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Personnel Management

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In Reply To:

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DATE: February 22, 2007

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 1101

FEDERAL LABOR RELATIONS AUTHORITY DECISIONS

61 FLRA No. 153;
61 FLRA 757
0-AR-3963
September 11, 2006

[U.S. Dep't of the Treasury, IRS, Small Business/Self Employed Business Division, Compliance Area 6 and NTEU, Chapter 74.](#) In an initial award, the Arbitrator concluded the Agency violated the parties' collective bargaining agreement by failing to grant the grievant a hardship transfer to a position in Florida and ordered that the grievant be given the job. The Arbitrator found the Agency had introduced no evidence to demonstrate "just cause" for denying the transfer, as required by the parties' agreement. The Arbitrator also ordered that the 126 hours of annual leave the grievant used to commute to work after the denial of her transfer be reinstated to her leave account. The FLRA denied the Agency's claim that the award fails to draw its essence from the parties' agreement because the Arbitrator examined the Agency's arguments for denying the grievant's request for a transfer and did not ignore the language "absent just cause" contained in the parties' agreement. The FLRA also rejected the Agency's claim that the award is contrary to management's right to select under § 7106(a)(2)(C) of the Statute because, as relevant here, the award satisfies prong II of the *BEP* analysis by reconstructing what the Agency would have done had it not violated the agreement. In this regard, the FLRA stated the Arbitrator found the grievant fully qualified and that absent just cause, the Agency was required to offer the hardship transfer to the grievant. In addition, the FLRA concluded the award satisfied the Back Pay Act requirements because the Arbitrator found the Agency breached the parties' agreement by not granting the grievant the hardship transfer and that this violation resulted in the grievant's loss of the position in Florida. Finally, the FLRA denied the Agency's claim that the Arbitrator exceeded his authority by ordering reinstatement of leave because the issue of an appropriate remedy was before the Arbitrator.

61 FLRA No. 154;
61 FLRA 765
0-AR-3930
September 13, 2006

[U.S. DOJ, Federal Bureau of Prisons, U.S. Penitentiary, Marion, IL and AFGE, Local 2343, Council of Prison Locals, Council 33](#). This case involved an amended 1999 grievance and a 2001 grievance concerning overtime compensation for employees under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, and the Portal-to-Portal Act (Act), 29 U.S.C. § 254. As relevant here, the Arbitrator sustained the grievance in part and ordered back pay for those employees who were entitled to overtime as a remedy. The FLRA denied the Agency's nonfact contention that the Arbitrator erred by determining that a prior settlement agreement between the parties applied to the amended 1999 grievance because this issue was disputed before the Arbitrator. The FLRA also rejected the Agency's claim that the award as to the amended 1999 grievance is contrary to the FLSA, as amended by the Act, because the Arbitrator's findings concerning the amount of overtime work performed by the grievants is based on sufficient evidence. Finally, the FLRA denied the Agency's claim that the award as to the 2001 grievance is contrary to § 254(a) and 5 C.F.R. § 551.412(b) because it provides compensation for preliminary and postliminary activities to employees who report directly to their posts. According to the FLRA, the Arbitrator properly found that the activities in dispute are integral to the job and not preliminary or postliminary.

61 FLRA No. 155;
61 FLRA 777
0-NG-2879
September 13, 2006

[NAGE, Local R14-89 and U.S. Dep't of the Army, Fort Bliss, Army Air Defense Center and School, Fort Bliss, TX](#). The proposals would end the Agency's practice of reserving parking spaces for certain specified management officials. The FLRA found the proposals outside the duty to bargain because they directly determine the conditions of employment of management officials.

