



United States
Office of
Personnel Management

Washington, DC 20415-2001

In Reply To:

Your reference:

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DATE: April 3, 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 1102

FEDERAL LABOR RELATIONS AUTHORITY DECISIONS

61 FLRA No. 161;
61 FLRA 806
CH-RP-05-0007
September 20, 2006

[U.S. Environmental Protection Agency and AFGE, AFL-CIO](#). The Union filed a motion for reconsideration of the FLRA's decision in [EPA, 61 FLRA 417 \(2005\)](#), where the FLRA denied the Union's claim that the position of an Equal Employment Specialist should be included in the bargaining unit and that the Regional Director committed prejudicial error when he first determined a hearing was warranted to resolve this issue only to render a decision without holding a hearing. The FLRA denied the Union's motion, finding the Union failed to meet the heavy burden of establishing that extraordinary circumstances exist to justify reconsideration. Specifically, the FLRA found the Union raised for the first time a claim that it is statutorily entitled to a hearing under 5 U.S.C. § 7111(b) and held that it will not consider claims that could have been previously raised but are raised for the first time on a motion for reconsideration.

61 FLRA No. 162;
61 FLRA 808
0-AR-4025
September 26, 2006

[AFGE, Local 3239 and SSA, Detroit, Michigan](#). As relevant here, the Arbitrator denied the Union's request for attorney fees and the Union argued before the FLRA that this denial is contrary to the Back Pay Act, 5 U.S.C. § 5596. The FLRA found the Arbitrator did not articulate the reasons for denying the Union's request for attorney fees and the record does not contain any evidence that would assist the FLRA in determining the Arbitrator's basis for denial. Accordingly, because it could not "take the action necessary to assure that the award is consistent with applicable statutory standards," the FLRA remanded that portion of the award for clarification of the reasons for the denial of attorney fees.

61 FLRA No. 163;
61 FLRA 810
0-AR-4015
September 26, 2006

[AFGE, Local 3979, Council of Prison Locals and U.S. DOJ, Bureau of Prisons, Federal Correctional Institution, Sheridan, OR](#). The Arbitrator denied the grievance, finding the Agency had just cause to discipline the grievant and that the Union failed to establish the discipline was motivated by anti-Union animus. The FLRA found the Union's bias exceptions were bare assertions that did not establish the Arbitrator's conduct as biased. The FLRA also denied the Union's claim that the Arbitrator failed to conduct a fair hearing because nothing prevents an arbitrator from asking questions, avoiding repetitious testimony, or suggesting that the proceeding progress expeditiously. In addition, the FLRA found the Union's claim

that the award is contrary to law deficient because the Union did not explain how the award is contrary to any law, rule or regulation. Further, the FLRA denied the Union's claim that the award fails to draw its essence from the just cause and progressive discipline provisions in the parties' agreement because the Arbitrator's application of these agreement standards to the facts of the case was not unfounded or implausible. The FLRA also rejected the Union's claim that the Arbitrator relied on nonfacts regarding the year in which an alleged anti-Union animus act occurred and the identification of an arbitration hearing exhibit because these findings are not central facts underlying the award. Finally, the FLRA denied the Union's claim that the Arbitrator exceeded his authority by considering evidence that the grievant failed to document numerous inmate records and by not considering a ULP charge because the issue before the Arbitrator concerned the grievant's suspension for failing to follow policy and not the ULP charge.

