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In Reply To:

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DATE: November 20, 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 1098

FEDERAL LABOR RELATIONS AUTHORITY DECISIONS

61 FLRA No. 130;
61 FLRA 654
0-NG-2870
August 11, 2006

[AFGE, Local 2139, National Council of Field Labor Locals and U.S. Department of Labor, Wage and Hour Division, Dallas, TX.](#) The proposal required the Agency to provide parking for bargaining unit employees who use their privately owned vehicles a majority of the time on Government business. The FLRA found the proposal within the duty to bargain. Relying on case law, the FLRA noted that where an agency has leased parking spaces through the GSA, as the Agency has done in this case, proposals requiring management to subsidize employee parking costs are within the duty to bargain. The FLRA also found that although the Agency argued correctly that 5 U.S.C. § 5704 requires that employees who park in commercial lots be reimbursed on a *pro rata* basis, the proposal concerns parking provided by the employer, rather than reimbursement of employee-rented public parking.

61 FLRA No. 131;
61 FLRA 657;
0-AR-3921
August 17, 2006

[OPM and AFGE, Local 32.](#) The Union filed a motion for reconsideration of the FLRA's decision in [OPM](#), 61 FLRA 358 (2005), where the FLRA determined that the Arbitrator's finding of disability discrimination and the make-whole remedy of backpay and interest, compensatory damages and attorney fees were deficient. The FLRA denied the Union's motion, finding that the Union failed to meet the heavy burden of establishing that extraordinary circumstances exist to justify reconsideration. Specifically, according to the FLRA, the Union did not establish that the FLRA erred in determining that the Arbitrator's summary findings failed to demonstrate that the grievant is an individual with a disability and that the Arbitrator expressly based the backpay remedy on the Agency's failure to reasonably accommodate the grievant's disability.

61 FLRA No. 132;
61 FLRA 658;
0-NG-2868
August 17, 2006

NATCA and U.S. Dep't of Transportation, FAA. The proposal concerned "runway incursions," which involve situations where an airplane on the ground does not maintain the required separation between itself and other airplanes, people, vehicles, or objects. The FLRA found the proposal outside the duty to bargain. In this regard, the FLRA stated that the Union did not file a response to the Agency's statement of position and, thus, did not dispute the Agency's assertions that Sections 1 and 2 of the proposal violate numerous management rights. According to the FLRA, where a union offers no argument or authority that a proposal does not affect management rights and does not make any argument that the proposal constitutes an exception to management rights, the Authority will find that the proposal is outside the duty to bargain.

61 FLRA No. 133;
61 FLRA 661;
0-AR-4008
August 21, 2006

AFGE, Local 171, Council of Prison Locals 33 and U.S. Dep't of Justice, Federal Bureau of Prisons, Federal Transfer Center, Oklahoma City, OK. The Union filed a group grievance and at the arbitration hearing the Arbitrator denied the Union's request to name a particular individual as the representative of the class of grievants, ruling instead that the Union President would be the grievant. The Arbitrator also dismissed the Union's grievance with prejudice because the Union stated that it was not prepared to proceed on the merits. The FLRA denied the Union's contention that the Arbitrator erred by denying the Union's request to name a particular individual as the representative. In this regard, the FLRA found that this contention constitutes a challenge to the Arbitrator's resolution of a procedural arbitrability issue and that the Authority generally will not find an arbitrator's ruling on the procedural arbitrability of a grievance deficient on grounds that directly challenge the procedural arbitrability ruling itself. The FLRA also denied the Union's fair hearing claim, finding that the Union had not shown that the Arbitrator refused to hear or consider pertinent and material evidence, or took other actions in conducting the proceeding that prejudiced the Union so as to affect the fairness of the proceeding as a whole. Rather, according to the FLRA, the Union declined to present its case in full because of its view that it was not prepared to do so.

