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In Reply To:

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DATE: January 9, 2007

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 1100

FEDERAL LABOR RELATIONS AUTHORITY DECISIONS

61 FLRA No. 144;
61 FLRA 719
0-AR-3821
August 31, 2006

[AFGE, AFL-CIO, Local 3614 and U.S. Equal Employment Opportunity Commission.](#) In *AFGE, AFL-CIO, Local 3614*, 60 FLRA 601, the FLRA remanded the case for clarification of whether any employees were entitled to overtime pay. The Arbitrator clarified in a supplemental award that no employees were entitled to overtime pay and the Union filed exceptions. The FLRA denied the Union's claim that the supplemental award failed to comply with the remand order because the issue before the Arbitrator concerned whether any employees were entitled to overtime pay and her clarification resolved that issue. The FLRA also denied the Union's exception that the award is contrary to 5 C.F.R. part 551 because the Arbitrator applied the correct legal standard of "suffered or permitted" to non-exempt employees and factually determined that no employee performed uncompensated overtime work. The FLRA further rejected the Union's claim that the Arbitrator relied on nonfacts regarding credibility, hearsay, comp time and unpaid overtime because the first two assertions constitute disagreement with the Arbitrator's determinations regarding credibility of witnesses and the third and fourth assertions involve matters disputed before the Arbitrator. In addition, the FLRA rejected the Union's contention that the Arbitrator failed to conduct a fair hearing by not holding an additional hearing pursuant to the remand order because the order did not require such action. Finally, the FLRA determined that because the Arbitrator complied with the remand order, her statements that arbitration is intended to be final and binding does not provide a basis for finding the Arbitrator biased.

61 FLRA No. 145;
61 FLRA 724
0-AR-4107
August 31, 2006

[AFGE, Local 3937 and SSA.](#) The FLRA denied the Union's nonfact exception to an arbitration award, not otherwise described.

61 FLRA No. 146;
61 FLRA 725
0-AR-4076
September 7, 2006

[AFGE, Local 2923 and U.S. Dep't of Health and Human Services, National Institute of Environmental Health Sciences, NIH.](#) The Arbitrator found the Union violated the parties' collective bargaining agreement concerning the reporting of official time. He ordered the Union's representatives to report their official time completely and accurately in five categories and provided that the parties "shall" utilize the grievance process to resolve disputes. He also retained jurisdiction over further actions regarding official time reporting including rulings by the FLRA. The FLRA found the portion of the award stating the Union "shall" use the grievance procedure contrary to law because it improperly limits the Union's right to utilize statutory, rather than contractual, procedures to resolve disputes. The FLRA also found the Arbitrator's open-ended retention of jurisdiction contrary to law because it generates a dispute over the Arbitrator's own employment that he is disqualified from resolving and nothing in the Statute gives arbitrators authority over FLRA rulings. Accordingly, the FLRA set aside those portions of the award. The FLRA upheld the portion of the Arbitrator's remedy requiring the Union to report its official time in five categories, finding that it did not exceed his authority or fail to draw its essence from the parties' agreement, and is not incomplete or contradictory so as to make implementation of the award impossible.

61 FLRA No. 147;
61 FLRA 729
0-AR-4062
September 7, 2006

[NTEU and U.S. Dep't of Homeland Security, U.S. Customs and Border Protection, Washington, D.C.](#) The parties went to the Federal Service Impasses Panel (FSIP) over a proposal requiring the Agency to establish a manned, dedicated phone line at all ports where employees are prohibited from carrying a cell phone while on duty. Relying on FLRA case law, the FSIP found the proposal negotiable and ordered the Agency to adopt the proposal. After Agency-head review, the Agency concluded the proposal was inconsistent with law and refused to implement the FSIP's order. The Union filed a grievance claiming this refusal violated the parties' agreement and was a ULP. The Arbitrator denied the grievance, concluding, based on FLRA case law and guidance, that he did not have jurisdiction because the only two avenues of appeal available to a union in these circumstances were a negotiability appeal and a ULP proceeding. The FLRA stated that where it is found that the provision the FSIP ordered the parties to adopt is not contrary to law, the agency will be found to have violated § 7116(a)(1) and (6) of the Statute by failing to incorporate that provision in the parties' agreement. Therefore, according to the FLRA, the Arbitrator was authorized to resolve the Agency's defense that its disapproval was lawful. The FLRA also found the Arbitrator's reliance on the case law and guidance misplaced because those decisions concerned the authority of the FSIP to resolve negotiability questions, not a grievance arbitrator's authority to resolve ULPs. Accordingly, the FLRA found the award deficient as contrary to law and remanded it to the Arbitrator to determine, on the merits, whether the Agency's failure to comply with the FSIP's order constitutes a ULP.