61 FLRA No. 156;
61 FLRA 779
0-NG-2832
September 15, 2006

[Nat'l Weather Service Employees Organization, Branch 9-10 and U.S. Dep't of Commerce, Nat'l Oceanic and Atmospheric Administration, Aircraft Operations Center, MacDill Air Force Base, FL](#). The proposal, among other things, would permit employees to decline to fly on aircraft on which the pilots do not meet the proposed flight time requirements. The FLRA found the proposal outside the duty to bargain because it did not constitute an appropriate arrangement. According to the FLRA, by precluding the Agency from assigning work to employees on aircraft piloted by pilots who do not meet the flight time requirements -- by making such assignments optional with the employees -- the proposal would excessively interfere with management's rights.

61 FLRA No. 157;
61 FLRA 784
SF-CA-03-0285
September 15, 2006

[U.S. Dep't of Labor, Office of Worker's Compensation Programs, S.F., CA and AFGE, Local 2391, AFL-CIO](#). This case is before the FLRA on the Union's exceptions to the Administrative Law Judge's (ALJ) decision, finding the Agency did not violate § 7116(a)(1) of the Statute by refusing to allow an employee, a Union Steward who is also a Federal Employees Compensation Act (FECA) claims examiner, to continue to represent a co-worker in a FECA claim before the Agency. The ALJ applied the standard for analyzing whether § 7120 of the Statute had been violated -- whether an objectively reasonable person, with knowledge of all the facts and procedures, would question an employee's ability to perform their official duties and act as a manager and/or representative of a labor organization -- and found that the employee's representational activities meant "she became an advocate in the same program where she adjudicates claims." The FLRA upheld the Judge's finding. The FLRA stated that as the union representative's representational activities directly relate to the union representative's regular job duties, there is a conflict between the union representative's ability to perform his or her official duties and to act as a union representative. The FLRA also determined that the Agency has a legitimate interest in ensuring that its procedure for processing FECA claims for its own employees is "objective and fair and that it is free of any suggestion that is otherwise."

61 FLRA No. 158;
61 FLRA 796
0-AR-4118
September 15, 2006

AFGE, Local 2145 and U.S. Dep't of Veterans Affairs, Medical Ctr., Richmond, VA.
The FLRA denied the Union's contrary to law, nonfact and essence exceptions to an arbitration award, not otherwise described.

61 FLRA No. 159;
61 FLRA 797
0-AR-4057
September 15, 2006

U.S. Dep't of the Air Force and AFGE, Local 997. The Arbitrator concluded the Agency violated the parties' agreement and OPM regulations when it conducted a reduction in force (RIF) by improperly crediting all grievants with 20 additional years of service for RIF purposes and by providing inaccurate position descriptions. As remedies, he ordered the Agency to return the four grievants to their pre-RIF positions and to ensure that position descriptions are accurate. The Arbitrator did, however, deny the portion of the grievance alleging the RIF was a sham, rejecting the Union's claim that the Agency purposely manipulated the RIF procedures to "achieve an end result." The FLRA denied the Agency's claim that the grievance is barred by § 7116(d) because it does not raise the same issues as an earlier-filed ULP charge, which alleged a failure to consult over the RIF and provide information. The FLRA found the record insufficient to determine whether the 20-year credits were, as the Agency claims, consistent with § 351.504(d), which requires agencies to award additional retention service credit to employees based on their performance ratings. Accordingly, the FLRA remanded this issue to the Arbitrator for further findings consistent with § 351.504(d). The FLRA also determined the award does not violate management's right to direct and assign employees under § 7106(a)(2) (A) of the Statute because, as relevant here, it satisfies prong I of *BEP* by providing a remedy for a violation of an applicable law; in this case OPM's RIF regulations. Finally, the FLRA concluded the Arbitrator did not exceed his authority by making additional findings and ordering remedies after finding the RIF was not a sham because the issue as framed by the Arbitrator was broad enough to encompass whether certain RIF actions were properly executed.