61 FLRA No. 164;
61 FLRA 816
0-AR-4040
September 28, 2006

[United States Dep't of Transportation, Maritime Administration and National Association of Independent Labor, Local 6](#). The Arbitrator found the Agency violated a government-wide regulation in several respects when it conducted a reduction in force (RIF) and established a new competitive area without notifying OPM. The Arbitrator did not rescind the RIF but ordered specific remedies for individuals he found were adversely affected by the violations. The FLRA denied the Agency's claim that the Arbitrator relied on nonfacts in concluding the Agency created two competitive areas. The FLRA found the Arbitrator's error regarding two employees' proper grade levels was not a central fact underlying his decision and the issue whether employees assigned to the new competitive area had an edge in continued employment was disputed at arbitration. The FLRA next found that to the extent the award effectively requires the Agency to offer positions in the new competitive area to non-grievants, the Arbitrator exceeded his authority by awarding relief to those not encompassed within the grievance. Accordingly, the FLRA found that portion of the award deficient and set it aside. With regard to the Agency's exception that the Arbitrator erred in finding a certain employee unqualified for a certain position, the FLRA stated that it is required to review an employee's qualifications under § 351.702(a)(4) *de novo*. However, the FLRA found the record insufficient to conduct this review and as a result, it remanded this portion of the award to the Arbitrator to make appropriate factual findings. The FLRA also rejected the Agency's claim that the award violates management's rights to determine its organization under § 7106(a)(1) and to assign work under § 7106(a)(2) (B) of the Statute. The FLRA found that because the award enforces the Agency's compliance with OPM's RIF regulations set forth in 5 C.F.R. Part 351, which are applicable laws within the meaning of § 7106(a)(2), it satisfies Prong I of the *BEP* test. The FLRA rejected the Union's contention that the Arbitrator erred in finding the RIF *bona fide* because the evidence supports the Arbitrator's findings that employees performed "additional work" that required "additional skills" not included in their pre-RIF positions and that the "amount and nature" of the additional work was "significant." Finally, the FLRA denied the Union's contention that the Arbitrator should have rescinded the RIF because there is no indication in the record that any employee's substantive entitlements were adversely affected by the Agency's failure to notify OPM of a new competitive area.

61 FLRA No. 165;
61 FLRA 825
WA-CA-04-0077
September 29, 2006

[U.S. Dep't of Labor, Washington, DC and AFGE, Local 12](#). The Administrative Law Judge (ALJ) found the Agency violated § 7116(a)(1) and (8) of the Statute by refusing to schedule an arbitration proceeding on a pending grievance and thus denying the Union access to arbitration provided by the collective bargaining agreement. The ALJ directed the Agency to post a notice signed by the Secretary of Labor and the Agency filed an exception regarding that order. The FLRA stated that it typically directs that a posting be signed by the highest official of the activity responsible for the violation because, when the highest official signs a notice, an agency indicates that it acknowledges and intends to comply with its statutory obligations. According to the FLRA, the complaint alleges that the Director of the

Office of Employee and Labor-Management Relations refused to schedule an arbitration proceeding on a pending grievance and nothing in the case implicates any Agency officials outside that office. Accordingly, the FLRA modified the ALJ's proposed order to reflect that the highest official of that office should sign the notice.

61 FLRA No. 166;
61 FLRA 834
0-AR-4037
September 29, 2006

U.S. Dep't of Transportation, FAA, Fort Worth, TX and NATCA. The Arbitrator determined that the grievant's removal was not for just cause and she ordered the removal converted to a written warning and the grievant reinstated with backpay and benefits. She also ruled the grievant had substantially prevailed for purposes of a request for attorney fees and the Agency filed exceptions to that ruling. The FLRA stated that, under § 7122(a) of the Statute, it lacks jurisdiction to review an arbitration award "relating to a matter described in section 7121(f)" of the Statute, which includes adverse actions, such as removals, that are covered under 5 U.S.C. § 4303 or § 7512. According to the FLRA, an award relates to a matter described in § 7121(f) when it resolves, or is inextricably intertwined with, a § 4303 or 7512 matter. Consistent with the foregoing, the FLRA stated that it has uniformly and repeatedly dismissed exceptions to awards pertaining to attorney fees in connection with an award relating to a matter explicitly described in § 7121(f). Accordingly, the FLRA dismissed the Agency's exceptions.

61 FLRA No. 167;
61 FLRA 836
0-AR-4016
October 13, 2006

AFGE, Local 2516 and U.S. Dep't of the Army, William Beaumont, Army Medical Center, Fort Bliss, TX. The Arbitrator concluded that the time during which the grievants were subject to call-back procedures did not constitute hours of work under § 551.431 and that they were not eligible for premium pay on an annual basis under § 550.141. The FLRA denied the Union's claim that the award is contrary to § 551.431, finding the Arbitrator did not err in concluding the grievants were in an on-call status and off duty based on evidence showing that employees are allowed to swap on-call shifts with other employees. The FLRA also rejected the Union's contention that the award is contrary to § 550.141, determining the Arbitrator did not err in concluding that employees were not eligible for premium pay on an annual basis based on his findings that employee homes had not been designated by the Agency as their duty stations and that their activities were not substantially restricted. Finally, construing the Union's exception to the Arbitrator's finding of no disparate treatment as a nonfact claim, the FLRA denied it because the issue of whether employees of other departments were paid when subject to call-back procedures was disputed at arbitration.

