



United States
Office of
Personnel Management

Washington, DC 20415-2001

In Reply To:

Your reference:

1

1

DATE: December 7, 2006

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 1099

FEDERAL LABOR RELATIONS AUTHORITY DECISIONS

61 FLRA No. 137;
61 FLRA 77
0-AR-3987
August 23, 2006

[U.S. Dep't of Transportation, FAA, Fairbanks, Alaska and National Association of Air Traffic Specialists](#). The Arbitrator invalidated a breath-alcohol test administered to the grievant, an air traffic control specialist, and ordered make-whole relief. In reaching his conclusion, the Arbitrator relied solely on his finding that the breath alcohol technician who administered the test failed to meet the training standards of DOT Order 3910.1C. Before the FLRA, the Agency argued that the award violates management's right to determine its internal security practices under § 7106(a)(1) of the Statute. In applying the *BEP* analysis utilized for this type of exception, the FLRA concluded the award does not satisfy prong I because it does not provide a remedy for a violation found by the Arbitrator of a contract provision negotiated pursuant to § 7106(b). In this regard, the FLRA determined the award was not based on a violation of the parties' collective bargaining agreement, but rather is based solely on DOT Order 3901.1C and expressly remedies only the failure of the technician who administered the test to meet the training requirements of the order.

61 FLRA No. 138;
61 FLRA 681;
0-AR-4020
August 23, 2006

[AFGE, Local 104 and National Archives and Records Administration](#). Seven employees filed grievances protesting their discipline for improperly disseminating veterans' information and the Union filed an institutional grievance. The Arbitrator concluded that the Union's grievance could not be presented as such because, contrary to the collective bargaining agreement's definition of "institutional grievance," it affected a group of individuals rather than the Union. Accordingly, the Arbitrator concluded the Union's grievance was not arbitrable, and dismissed the grievance. The FLRA denied the Union's essence argument challenging the Arbitrator's interpretation of the agreement and its exceeds authority claims that the Arbitrator "mis-framed" the Union's institutional grievance as a group grievance and failed to define an institutional grievance. In this regard, the FLRA concluded that these contentions constitute challenges to the Arbitrator's procedural arbitrability determination, which the FLRA generally will find insufficient to

reverse an arbitrator's ruling. The FLRA also denied the Union's argument that the award is contrary to § 7112 of the Statute, finding it does not violate the Union's right to represent bargaining unit employees in arbitration, but only establishes what type of grievance must be utilized by the Union to pursue this grievance to arbitration.

61 FLRA No. 139;
61 FLRA 684;
0-AR-3960
August 23, 2006

[U.S. Dep't of Homeland Security, Customs and Border Protection, El Paso, TX.](#) The Agency refused to bargain with the Union over proposed changes to unit employees' conditions of employment because the Union did not submit written proposals. The Arbitrator concluded that the Agency had not met its duty to bargain. In reaching this conclusion, the Arbitrator determined that the parties' agreement did not require the Union to submit an initial written request to bargain because the case involved bargaining at the Sector level and not at the National level. In addition, the Arbitrator determined that although the parties may have exchanged written proposals at some time in the past, that informal practice did not modify the terms of the parties' agreement. The FLRA denied the Agency's essence exception, finding that the Agency had not established that the Arbitrator's interpretation of the agreement as not requiring written proposals at the Sector level or his past practice assessment were implausible or irrational.

61 FLRA No. 140;
61 FLRA 688;
DE-CA-03-0099
August 23, 2006

[United States Department of Defense, Defense Commissary Agency, Peterson Air Force Base, Colorado Springs, Colorado and AFGE, Local 1867.](#) The Administrative Law Judge (ALJ) found that the Agency provided adequate notice of the RIF but violated § 7116(a)(1) and (5) of the Statute by failing to engage in impact and implementation bargaining as requested by the Union. The ALJ ordered a *status quo ante* remedy. The FLRA denied the Union's cross-exception alleging that the Agency failed to provide sufficient notice because the information the Agency gave the Union was sufficient to provide it with notice of the scope and nature of the RIF and that the RIF was imminent. The FLRA also denied the Agency's claim that the ALJ failed to state the basis of her credibility determinations, contrary to the Administrative Procedures Act, because the ALJ stated that her determinations were based on the entire record, including her observation of the witnesses and their demeanor. The FLRA also upheld the ALJ's determination that the Agency failed to offer the Union an opportunity to bargain, finding that the Union had timely requested to bargain. Finally, the FLRA upheld the ALJ's order of a *status quo ante* remedy, finding that the ALJ properly applied the *FCI* factors in ordering this remedy.

61 FLRA No. 141;
61 FLRA 707;
0-AR-3994
August 24, 2006

[AFGE, Local 607, Council of Prison Locals and U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Elkton, Ohio.](#) The Arbitrator denied a grievance alleging that the Agency violated the master collective bargaining agreement and law by failing to pay night shift differential to employees who worked certain night overtime. Specifically, the Arbitrator found that the grievants were not entitled to this pay under 5 U.S.C. § 5545(a) because the night overtime assigned was "occasional or irregular overtime" that could not have been scheduled in advance of the administrative workweek. In addition, the Arbitrator determined that the grievants failed to submit a report of underpayment as required by the parties' agreement. The FLRA denied the Union's claim that the Arbitrator's erroneous assumption that the Agency had not scheduled night overtime prior to the start of the administrative workweek constituted a nonfact, finding that this issue was disputed before the Arbitrator. The FLRA also denied the Union's exception that the award is contrary to § 5545(a), finding that the Arbitrator's determination that there was no factual support for employees having performed night work that the Agency scheduled in advance supports his conclusion. Finally, the FLRA denied the Union's claim that the Arbitrator denied the Union a fair hearing by

61 FLRA No. 142;
61 FLRA 712
0-AR-4064
August 30, 2006

failing to admit certain exhibits into evidence because the Union failed to establish that the exhibits in question would have been pertinent or material or that the Union was prejudiced by the Arbitrator's actions.

