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In Reply To:

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DATE: April 6, 2007

MEMORANDUM TO: MEMBERS  
NETWORK ON EMPLOYEE & LABOR RELATIONS

FROM: Frank Jacquette  
for ANA A. MAZZI  
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Center for Workforce Relations & Accountability Policy

Subject: Case Listing Number 1103

**FEDERAL LABOR RELATIONS AUTHORITY DECISIONS**

61 FLRA No. 169;  
61 FLRA 846  
0-AR-4012  
October 26, 2006

[NTEU and U.S. Dep't of the Treasury, IRS](#). The Union filed a motion for reconsideration of the FLRA's decision in *NTEU*, 61 FLRA 618, where the FLRA set aside an arbitration award because, as relevant here, the arbitrator's finding of a contract violation interfered with management's right to select under § 7106(a)(2)(C) and the five knowledge requirement imposed by the Agency did not violate the uniform guidelines on selection procedures. 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 that it did not raise the management rights issue *sua sponte* because the Agency argued the award interfered with its selection right. The FLRA also found that it did not err in relying on the record and the Arbitrator's findings in concluding that the five knowledge requirement did not violate the uniform guidelines on selection procedures.

61 FLRA No. 170;  
61 FLRA 849  
0-AR-4052  
October 26, 2006

[U.S. Dep't of the Interior, Nat'l Park Service, Gettysburg Nat'l Military Park and AFGE, Local 3145](#). The Arbitrator held that the Agency did not have just cause to revoke the grievant's law enforcement commission. As a remedy, he ordered that the commission be reinstated, the grievant be reimbursed for lost salary and benefits, and all references to the revocation be expunged from the grievant's personnel records. The FLRA denied the Agency's nonfact claim because the issue whether two employees had been treated differently from the grievant was disputed at arbitration. The FLRA also denied the Agency's claim that the Arbitrator improperly applied Title VII discrimination principles because unless a specified standard of proof is required, which is not the case here, arbitrators have the authority to establish whatever standard they consider appropriate. Further, the FLRA rejected the Agency's claim that the Arbitrator failed to conduct a fair hearing by not clearly stating a standard of review because the Arbitrator was not required to apply a particular standard of review. Finally, the FLRA denied the Agency's claim that the award fails to draw its essence from the parties' agreement because the Arbitrator ignored the applicable contractual standard that discipline only be imposed to "promote the efficiency of the service" when he resolved the grievance by determining whether the Agency had been "consistent in its approach" to

discipline. The FLRA found the Arbitrator's use of a standard consistent with *Douglas* in interpreting the contract language was not irrational or in disregard of the parties' agreement.

61 FLRA No. 171;  
61 FLRA 854  
0-AR-4011  
November 1, 2006

[\*U.S. Dep't of Transportation, FAA and NATCA\*](#). The Arbitrator concluded the Agency violated a settlement agreement, which prescribes minimum staffing levels, when it failed to consider calling in additional staff on the day where the number of air traffic controllers on the mid-shift was reduced from four to three due to illness. The FLRA denied the Agency's argument that the Arbitrator exceeded his authority by failing to frame the issue for resolution because on page 1 of the award, the Arbitrator specifically set forth the issue as whether the Agency's action violated the cba or the settlement agreement, and the award resolves precisely this issue. The FLRA also denied the Agency's claim that the award fails to draw its essence from the parties' agreement or the settlement agreement, finding the Agency cited no provisions of the parties' agreement and the Arbitrator's enforcement of the settlement agreement is not irrational because it concerns the same issue as the grievance in this case. Finally, the FLRA rejected the Agency's claim that the award is contrary to management's rights to assign work under § 7106(a)(2)(B) of the Statute. Applying FLRA precedent, the FLRA found the enforcement of the settlement agreement satisfies Prong 1 of the *BEP* test because, by prescribing minimum staffing levels, the settlement agreement is a matter negotiated pursuant to § 7106(b)(1).