61 FLRA No. 168;
61 FLRA 841
0-AR-3992
October 24, 2006

AFGE, Local 3957, Council of Prison Locals and U.S. Dep't of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Oakdale, Louisiana. The Agency terminated an employee in the position of Correctional Officer, GS-05. As part of an EEO settlement agreement, the Agency reinstated the employee, appointing him to the position of Time and Leave Clerk, Grade GS-05. The Union filed a grievance regarding the settlement agreement, alleging the Agency violated the parties' collective bargaining agreement because: (1) the Union was not afforded an opportunity to be present during the EEO settlement discussions; (2) the Union was not given a copy of the settlement agreement; and (3) the Time and Leave Clerk position was removed from the roster of positions on which the employees bid quarterly under the parties' agreement. The Arbitrator denied the grievance. The FLRA rejected the Union's claim that the Arbitrator exceeded her authority by not addressing ULP claims because by framing the issue as whether the parties' agreement was violated, the Arbitrator properly confined herself to that determination. The FLRA also denied the Union's contention that the Arbitrator erred by finding a memorandum issued by the FLRA general counsel to the regional directors non-mandatory with respect to union presence at EEO settlement negotiations. The FLRA construed this contention as a contrary to law claim and found that the memorandum itself does not constitute a law within the meaning of § 7122(a) of the Statute on which exceptions to an arbitration award can be

predicated. Further, the FLRA denied the Union's claim that the award fails to draw its essence from the agreement because the Agency unilaterally removed the Time and Leave Clerk position from the roster once it was filled by the grievant. The FLRA determined that the Arbitrator's finding that nothing in the parties' agreement precluded the Agency from taking this action was not irrational or unfounded. Finally, the FLRA rejected the Union's nonfact claim that the Arbitrator erred by finding that no member of the bargaining unit was harmed by the removal of the Time and Leave clerk position from the roster because it was a matter disputed at arbitration.

FEDERAL SERVICE IMPASSES PANEL DECISIONS

06 FSIP 68
December 22, 2006

Dep't of the Army, Army Dental Activity, Fort Carson, CO and Local 1345, AFGE, AFL-CIO. The impasse before the Panel concerned the Agency's desire to eliminate mandatory time-off awards for employees who receive Level 1 and Level 2 ratings of "excellent" on their annual performance appraisals. The agency proposed language requiring supervisors to nominate employees for awards in a fair and equitable manner. It also proposed the creation of an awards committee, on which the Union would be represented, to review nominations and recommend action to the commander. The Union asserted there was no need to change existing practices and that mandatory awards allowed employees to be recognized equally through use of a measurable scale rather than "any hidden agendas." The Panel ordered the parties to adopt the Agency's proposal. The Panel found that its decision "is consistent with our view that limitations on the discretion to distribute performance awards should not be unilaterally imposed upon management." The Panel also stated that the Agency's proposal balanced the interests of both sides by providing some union oversight.

06 FSIP 88
December 22, 2006

Dep't of the Air Force, Air Education and Training Command, Tyndall Air Force Base, Tyndall AFB, Florida and Local 3240, AFGE, AFL-CIO. The impasse before the Panel concerned the Agency's decision to assign, from among current employees, an additional work leader to work on weekends and holidays. The Union proposed that the Agency hire a new employee to serve as work leader because it would resolve an ongoing staffing shortage. The Union also argued the cost of a new position would be offset by a decrease in overtime the Agency was currently experiencing because of the staff shortage. The Union further asserted that the Agency's plan would be a hardship on employees and complicate their personal and family lives. The Agency contended that adding a leader would improve productivity because employees would no longer have to wait for the arrival of a leader before clocking in. The Agency also explained that it planned to detail current lower graded employees into the leader job thereby giving them the opportunity to upgrade their training and compete for promotion to future leader positions. The Panel ordered the Union to withdraw its proposal. According to the Panel, the Union failed to demonstrate that the benefits of its proposal would outweigh its costs and did not provide any evidence to establish the severity of the hardship that current employees would face as a result of the Agency's plan.

