement pertaining to the safety and health of employees. The FLRA

61 FLRA No. 121;
61 FLRA 628
0-AR-3972
July 26, 2006

denied the Union's contrary to law exception, finding that an agency is not required to affirmatively seek to have second-hand smoke, or any other matter, added to the lists set out in the HPD and EDP Appendices. The FLRA also denied the Union's essence exception, finding that there is no indication that the Arbitrator added a requirement in the parties' agreement for the Union to request the Agency to petition OPM to include second-hand smoke in relevant appendices.

AFGE, Local 12 and U.S. Dep't of Labor. The Arbitrator sustained a grievance over the grievants' entitlement to equal pay for equal work. The Arbitrator remanded the question of the amount of back pay to the parties and directed, among other things, that the Agency conduct a desk audit to determine if there should be an adjustment in the grievants' grade level. In a supplemental award (SA), the Arbitrator determined that an Agency-conducted desk audit report addressed the grade level at which the grievants were performing their duties and that it should be applied retroactively. Subsequently, the Union requested the Arbitrator to reconsider his SA. The Arbitrator denied the Union's request in a letter. The Union filed exceptions with the FLRA 30 days after receiving the letter. The FLRA determined that the exceptions were untimely filed because the time limit began on the date the SA was served on the parties and not the date that the Arbitrator's letter denying the request for reconsideration was served. According to the FLRA, the SA resolved the parties' outstanding issues and the Union's exceptions challenge the Arbitrator's findings in the SA and not the determinations in his letter.

61 FLRA No. 122;
61 FLRA 631
0-AR-3979
July 26, 2006

AFGE, Local 3810 and U.S. Dep't of Commerce, Economic Development Administration. The Arbitrator determined that the Agency did not violate either OPM Regulation or the parties' collective bargaining agreement when it chose not to promote the grievant to a GS-14 position. The FLRA denied the Union's contrary to law exception, finding that § 7106(a)(2)(C) does not compel an arbitrator or an agency to promote an employee in a career ladder position and that there is no provision of the Code of Federal Regulations or Authority precedent that requires a career ladder promotion when an employee receives a successful performance evaluation and works 52 weeks at a lower grade. The FLRA also denied the Union's nonfact exception, finding that even assuming the Arbitrator erred in concluding that the supervisors denied the promotion, rather than simply taking no action upon it, the Union has not established that this error would have led to a different result.

61 FLRA No. 123;
61 FLRA 634
0-AR-4029
July 27, 2006

U.S. Dep't of Transportation, FAA and NATCA. The grievance alleged that the Agency violated the parties' upgrade memorandum of understanding by not upgrading the air traffic control level of the Atlanta facility, which would have resulted in pay increases for the employees at that facility. The Arbitrator rejected the Agency's claim that the matter was not arbitrable because it concerned a classification issue within the meaning of § 7121(c)(5) of the Statute. In this connection, the Arbitrator explained that the Authority defines classification within the meaning of § 7121(c)(5) in terms of OPM's classification standards and that the Agency is not subject to OPM's classification standards. The FLRA stated that § 7121(c)(5) applies whether or not an agency is subject to OPM's classification standards and concluded that the Arbitrator thus erred in finding that § 7121(c)(5) is inapplicable. The FLRA noted that as a result of his findings, the Arbitrator did not resolve the parties' dispute over whether the grievance concerns a classification matter under § 7121(c)(5) and that the record is devoid of any factual findings to which the FLRA may defer in assessing whether the grievance involves a classification matter. Accordingly, the FLRA remanded the matter for this determination.

FEDERAL SERVICE IMPASSES PANEL DECISIONS

06 FSIP 41
June 12, 2006

[Dep't of the Army, U.S. Corps of Engineers, Northwestern Division, Portland, OR and United Power Trades Organization.](#) The impasse before the Panel concerns the ground rules for negotiating the impact and implementation of the Agency's Random Drug Testing Program. The Panel directed the parties to mediation-arbitration and the specific issues and resolution are as follows:

(1) The number of bargaining team members. The Union proposed that each negotiating team have five members and the Agency proposed two members. Citing past practice, the Arbitrator ordered the parties to adopt the Agency's proposal.

(2) Official time to prepare for negotiations. The Union proposed 40-hours-per-person and the Agency proposed a total bank of twenty hours. The Arbitrator ordered the parties to adopt the Agency's proposal, finding that its offer was more reasonable as official time for researching and planning negotiations is established by the parties' collective bargaining agreement.

(3) Payment of Travel and Per Diem Expenses to Prepare for Negotiations. Finding the Union's request for a 1-day planning session reasonable, the Arbitrator ordered that the Agency pay for the travel and *per diem* expenses for this session for up to four Union representatives in Spokane, Washington, or some other mutually agreeable location.

(4) Implementation of Drug-Testing Program Prior to the Completion of Bargaining. The Arbitrator determined that both parties proposed similar language indicating that the Agency will not implement any changes in personnel policy or conditions of employment until negotiations are complete, except as allowed by law. The Arbitrator ordered the parties to withdraw their proposals.

(5) Official time for Impasse Proceedings. The Arbitrator determined that the only difference between the parties' offers is that the Union proposes official time for four negotiators, rather than "equal numbers," as proposed by the Employer. The Arbitrator ordered the parties to adopt the Agency's proposal, finding that the Union has not provided a compelling reason to change the past practice of providing official time for "equal numbers."

06 FSIP 33
June 23, 2006

[Dep't of Veterans Affairs, Veterans Health Administration, Health Revenue Center, Topeka, KS and Local 906, AFGE, AFL-CIO.](#) The impasse before the Panel concerned official time for the local Union President. The Agency proposed to maintain the *status quo*, which is that the Union President would continue to receive 40-percent official time each week (16 hours). The Union proposed authorization of 50-percent official time (20 hours), due to the fact that the bargaining unit has more than doubled in the past year. The Panel agreed with the Union, finding its request "reasonable."

06 FSIP 73
June 23, 2006

[Dep't of Veterans Affairs, VA Medical Center, Chillicothe, OH and Local 1631, AFGE, AFL-CIO.](#) The impasse before the Panel concerned whether the Agency's decision to terminate the 5/4-9 compressed work schedule (CWS) of a Medical Administrative Assistant (MAA) at the facility's Mental Health Clinic (MHC) is supported by evidence that the schedule has caused an adverse agency impact. The Agency asserted that the 5/4-9 CWS has diminished the level of service provided to veterans and caused a reduction in productivity. The Union claimed that the Agency has not provided sufficient data to support its assertion. The Panel ordered the

termination of the 5/4-9 CWS in MHC because it concluded that the Agency demonstrated that the 5/4-9 CWS is causing a diminished level of service to veterans.

06 FSIP 37
June 27, 2006

[FDIC, Wash., D.C. and Chapter 207, NTEU](#). The impasse before the Panel concerned how the parties are to define “seniority” for the purpose of establishing priority in office selection. The Union proposed a determination first by grade, and as a tiebreaker, by length of time in the unit. The Agency proposed that the tiebreaker be an employee’s length of service not only at FDIC, but also including employment at the Resolution Trust Corporation (RTC) and the Federal Home Loan Bank Board (FHLBB). The Panel agreed with the Agency and ordered adoption of the following wording:

For moves involving Headquarters facilities in Washington, D.C. and facilities in Virginia Square, the employees in each unit shall select their offices by grade. If there are two or more employees with the same grade in a unit, the tie shall be broken by length of time in grade (FDIC/RTC/FHLBB), *i.e.*, the employee with the longest time in grade will choose first and so on.