[U.S. Dep't of Veterans Affairs, West Palm Beach VA Medical Center, West Palm Beach, Florida.](#) The Arbitrator sustained a grievance alleging that an Agency requirement that Union representatives report in person to their supervisors before leaving their worksites to use official time for representational duties was not enforceable under the parties' collective bargaining agreement. Specifically, the Arbitrator found that the reporting requirement "unfairly" singled out Union representatives in violation of Article 16, Section 1 of the agreement and that the only reference to a reporting requirement in the agreement, Article 45, Section 5, concerned travel on Union business away from the Agency's facility and that there was no such requirement for movement within the facility. The FLRA denied the Agency's argument that the award interferes with management's right to assign work under § 7106(a)(2)(B) of the Statute, finding that the Agency made no attempt to show, and did not cite precedent showing, a connection between the reporting requirement and management's right under § 7106(a)(2)(B). The FLRA also denied the Agency's essence claims, finding that the Agency failed to demonstrate that the Arbitrator's interpretation of Articles 16 and 45 was not rational or implausible. Finally, the FLRA denied the Agency's claim that the Arbitrator exceeded his authority by creating a reporting requirement for all employees, not just unit employees. In this regard, the FLRA stated that the award has no effect on non-unit employees because it is limited to Union representatives conducting representational activities on official time under the agreement.

61 FLRA No. 143;
61 FLRA 715
0-AR-4090
August 30, 2006

[LIUNA, Local 1396 and U.S. Dep't of Health and Human Services, Indian Health Service, Rockville, MD.](#) The grievant was charged with one hour of absence without leave (AWOL) and grieved that action. Finding that the grievant violated the parties' collective bargaining agreement by leaving the office to seek out a meeting with the Deputy Director to discuss a letter of reprimand without seeking prior approval from her supervisor, the Arbitrator denied the grievance. The FLRA denied the Union's contrary to law claim, finding that the case precedent relied on by the Union is misplaced. In this regard, the FLRA decision relied on by the Union is based on application of 5 C.F.R. § 630.403, which requires the agency to grant an employee sick leave in certain circumstances. However, according to the FLRA, this case does not involve sick leave and the Union points to no regulatory requirement that would require the Agency to grant sick leave in the circumstances of this case. The FLRA also distinguished an MSPB case relied on by the Union where the MSPB noted that an adverse action against an employee on the ground he was AWOL would not be sustained if it was shown that the employee was entitled to workman's compensation for the period covered by the AWOL charge, finding that no such circumstances are present in this case. Finally, the FLRA found that, contrary to the Union's argument, in the absence of a regulatory or contractual requirement that an employee be granted leave, a failure to follow leave request procedures can be the basis for an AWOL charge.

FEDERAL SERVICE IMPASSES PANEL DECISION

06 FSIP 106
October 3, 2006

[Department of the Army, Installation Management Agency Directorate of Emergency Services Headquarters, Fort Bragg Garrison Command \(Airborne\), Fort Bragg, North Carolina and Local 1770, AFGGE, AFL-CIO.](#) The impasse before the Panel concerned whether the Agency's decision to terminate the 4/10 compressed (CWS) of three Physical Security Inspectors is supported by evidence that the schedule has caused an adverse agency impact. The Agency asserted that the 4/10 CWS has caused a reduction in productivity and proposed to schedule all

Physical Security Inspectors to work five (5) eight hour days so that more inspections can be conducted. The Union claimed that the Agency failed to provide sufficient evidence to support its assertion and proposed that the three Physical Security Inspectors continue to work 4/10 CWS, with each having a different regular day off. The Panel ordered that the parties adopt the Union's final offer. According to the Panel, the record did not establish that the current 4/10 CWS has had a negative impact on the Agency's ability to accomplish its mission, or that replacing it with a 5/8 schedule would lead to an appreciable increase in productivity.

MERIT SYSTEMS PROTECTION BOARD DECISIONS

CH-0752-02-0318-I-1
2006 MSPB 305
October 6, 2006

Ortiz v. Department of Justice. The Board denied the appellant's request that his name or medical condition not be disclosed in the Board's decision. The Board outlined general principles which apply to such determinations as well as ways the request for confidentiality might be achieved. The Board stated that anonymity will be granted only when it is shown that harm is likely and the extent and likelihood of harm significantly outweighs the public interest in disclosure. Although the appellant argued his medical condition (depression) might be used to deny him employment, the Board concluded this claim was speculative.

AT-3443-04-0915-
I-12006 MSPB
319 October 27, 2006

Russell v. Equal Employment Opportunity Commission. **The Board determined that it has jurisdiction over this USERRA appeal notwithstanding the collective bargaining agreement (CBA), 5 U.S.C. § 7121, and the appellant's filing of a grievance. The Board determined that USERRA preempts or "supersedes," the CBA to permit the appellant to bring the MSPB appeal notwithstanding 5 USC 7121(a) which provides that with certain exceptions, the CBA is the exclusive procedure for resolving grievances. The Board concluded that failure to exclude USERRA claims from the CBA's grievance procedure constitutes an impermissible attempt under USERRA to limit individual USERRA rights by agreement.**