06 FSIP 93
December 22, 2006

Dep't of Housing and Urban Development, Region IX, San Francisco, CA and Local 1450, NFFE, Federal District 1, IAM&AW, AFL-CIO. The impasse before the Panel concerned whether the bargaining unit's annual performance appraisal cycle should be changed from February 1 through January 31 to the fiscal year. Opposing the change, the Union contended that it would result in fewer appraisals above the level of fully successful and therefore fewer awards. The Union reasoned that agency managers caught up in end of fiscal year activities would not take the time to document outstanding and highly successful performance by employees. The Agency noted that the change would align the appraisal cycle of the 500 employees represented by the Union with that of the other 9,000 employees in the

department. The Panel ordered the parties to adopt the Agency's final offer. The Panel found the Union's contention regarding lower appraisals speculative, and outweighed by the benefit of aligning the appraisal cycle with that used in the department. The Panel also noted that the parties' collective bargaining agreement provided for grievances over performance ratings and it therefore concluded employee interests were adequately protected.

06 FSIP 100
December 22, 2006

[Dep't of the Army, U.S. Army Garrison, Fort Greely, Alaska and Local 1949, AFGE, AFL-CIO](#). The impasse before the Panel concerned the Agency's decision to terminate the police officers' 7/12 compressed work schedule (CWS) (4 days on, 3 days off in one week; 3 days on, 4 days off in the other, with 4 hours overtime). The Agency proposed to establish a 24-hour, three shift operation, with employees working an eight hour shift. The Agency asserted that the schedule would save almost \$90,000 per year by eliminating the automatic four hours of overtime and would eliminate the need for a shift supervisor and team leader position. The Union proposed a 6/12 schedule where employees would work six 12 hour days and one 8 hour day (4 days on, 3 days off), resulting in 80 hours and eliminating the automatic overtime. In addition to disputing some of the agency's cost and savings claims, the Union contended that the days on/days off portion of the schedule was used by the agency to recruit current employees. The Panel first determined that it could not rule on the dispute under the terms of the Federal Employees Flexible and Compressed Work Schedules Act (Act), because the compressed schedule at issue was not collectively bargained. As a result, the Panel asserted jurisdiction under 5 USC 7119. Describing the case as having "unique circumstances," the Panel attempted to balance the interests of both parties. In so doing, the Panel ordered adoption of the Agency's schedule for new employees hired into the police force after the date of this Panel decision. The Panel ordered adoption of the Union's schedule for police officers on the current CWS, but stated that the Agency will no longer be required to pay the built-in overtime cost of 4 hours per employee per pay period. In a footnote, the Panel stated that if, after a suitable time period, the Agency compiles evidence that the Union's schedule is causing an adverse agency impact, it can attempt to terminate the CWS under the criteria specified in the Act.

06 FSIP 110
December 22, 2006

[Dep't of Justice, Federal Bureau of Prisons, Federal Correctional Institution Schuylkill, Minersville, PA and Local 3020, AFGE, AFL-CIO](#). The impasse before the Panel concerned whether the Agency's decision to not establish a 5-4/9 compressed work schedule (CWS) for recreation specialists is supported by evidence that the schedule is likely to cause an adverse agency impact. Focusing on the effect at its prison camp, the Agency argued that the 5-4/9 schedule would reduce by one-third the current coverage, resulting in security problems. The Union claimed that the Agency failed to provide sufficient evidence to support its assertion and that the Agency's allegation that coverage would be reduced at the prison camp by one-third was not true. Concluding the Agency met its statutory burden of establishing that an adverse agency impact is likely to occur, the Panel ordered the Union to withdraw its proposal. The Panel concluded that supervision of inmates is a "core element" of the recreation specialist position and that under the proposed schedule the number of times the specialist post would be vacated would increase significantly.