61 FLRA Nos. 148 &
149;
61 FLRA 735 & 738;
0-AR-4010 & 4030
September 11, 2006

[FDIC and NTEU, Chapter 274 \(735\); FDIC and NTEU, Chapter 274 \(738\).](#) The following summary applies to both cases. The Arbitrator found the Agency violated the parties' agreement by not recommending the grievant for an award and he awarded the grievant a three percent increase in his base pay. The FLRA found the award contrary to management's rights to assign work and direct employees. In applying the *BEP* analysis utilized for this type of exception, the FLRA found the award does not satisfy prong II because it does not reflect a reconstruction of what management would have done had it not violated the parties' agreement. In this regard, the FLRA found the Arbitrator did not determine that, had the grievant been nominated for an award, he would have received one. Instead, according to the FLRA, the record establishes that, absent the violation of the agreement, the Agency would have nominated and considered the grievant for an award. Accordingly, the FLRA modified the arbitration award by striking the portion of the award that grants

the grievant a three percent pay increase and directed the Agency to consider the grievant for an award.

61 FLRA No. 150;
61 FLRA 741
0-AR-3986
September 11, 2006

[U.S. Dep't of Homeland Security, U.S. Customs and Border Protection, El Paso, TX and AFGE, National Border Patrol Council, Local 1929](#). The Arbitrator found the grievance arbitrable and that the Agency violated the parties' collective bargaining agreement by informing a Union representative on official time for part of the day that he could not claim that day as an excludable day for purposes of computing the individual's Administrative Uncontrollable Overtime entitlement. The Arbitrator ordered the Agency to cease this action with regard to all Union representatives in the El Paso sector. The FLRA denied the Agency's non-arbitrable claim because it constitutes a challenge to the Arbitrator's procedural arbitrability determination, which the FLRA generally will find insufficient to reverse an arbitrator's ruling. The FLRA also found the Arbitrator's interpretation of the parties' agreement as not permitting Union representatives to suffer any loss of pay, allowances, or penalty for engaging in representational activities and his finding that the grievant suffered harm were not irrational or implausible. In addition, the FLRA denied the Agency's nonfact contention that the Arbitrator erred in finding the grievance arose from the local level, as opposed to the national level, because this issue was disputed before the Arbitrator. Further, the FLRA rejected the Agency's claim that the award is contrary to FLRA case law because the Union did not demonstrate harm, finding the Agency failed to show how the administrative law judge's determination in the ULP decision it relied on controls the Arbitrator's evaluation of the record herein in determining whether a contract violation has occurred. Finally, the FLRA denied the Agency's claim that the Arbitrator's remedy exceeds the scope of his authority because the record shows the scope of the grievance encompassed all Union representatives in the El Paso sector.

61 FLRA No. 151;
61 FLRA 750
0-AR-4072
September 11, 2006

[U.S. Dep't of Transportation, FAA and PASS, AFL-CIO](#). The Arbitrator concluded the Agency violated the parties' collective bargaining agreement by incorrectly paying the grievants after increasing the number of standby hours required of them each week and ordered the employees be paid overtime pay under the Fair Labor Standards Act (FLSA) for the extra standby time. The FLRA denied the Agency's claim that the award is contrary to Agency regulations because the subject of annual premium pay was incorporated into the parties' agreement, which controls the matter, and the Arbitrator resolved the dispute based on the agreement. The FLRA also denied the Agency's claim that the award is contrary to the premium pay standards of 5 U.S.C. § 5545 because Title 5 does not apply to the Agency's personnel system. The FLRA further rejected the Agency's assertion that the award is contrary to the FLSA, concluding the grievants are not being awarded dual premiums but are only receiving premium pay for all standby hours at the FLSA rate. In addition, the FLRA determined the award did not affect management's right to assign work because it is limited to the appropriate rate of pay, rather than the Agency's right to assign standby hours. Finally, the FLRA concluded the Arbitrator did not exceed his authority because his ruling was directly responsive to the stipulated issue.

61 FLRA No. 152;
61 FLRA 755
0-AR-4082
September 11, 2006

[AFGE, Council 1770 and U.S. Dep't of the Army, Headquarters XVIII Airborne Corps and Fort Bragg, Fort Bragg, NC](#). The grievant grieved a 14-day suspension and subsequently filed a formal EEO complaint alleging discrimination based on disability, race, sex, and age. The Arbitrator concluded he did not have jurisdiction over the grievance because the parties' collective bargaining agreement excludes EEO matters from the grievance procedure, and thus denied the grievance. The FLRA denied the Union's claim that the Arbitrator was precluded from considering the Agency's untimely allegation that the grievance was nonarbitrable because it

constitutes a challenge 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 nonfact claim that the grievance was arbitrable under § 7121(e) of the Statute because it was filed before the EEO complaint, determining that the Arbitrator found the grievance nonarbitrable due to the subject matter and that § 7121(e) was irrelevant. Further, the FLRA denied the Union's claim that the award is contrary to law because the grievance did not concern EEO matters. According to the FLRA, the grievance does not make clear the grounds for the grievance and the underlying "action" in both the grievance and the EEO complaint is the 14-day suspension.