61 FLRA No. 160;
61 FLRA 803
0-AR-4053
September 15, 2006

NATCA, AFL-CIO, Local ECE and U.S. Dep't of Transportation, FAA. **The Arbitrator found the grievant was not entitled to hazardous duty pay for height work and, as relevant here, he denied the grievance. The FLRA denied the Union's exception that the award is contrary to government-wide regulations issued by OPM, 5 C.F.R. Part 550. In this regard, the FLRA determined the Agency is governed by an agency-specific personnel system that is exempt from most of the requirements of Title V, including the hazard pay provisions of 5 U.S.C. § 5545(d). Therefore, according to the FLRA, as the hazard pay provisions do not apply to the Agency, the regulations implementing those provisions also do not apply to the Agency.**

FEDERAL SERVICE IMPASSES PANEL DECISION

06 FSIP 57
November 2, 2006

Dep't of the Interior, Nat'l Park Service, Pictured Rocks Nat'l Lakeshore and Local 2192, NFFE, Fed. Dist. I, IAM&AW, AFL-CIO. The impasse before the Panel arose from a disagreement over the level of protection the collective bargaining agreement should provide to ensure that seasonal employees are not displaced by park volunteers. The Union's proposal would preclude the Agency from using volunteers to displace current seasonal employees, and would discourage the Agency from using volunteers to perform the "grade-controlling duties" that establish career experience and may directly tie to advancement within the Agency. The Agency's proposal would essentially incorporate into the parties' agreement the requirements of the legislation creating the VIP Program, which preserves the Agency's discretion to hire the best-qualified person for a position. The Panel ordered the parties to adopt the Agency's proposal because it is sufficient to protect the Union's interests.

MERIT SYSTEMS PROTECTION BOARD DECISIONS

- DC-0752-06-0107-I-1
December 15, 2006
2006 MSPB 355
- [*Fiori v. U.S. Postal Service*](#). The Board found that the agency's removal action was not subject to the Last Chance Agreement's (LCA) waiver provision because the agency effected a new removal action, rather than reissue the prior action held in abeyance. The new action informed the appellant of her right to appeal to the Board. The waiver in the LCA does not bar Board jurisdiction over the appellant's removal. The Board remanded the appeal for adjudication on the merits and to address the appellant's claims that the agency suspended her for over 14 days for violating the LCA prior to her removal.
- CH-0752-04-0546-M-1
December 19, 2006
2006 MSPB 361
- [*Gose v. U.S. Postal Service*](#). In this case, before the Board pursuant to a remand from the U.S. Court of Appeals for the Federal Circuit, the Board ordered the agency to cancel the appellant's removal and reinstate him to his former position, with back pay, effective the date of his removal. The agency had removed the appellant based on a charge of unacceptable conduct for consuming alcoholic beverages while wearing his Postal Service uniform at a Veterans of Foreign Wars (VFW) Post. On appeal, the court found that the agency interpreted its regulation to mean that a "public place" is every place where there is a Postal Service customer and, further, that it considered every citizen to be a Postal Service customer. The court determined that the agency's interpretation of its regulations was not entitled to deference because it would eviscerate the regulation's requirement that the conduct occur in a public place.
- SF-0432-05-0867-I-1
and SF-0432-05-0858-I-1
December 20, 2006
2006 MSPB 366
- [*Quiet and Wilson v. Department of Transportation*](#). The Board held that because the appellants separated from service based on their resignations and not as a result of the agency's performance-based removal actions, the AJ prematurely determined that the Board had jurisdiction over their appeals on the mere basis that they had filed for discontinued service retirement. Because an involuntary resignation does not qualify as an involuntary separation for the purposes of a discontinued service retirement, the Board determined it is far from clear that the appellants were eligible for discontinued service. The Board remanded the consolidated cases to the AJ for adjudication as involuntary resignation/constructive removal appeals. The Board instructed that if, after resolution of the involuntary resignation/constructive removal appeals, OPM rules that the appellants are entitled to discontinued service retirement annuities, the appellants may file adverse action appeals, seeking adjudication on the merits of the appellants' performance-based removals.
- DE-0752-05-0426-I-2006
December 20, 2006
2006 MSPB 368
- [*Clemens v. Department of the Army*](#). The Board sustained the agency's removal of the appellant for failure to perform the essential functions of her Automation Assistant position, finding that the financial duties of the position were essential, even though the Position Description stated they comprised only 4% of the duties of the position. In the supervisor's estimation, such financial duties actually constituted 20% of the position. The appellant could have sought a classification review or desk audit of her position if she disagreed with the percentage of time allocated to the financial duties. Regarding the appellant's disability discrimination claim, the Board held that the appellant did not prove this claim.
- DA-0752-05-0485-I-1
January 10, 2007
2007 MSPB 4
- [*Jenkins v. Department of the Treasury*](#). The Board granted the agency's cross-petition for review, affirmed its removal action, and held that the agency proved its charge of failure to timely file a 2002 personal federal income tax return. Contrary to the AJ's conclusion, the agency was not required to prove willful misconduct because the agency charged the appellant in the alternative with violating either Section 1203 of Restructuring and Reform Act (which proscribes willful misconduct), or other rules which do not require a showing of intent. The underlying specification stated that the appellant "willfully failed to file" her 2002 return by April 15, 2003, but that even if she "did not willfully fail to timely file," she "still filed [her] return after the due date." The proposing official further stated