06 FSIP 111
December 22, 2006

[Dep't of Justice, Federal Bureau of Prisons, Federal Correctional Institution Schuylkill, Minersville, PA and Local 3020, AFGE, AFL-CIO](#). The impasse before the Panel concerned whether the Agency's decision to not establish a 5-4/9 compressed work schedule (CWS) for a GED Instructor in the Education Department is supported by evidence that the schedule is likely to cause an adverse agency impact. The Agency asserted that the loss of one instructional day each pay period would result in a reduction of more than 2000 annual classroom hours for inmates and increase the length of time they spend in the GED program by more

than 9 weeks, thus leading to a decline in inmate enrollment in the GED program. The Agency also argued the instructor would not be able to meet the policy requirement of spending a minimum of 50 percent of his time in direct inmate contact. The Union asserted that the Agency's claim that GED students would have to remain in the program longer was nothing more than conjecture and that a nine hour day would actually increase instructional time. The Panel ordered the parties to negotiate over the Union's proposal. The Panel found the consequences predicted by the Agency speculative and the argument that the schedule would not permit the instructor to abide by the policy regarding minimum inmate contact time "particularly unpersuasive."

06 FSIP 130
December 22, 2006

[Smithsonian Institution, National Gallery of Art, Washington, DC and Local 1831, AFGE, AFL-CIO.](#) The impasse before the Panel concerned three remaining issues in negotiations over a successor collective bargaining agreement.

1. Official time for Union-sponsored training. The Union proposed to maintain current language allowing a specific number of official time hours for each steward to attend union sponsored training. The Agency proposed a bank of 150 hours each calendar year to be used by all union representatives. The Panel ordered the parties to adopt the Agency's proposal. The Panel found the Agency's offer generous, particularly noting its openness to renegotiation should the bank hours be exhausted.
2. Official time for representational purposes for Union officials other than the Union President. The Union proposed that representatives other than the union president receive a reasonable amount of time to perform representational activities. The Agency proposed to define reasonable time as a total of no more than 6 hours per week, shared by all representatives except the union president. The Panel ordered adoption of the Agency's proposal, noting that it was consistent with the deal struck by the parties in response to numerous grievances over the meaning of reasonable time. The Panel reasoned that reverting to a reasonable time standard would only lead to more disagreements.
3. Percentage of arbitration costs paid for Agency-initiated grievances. The Agency proposed to maintain the current practice whereby it paid 65 percent and the Union sought a 75/25 percent split. The Panel ordered the parties to adopt the Agency's proposal, finding the Union failed to demonstrate the need to change the *status quo*.

06 FSIP 89
January 4, 2007

[Dep't of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Herlong, CA and Local 1217, AFGE, AFL-CIO.](#) The impasse before the Panel concerned whether the Agency's decision to not establish a 4/10 compressed work schedule (CWS) for employees in the Facilities Services Department who supervise prison inmate crews is supported by evidence that the schedule is likely to cause an adverse agency impact. The Union explained that the proposed schedule could be accommodated if the Agency were to extend the workday of the inmates and that the added inmate hours would enhance productivity by allowing completion of more work orders. The Agency claimed the proposed schedule would reduce productivity, even if inmate work hours were extended because employees would still be working almost two hours each day without performing supervisory functions, requiring the agency to invent work for them during that time. The agency pegged the cost of staff idleness at almost \$175,000 annually. Concluding the Agency met its statutory burden of establishing that productivity is likely to be reduced, the Panel ordered the Union to withdraw its proposal. The Panel noted that the position in question exists to supervise inmates and it found little evidence to indicate that even if inmate work hours were increased to the extent suggested, there still does not appear to be a sufficient amount of non-supervisory work for employees to perform to justify a 10-hour day. The Panel also explained that, while the agency has the option of

extending the work hours of inmates, this measure should not be imposed if the agency is unwilling to agree to do so.