FEDERAL SERVICE IMPASSES PANEL DECISION

06 FSIP 54
October 19, 2006

SEC, Washington, D.C. and NTEU. The impasse before the Panel arose from negotiations over the parties' compensation and benefits agreement related to its pay-for-performance system. Among other numerous compensation-related issues such as annual adjustments and standards defining acceptable performance, the key issue involved the Agency procedure to be followed if it is unable to meet its financial obligations should Congress fail to fully fund the Agency's budget. The Agency's proposal grants it discretion in those circumstances to alter the compensation agreement with regard to the areas of basic pay, local pay rates, merit pay increases and benefits. The Union's proposal would allow for the reopening of the compensation agreement for negotiation. The Panel ordered the parties to adopt the Union's proposal. With regard to the other issues, the Panel ordered the parties to adopt a modified version of the Agency's final offer, finding the Agency's approach of narrowly tailoring changes to employees pay and benefits warranted.

MERIT SYSTEMS PROTECTION BOARD DECISIONS

AT-0752-05-0931-I-1
2006 MSPB 330
November 21, 2006

Kile v. Department of the Air Force. The Board determined that the appellant was not reduced in grade and that the agency removed the appellant's locality adjustment resulting in a loss of pay. The issue before the Board is whether it has jurisdiction to consider the appellant's loss of a locality adjustment as a reduction in pay. The Board remanded the case for a determination of whether the definition of "rate of basic pay" in 5 C.F.R. § 752.402(f) or the definition of "rate of basic pay" in 5 C.F.R. 531.203 is applicable in this appeal. The Board noted this appeal involves complex issues of first impression and the appellant's pleadings should therefore be interpreted liberally and instructed that if the AJ determines on remand that the Board has jurisdiction over this appeal, he should determine whether OPM's regulations should be applied retroactively in the present case.

AT-3443-05-0538-I-1
2006 MSPB 337
November 27, 2006

Walker v. Department of the Army. *The Board found that the agency's failure to process the appellant's self-nomination for a position violated the appellant's right as a preference-eligible under 5 U.S.C. § 3304(f) to compete for the position and that the proper remedy in this case was an order requiring the agency to reconstruct the hiring process to afford the appellant proper consideration for the position. The Board held that the remedial provisions of the Veterans Employment Opportunities Act of 1998 (VEOA) are not limited to providing a remedy for a violation of the "veterans' preference requirements," but rather VEOA provides a remedy for a violation of an "individual's rights under any statute or regulation related to veterans' preference." The Board stated that a violation of the opportunity to compete guaranteed by 5 U.S.C. § 3304(f) is remediable under VEOA.*

DC-315H-06-0054-I-1
2006 MSPB 336
November 27, 2006

Chavies v. Department of the Navy. The Board stated that the Statement of Understanding (SOU) that the appellant signed before starting work in the position from which he was involuntarily separated was not a waiver of the appellant's rights under 5 U.S.C. chapter 75 and was instead simply a notice in which the agency advised the appellant of the rights it believed he would have in the event of his involuntary separation during the first year following his appointment, and in which the appellant acknowledged that he understood the information in the notice. The agency had intended the SOU to be a waiver of the appellant's rights. Member Sapin in a concurring opinion stated that she would base the decision on a broader basis and hold that a waiver of chapter 75 rights, signed on a routine basis in connection with an employment offer, is not enforceable.

DC-0752-06-0136-I-1
2006 MSPB 354
December 14, 2006

Romero v. Department of Defense. The Board held that the appellant's settlement agreement with the agency waived his right to contest the imposition of his indefinite suspension. The Board determined that the waiver does not bar a claim that the agency has improperly continued that suspension. The appellant could not have known, either at the time he filed his discrimination complaint or at the time he entered into the settlement agreement, that the agency might subsequently continue his indefinite suspension well beyond the final security clearance determination. Whether the appellant may challenge the continuation of his indefinite suspension depends upon whether the agency acted reasonably when it took no further action for at least four months after a final security clearance decision had been made. The case was remanded to the administrative judge for further proceedings. In a dissenting opinion, Chairman McPhie stated that he would have found that the appellant waived his right to appeal the continuation of the indefinite suspension.