that she was charging the appellant “*in the alternative.*” (Emphasis in the original.) The Board concluded that the evidence established the appellant failed to timely file her 2002 tax return.

NOTEWORTHY COURT DECISIONS

Fed. Cir. No. 3050;
MSPB Docket No.
DE-0752-02-0233-C-1
December 21, 2006

[*Lary v. U.S. Postal Service.*](#) The Court determined that the agency materially breached a prior settlement agreement with the appellant when it did not provide stipulated documents to him in connection with his disability retirement within the agreed timeframe. The Court stated specific performance was the appropriate remedy and the MSPB should order the agency to vacate any prior removal records and issue new documents, thereby allowing the appellant to file for disability retirement benefits within one year of the new removal action.

127 S.Ct. 881
January 22, 2007

[*Osborn v. Haley.*](#) Osborn, a government contractor, sued Haley, a Forest Service employee, for allegedly convincing Osborn’s employer to fire her and argued that Haley’s efforts were outside the scope of his employment. Pursuant to the Westfall Act, the United States Attorney, serving as the Attorney General’s delegate, certified that Haley was acting within the scope of his employment at the time of the conduct alleged and moved to substitute the United States as the defendant. The United States Attorney thereupon removed the case to a federal district court, where she asserted that the alleged wrongdoing never occurred. The District Court, accepting Osborn’s allegations as true, rejected the Westfall Act certification and remanded the case to state court. The Sixth Circuit Court of Appeals vacated the District Court’s order, holding that a Westfall Act certification is not improper simply because the United States denies the occurrence of the incident on which the plaintiff centrally relies, and it instructed the District Court to retain jurisdiction. The Supreme Court affirmed the Sixth Circuit’s opinion, finding that Westfall Act certification is proper when a federal officer charged with misconduct asserts, and the Attorney General concludes, that the incident or episode in the suit never occurred. Specifically, the Supreme Court held that the United States must remain the federal defendant unless and until the District Court determines that the employee, in fact, and not simply as alleged by the plaintiff, engaged in conduct beyond the scope of his employment.

Fed. Cir. No.
2006-3363, MSPB
Docket No.
DC-1221-06-0266-
W-1
January 26, 2007

[*Stoyanov v. Department of the Navy.*](#) The Court held that the Board properly dismissed the appeal for lack of jurisdiction because the appellant’s whistleblower complaint with the OSC alleged that the agency was escalating intentional discrimination against the appellant’s brother, based on the whistleblowing activities of both brothers. The statute giving the Board jurisdiction over IRA appeals on its face requires that the allegedly improper personnel practice must be taken or proposed to be taken against the person bringing the IRA appeal. The Court distinguished this statute from the National Labor Relations Act (NLRA)’s definition of “unfair labor practices” (not just discrimination against an employee because of his union activities, but also any practice that interferes with, restrains or coerces employees in exercising union rights).