06 FSIP 101
January 11, 2007

[Dep't of Justice, Federal Bureau of Prisons, U.S. Penitentiary, Victorville, CA and Local 3969, AFGE, AFL-CIO](#). The impasse before the Panel concerned whether to implement a 6-month pilot for a 4/10 compressed work schedule (CWS) or a 5-4/9 CWS for Unit Management employees at the Penitentiary. The Agency wanted to implement a 5-4/9 schedule that would be available to approximately half of the unit employees, excluding secretaries because they were needed to perform administrative functions during normal business hours. The Agency contended the more limited approach would not affect operations and better serve its needs. The Union sought 4/10 schedules for all employees. The Union noted that the 4/10 schedule had been successful in other units, and a longer duty day would ensure greater staff presence during the most volatile time of the day. The Panel ordered the parties to adopt the Union's proposal. The Panel found the Agency's proposal lacked clarity as to how employees would bid and be selected to participate in the test and that the Agency failed to adequately explain why the 4/10 schedule worked in other units, but would not work in the unit at issue. The Panel noted that, under the Union's proposal, employee days off, including those of the secretaries, would be scattered throughout the week, ensuring adequate coverage. The Panel also concluded that the Union's proposal would allow the parties in the long term to better judge the impact of the work schedule on all employees. Finally, the Panel stated that under the provisions of the Federal Employees Flexible and Compressed Work Schedules Act, the Agency could seek to terminate the schedule at any time it experienced an adverse agency impact.

MERIT SYSTEMS PROTECTION BOARD DECISIONS

AT-0432-05-0583-I-2
January 26, 2007
2007 MSPB 23

[Manning v. Department of Homeland Security](#). The Board granted the appellant's petition for review and remanded to the AJ for further findings. Specifically, the appellant's performance improvement plan (PIP) allowed "no more than two incidents" of error resulting in certain specified negative impact or no more than 4 incidents of error resulting in no negative impact. The agency alleged the appellant committed five errors under the first category and three under the second category. The agency did not provide testimony on the second category of errors. The administrative judge, after finding the agency proved two of the five errors under the first category, erroneously concluded he did not need to address the other three incidents to sustain the removal action. The Board held that at least three errors under the first category must be proved to sustain the action. Furthermore, because it is required to review the agency's decision solely on the grounds invoked by the agency, it rejected the agency's suggestion that, upon remand, the AJ, if he finds that the errors in the first category did not result in negative impact, could consider them as meeting the lower threshold of the second category of errors. The Board vacated the initial decision and remanded the appeal.

SF-0752-06-0316-I-1
February 1, 2007
2007 MSPB 31

[George v. Department of the Army](#). The Board affirmed the reduction in grade of a GS-8 Supervisory Firefighter based on one of three charges, but reversed the AJ's conclusion that the agency proved a second charge, "Allowing False Time Cards to be Processed Resulting in Over Payment for Unearned Overtime for Yourself and Subordinates," by showing the appellant was negligent. The Board held that the charge required the agency to prove by preponderant evidence that the employee knowingly supplied incorrect information with the intent of defrauding the agency. In addition, the agency was required to show that the appellant intentionally allowed the false time cards to be processed.

NY-0731-03-0145-B-2
February 2, 2007

[Nakshin v. Department of Justice](#). The Board reopened this case on its own motion to resolve a conflict in the Board's suitability case law. After the appeal in

this case was remanded for further adjudication, the Board issued a decision in *Duggan v. Department of the Interior*, 98 M.S.P.R. 666, ¶ 7 (2005), *affd.*, 190 F. App'x 963 (2006) (NP). In *Duggan*, the Board stated that the appellant must demonstrate that his nonselection was based on the agency's determination that he was unsuitable due to one or more of the factors set forth under 5 C.F.R. § 731.202. In *Nakshin* the Board overruled *Duggan* as contrary to the Board's reasoning in its prior decisions concerning suitability determination, i.e., an agency's action can be characterized as a constructive suitability determination over which the Board has jurisdiction when, among other criteria, the agency's nonselection decision was a finding the individual was unsuitable for employment within the meaning of 5 C.F.R. part 731. The Board cited two of its prior decisions in which this requirement has been applied. The Board acknowledged the administrative judge did not, in reversing the agency's removal action, rely on the overruled jurisdictional test of *Duggan*. The Board affirmed the initial decision as modified by the Board's clarification of its case law regarding the jurisdictional test in constructive suitability appeals.