61 FLRA No. 134;
61 FLRA 664;
0-AR-3877
August 23, 2006

ACT, New York State Council and U.S. Dep't of Defense, National Guard Bureau, State of New York Division of Military and Naval Affairs. The Union filed a motion for reconsideration of the FLRA's decision in *ACT, New York State Council*, 60 FLRA 890, where the FLRA upheld the Arbitrator's finding that the Agency did not violate the parties' collective bargaining agreement when it issued a new smoking policy. The FLRA denied the Union's motion, finding that the Union failed to meet the heavy burden of establishing that extraordinary circumstances exist to justify reconsideration. Specifically, the FLRA rejected the Union's claim that the failure of the Arbitrator and the Authority to decide the unfair labor practice claim was contrary to § 7116(d) of the Statute. In this regard, the Authority concluded that as the parties did not stipulate that this case involved a ULP claim, the Arbitrator's formulation of the issue as contractual was proper and the Arbitrator was not obligated to address and resolve whether the Agency's actions violated the Statute. The FLRA refused to impose a requirement that § 7116(d) requires arbitrators to always address and resolve alleged ULPs that a party may raise. The FLRA also rejected the Union's assertion that the Arbitrator did not interpret and apply the parties' agreement in denying the grievance.

61 FLRA No. 135;
61 FLRA 667
0-AR-3950
August 23, 2006

U.S. Dep't of the Treasury, IRS and NTEU. The grievant, a GS-12 employee, performed work at the Grade 13 level for an 8-month period. The Arbitrator determined that the Agency violated the parties' collective bargaining agreement when it failed to detail the grievant to the higher-grade level for the first 4 months. As a remedy, the Arbitrator ordered that the grievant be made whole, with interest, for the pay differential he should have received for work at the Grade 13 level for

the entire 8-month period. The FLRA concluded that that the Arbitrator's backpay remedy is deficient to the extent that it exceeds 120 days, and set aside that portion of the remedy, because it is contrary to 5 C.F.R. § 335.103(c). Relying on case law, the FLRA stated that temporary promotions of more than 120 days must be made pursuant to competition and that an arbitrator's award of a temporary promotion in excess of the regulatory cap of 120 days is contrary to § 335.103(c).

61 FLRA No. 136;
61 FLRA 671
0-AR-3982
August 23, 2006

[U.S. Environmental Protection Agency, Region 2 and AFGE, Local 3911](#). The Arbitrator found that the Agency's failure to grant the grievant an accretion-of-duties promotion violated the Equal Pay Act, Title VII of the 1964 Civil Rights Act, and the parties' agreement. Among other things, the Arbitrator ordered the Agency to promote the grievant to GS-13 within 10 days of the award and pay her back pay for a period of two years prior to the date of her promotion. The FLRA found the award contrary to § 7121(c)(5) of the Statute, which provides that a grievance concerning the classification of any position is removed from the scope of the negotiated grievance procedure. Given the facts of this case, according to the FLRA, the substance of the grievance concerned, and is integrally related to, the classification of the grievant's position. Specifically, the FLRA determined that grievance itself sought a promotion for the grievant to a GS-13 position, the Arbitrator's analysis involved a determination of the grade level of the duties assigned to and performed by the grievant, and, based on his conclusions as to the proper classification of those duties, he awarded the grievant a promotion to the next available GS-13 position.

FEDERAL SERVICE IMPASSES PANEL DECISIONS

06 FSIP 45
September 21, 2006

[Department of Health and Human Services, Public Health Service, Indian Health Service, Window Rock, Arizona and LIUNA, AFL-CIO](#). The impasse before the Panel concerned the extent to which the Agency should reimburse the Union for bargaining-unit members' travel and *per diem* expenses in connection with future bargaining over their initial master labor agreement. The Panel concluded that neither party offered a solution that appropriately balanced the equities involved. In this regard, the Panel found that the Union's proposal of requiring the Agency to pay \$300,000 before the Union incurs any financial burden would give it virtually no incentive to conduct negotiations expeditiously. The Panel also found that the part of the Agency's proposal that conditions its future contributions on the cost of previous bargaining is unpersuasive, given that its expenditures were the result of a voluntary agreement between the parties. The Panel ordered the adoption of a modified version of the Agency's final offer that provides both sides with a financial interest in conducting their negotiations in an efficient and effective manner.