AT-3443-05-0936-I-1
February 6, 2007
AT-3443-05-0936-I-1

Hesse v. Department of the Army. The Board held that "active duty," as that term is used in 5 U.S.C. § 2108(2) may consist entirely of active duty for training. The Board concluded that the plain language of 5 U.S.C. § 2108 and 38 U.S.C. 101 indicates that the provision limiting the definition of "active duty" to individuals who served on active duty for purposes other than training does not apply to the definition of "disabled veteran" in 5 U.S.C. § 2108(2). The Board concluded the appellant is a "disabled veteran" under 5 U.S.C. § 2108(2), and, accordingly, he is a preference eligible. The Board found the appellant had no USERRA claim that is distinguishable from his VEOA claim. The agency was ordered to reconstruct the selection process. Member Rose issued a dissenting opinion.

AT-3443-06-0447-I-1
February 21, 2007
2006 MSPB 51

Jolley v. Department of Homeland Security. The Board found that the plain language of 5 U.S.C. § 3304(f) entitled the appellant, a VEOA candidate, to meet the eligibility requirements and to compete for the vacancy, which was opened to applicants outside of the agency's workforce. The agency had declined to consider the appellant's application on the ground that the appellant was "not within the area of consideration specified on the announcement." The Board held that neither section 3304(f)(1) of the law nor OPM's regulations at 5 CFR part 335 "appear to support the proposition that" an agency may decline to accept applications from VEOA candidates who are outside the area of consideration specified in the vacancy announcement. The Board declined to give deference to OPM guidance in the *VetGuide*, noting that it was not promulgated as a regulation under rulemaking procedures and appeared to be in conflict with the plain language of the law.

DA-3443-06-0168-I-1
February 22, 2007
2007 MSPB 53

Styslinger v. Department of the Army. The Board held that even though the appellant lacks preference eligibility, the Board has VEOA jurisdiction over his claim that a retired member of the armed forces may qualify as a veteran "who has been separated from the armed forces" for the purposes of 5 U.S.C. §§ 3304(f)(1) and 3330(a)(1)(B). The Board concluded that the agency could not rely on the appellant's status as a current federal employee to deny him the right to compete for the position for which the agency accepted applications from outside its own workforce and that the agency violated 5 U.S.C. § 3304(f)(1) by rejecting the appellant's application. The Board noted that the record does not establish whether the appellant met the time-in-grade requirements necessary to qualify for the position and that while the VEOA guarantees preference eligibles and certain non-preference eligibles the right to compete for particular positions, it does not exempt them from eligibility criteria, such as time-in-grade restrictions that are applicable to all candidates. Member Rose issued a concurring and dissenting opinion. The Board ordered the agency to determine whether the appellant was qualified for the position for which he applied and, if he was qualified, to reconstruct the selection process for that position.

CH-315H-04-0557-
B-1
February 22, 2007
2007 MSPB 52

Wiley v. Department of Veterans Affairs. The Board held that it did not have jurisdiction because the agency did not have delegated authority from OPM to terminate the appellant's probationary appointment under its own authority on the ground that he had omitted two criminal convictions on a pre-employment questionnaire. The Board stated that the plain meaning of 5 C.F.R. 731.103(a) is clear that an agency's authority to terminate a probationer under Part 315 for alleged "material, intentional false statement or deception or fraud in examination or appointment" is conditioned on the agency's obtaining OPM's prior approval. OPM stated that the agency did not inform it of the appellant's May 4, 2004, termination until June 8, 2004. The Board observed that OPM's regulations expressly provide that an agency's authority to take a suitability action against an individual in the first year of a "subject to investigation appointment" is subject to the agency limitations proscribed in 5 C.F.R. § 731.103(a). The Board noted that OPM recently published proposed OPM regulations which would amend § 731.103(a) but held that since those regulations are "merely proposed," they cannot be lawfully applied by the Board. Member Rose issued a concurring opinion.

CH-0752-06-0251-I-1
February 23, 2007
2007 MSPB 57

Adams v. Department of the Army. The Board sustained the removal of a GS-7 human resources assistant for failure to maintain access to the agency's computer system. The Board noted that while it has no authority, in adjudicating adverse actions based on the withholding of security clearance, to review the merits of underlying security clearance determinations, it concluded that the present appeal did not involve the revocation of a security clearance. The agency suspended the appellant's computer access when his background investigation report disclosed the appellant had failed to pay debts he owed on multiple accounts. The agency was concerned about whether the appellant demonstrated the integrity and responsibility required to access its computer system, which contains sensitive (although not classified) information. The Board found those concerns to be legitimate. The Board noted the appellant's refusal to make a repayment plan with his creditors, as expected by the agency, and to reduce his Thrift Savings Plan (TSP) deposit of 15 percent of his salary, suggested by an agency employee assistance program counselor, reflected adversely on his integrity and responsibility. Member Sapin issued a dissenting opinion.

DA-0752-06-0098-I-1
February 26, 2007
2007 MSPB 58

Wagner v. Department of Homeland Security. The Board vacated the initial decision and remanded the case to the AJ to make new determinations on the appellant's level of compliance with her discovery order, what if any sanction is appropriate, and to schedule a new hearing. Specifically, the AJ sanctioned the appellant for failing to comply with her order directing him to respond to the agency's discovery request by close of business on a date certain. Her sanction was to prohibit the appellant from offering evidence and argument to refute the agency's charges and limit the hearing to the reasonableness of the penalty. On review, the Board determined the appellant substantially complied with the AJ's deadline for discovery responses because he submitted them at 6:18 p.m. on the day ordered and the AJ did not explain what "close of business" meant. Moreover, neither party informed the administrative judge that the appellant had filed a discovery response (the agency argued the discovery responses were incomplete). The Board ordered that evidence should be taken concerning the completeness of the discovery responses, a determination be made about whether there was substantial compliance with the discovery order, and, if she finds noncompliance, the AJ must reconsider whether it is appropriate to sanction the appellant.

FEDERAL CIRCUIT DECISIONS

Fed. Cir. No.
2005-3077, MSPB
Docket Nos.
AT-3443-02-0622-I-1,
AT-0330-02-0621-B-1
March 7, 2007

Kirkendall v. Department of the Army. The Federal Circuit reversed the MSPB's decision dismissing the appellant's claims that he was discriminated against in violation of the Veterans Employment Opportunities Act of 1998 ("VEOA"), 5 U.S.C. § 3330a (2000), and the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. § 4311 (2000). The Board had dismissed the appellant's appeal as untimely filed, holding that it has no authority to review whether the Department of Labor (DOL) should have waived the 60-day time limit for filing a claim with DOL and the 15-day deadline to appeal DOL's decision. The court held that the Board had the authority and the obligation to consider the question of whether 5 U.S.C. § 3300(a)(2)(A) is subject to equitable tolling of the appellant's appeal to the Department of Labor and concluded that the VEOA is subject to equitable tolling.

With respect to hearing rights, the court held the USERRA statute clearly evinces Congress' intent to provide veterans with a hearing as a matter of right. The court observed that its prior decisions make clear that "interpretive doubt is to be resolved in the veteran's favor." Because the court concluded the VEOA is subject to equitable tolling and *Kirkendall* was entitled to a hearing on his USERRA claim, it reversed and remanded the case back to the Board.

Fed. Cir. No.
2006-3144, FMCS
Docket No. 05-58351
March 16, 2007

Perez v. Department of Justice. The Federal Circuit affirmed the arbitrator's decision that the agency was not required to prove it had reasonable cause to believe the appellant had committed a crime for which a term of imprisonment may be imposed to sustain its indefinite suspension action because it provided him a 30-day notice period. Here, the agency suspended the appellant indefinitely pending an investigation into an inmate's allegations that he helped smuggle illicit drugs into the correctional institution where he worked. The agency took this action to promote the efficiency of the service and did not invoke the "crime provision" in 5 U.S.C. § 7513(b)(1) to shorten the 30-day notice period. The appellant did not challenge the decision that his indefinite suspension met the "efficiency of the service" standard in 5 U.S.C. § 7513(a). Instead, he claimed that, in addition to providing 30 days advance notice, the agency was required under 5 U.S.C. § 7513(b)(1) to determine that there was reasonable cause to believe that he had committed a crime even if the agency did not curtail the notice period. The arbitrator rejected this claim and the Federal Circuit affirmed. A dissenting opinion was issued.