06 FSIP 75
September 21, 2006

Department of the Navy, Naval Air Station Lemoore, Lemoore, CA and Local 2111, AFGE, AFL-CIO. Due to budgetary concerns, the Agency proposed to discontinue cash sales (serving of meals) to civilian employees represented by the Union at two galleys located at the Naval Air Station Lemoore (NASL). The Agency argued that the Panel should impose the same result at NASL as it did in *Department of the Navy, Naval Air Depot, North Island, San Diego, CA and Local 77, IFPTE*, Case No. 06 FSIP 1 (April 7, 2006) (*North Island*), where it ordered the discontinuation of cash sales to civilians at the North Island galley. In the instant case, the Panel ordered that the civilians continue to be allowed to eat in the NASL galleys in accordance with the rates set by the Under Secretary of Defense Comptroller (USDC). The Panel found that the alternative dining options available to the civilians at NASL are more limited than those at North Island. In addition, the Panel stated that it was “persuaded” that the Agency’s argument that current rates do not allow for the collection of the full cost of each meal sold are more appropriately directed to the USDC than to the Panel.

MERIT SYSTEMS PROTECTION BOARD DECISIONS

SF-3443-04-0614-I-3
2006 MSPB 316
October 20, 2006

Brandt v. Department of the Air Force. The Board found the appellant’s rights under Veterans Employment Opportunities Act of 1998 (VEOA) were not violated when the agency selected candidates for a position in the competitive service using merit promotion procedures because, in such cases, veterans’ preference provisions are not applicable. The Board acknowledged that merit promotion procedures, like competitive examination procedures, provide for competition among candidates. The Board distinguished this case from *Dean v. Department of Agriculture* and *Olson v. Department of Veterans Affairs*, (on the Outstanding Scholar Program) and *Deems v. Department of Treasury* (on the Clerical and Administrative Support Positions assessment tool). Unlike the appointing authorities in those cases, the authority used here (5 U.S.C. § 3304(f)) creates a valid exception to the general requirement that individuals appointed to the competitive service either have passed an examination or have been specifically excepted from doing so.

PH-1221-05-0595-W-1
2006 MSPB 303
October 5, 2006

Oscar v. Department of Agriculture. After holding a hearing, the administrative judge dismissed this IRA appeal for lack of jurisdiction, finding that the appellant did not make a protected disclosure. Citing *Spencer v. Department of the Navy*, 327 F.3d 1354, 1356 (Fed. Cir. 2003), the Board denied the request for corrective action but modified the initial decision, concluding that: the appellant made nonfrivolous allegations of jurisdiction; the hearing held below was not a jurisdictional hearing but a hearing on the merits; and the AJ’s conclusion that the appellant did not make a protected disclosure was a finding on the merits. The threshold issue of Board jurisdiction in an IRA appeal is determined on the written record. If the appellant makes nonfrivolous allegations of jurisdiction, he is entitled to a hearing on the merits, which is what the appellant received here.

AT-1221-06-0174-W-1
2006 MSPB 310
October 6, 2006

Hagen v. Department of Transportation. The Board concluded it was improper for the AJ to deny the appellant’s request for corrective action on the merits, without first determining whether the Board has jurisdiction over the IRA appeal. All of the required elements of the jurisdictional standard must be addressed by the AJ. To the extent the AJ dismissed the appeal as moot, the Board reasoned that the appellant should have had an opportunity to address the issue. The Board vacated the initial decision and remanded for further adjudication.

CH-3443-06-0221-I-1
2006 MSPB 311
October 10, 2006

Roy v. Department of the Treasury. The Board's regulations do not permit dismissal of an appeal as a sanction for failure to comply with a single order. In this case there was no evidence that the appellant intended to abandon his appeal. As a technical matter, to dismiss this appeal for failure to state a claim upon which relief can be granted was incorrect because it was not beyond doubt that the appellant could not prove facts which would entitle him to relief.

CH-3443-05-0761-I-1
2006 MSPB 312
October 10, 2006

Wood v. Department of Justice. Under the circumstances of this USERRA case it was appropriate to dismiss the appeal without prejudice to allow the appellant additional time to obtain evidence of the specific dates he claimed he was forced to use leave for nonduty days, rather than dismissing his appeal for failure to state a claim. The Board noted that imposition of a deadline by which the appeal must be refiled was not warranted. Denial of the appellant's request for a hearing should be reviewed if the appellant refiles his appeal and again appeals for a hearing if material facts are in dispute.