61 FLRA No. 172;  
61 FLRA 857  
0-AR-4121  
November 8, 2006

[\*NFFE, Local 1442 and U.S. Dep't of the Army, Letterkenny Army Depot, Chambersburg, PA\*](#). The Arbitrator denied the grievance alleging the Agency violated the parties' collective bargaining agreement by contracting out bargaining unit work. The FLRA denied the Union's claim that the award is contrary to 10 U.S.C. §§ 2461 and 2464, Circular A-76, 5 C.F.R. Chapter 300, Subpart E, FAR § 37-104, and 5 U.S.C. § 3109, which place limitations on the right of management to contract out bargaining unit work. According to the FLRA, the Union's primary argument is that the Agency's stipulation that it did not comply with the laws and regulations relied on by the Union is sufficient to demonstrate that the award is deficient. However, according to the FLRA, the Union has not demonstrated that those laws and regulations apply in the facts and circumstances of this case and, if the disputed law or regulation does not apply, then whether the Agency complied with it is irrelevant. The FLRA further stated that a general assertion, absent more, is not sufficient to support a contention that an award is contrary to law.

61 FLRA No. 173;  
61 FLRA 860  
0-AR-4135  
November 8, 2006

[\*AFGE, Council 220, AFL-CIO and SSA\*](#). The FLRA denied the Union's exceeded authority and essence exceptions to an arbitration award, not otherwise described.

61 FLRA No. 174;  
61 FLRA 861  
0-AR-4058  
November 16, 2006

[\*U.S. Dep't of Veterans Affairs, Jefferson Barracks, Nat'l Cemetery, St. Louis, MO, and NAGE, Local R14-116\*](#). The grievant caused monetary damage when the equipment he was operating dented a shed. The Agency, citing human error as the contributing factor, determined the grievant to be pecuniarily liable. The Arbitrator found the Agency misapplied provisions of an Agency handbook, which provided

61 FLRA No. 175;  
61 FLRA 864  
BN-RP-05-0023

that employees would not be held liable for damage resulting from reasonable human error. Accordingly, the Arbitrator ordered the grievant be made whole. The FLRA denied the Agency's essence exception that the grievance is not arbitrable because the Agency fails to demonstrate that the grievant's complaint that he was "unjustly" held accountable for the damage to the shed is not rationally related to the definition of the term "grievance" set forth in the parties' agreement. The FLRA also rejected the Agency's contention that the award violated the report of survey regulation because his application of the regulation was based on his finding that the accident resulted from human error and the Agency did not contest that finding. Finally, the FLRA concluded the award did not violate the agency's right to determine internal security practices under § 7106(a)(1) of the Statute. The FLRA explained that the Agency's argument that the Arbitrator did not base his award on an interpretation of the agreement and instead substituted his judgment for that of management in an internal security matter, merely restated the arbitrability claim. [\*U.S. Dep't of Veterans Affairs, VA Connecticut Healthcare System, West Haven, Connecticut and AFGE and NAGE, SEIU\*](#). In 1995, the Agency merged its Newington and West Haven medical centers into a consolidated system, under a single director and administrative services. AFGE represented employees at West Haven, while NAGE had a unit of employees at Newington. AFGE filed a petition for exclusive representation, asserting the Newington unit had accreted to the West Haven unit or in the alternative that West Haven had become a successor employer. The Regional Director (RD) found the NAGE unit should remain intact. The RD concluded the NAGE employees maintained their own community of interest. The RD found a separate Newington unit would promote effective dealings, given the successful bargaining between the facility and NAGE over 30 years including the 10 years since the facilities merged. He concluded a single unit would not contribute to efficient operations. The FLRA ruled the RD did not fail to apply established precedent. The FLRA noted that while NAGE did not specifically petition for maintaining its unit, it did oppose the AFGE petition. The FLRA explained that nothing in its regulations or precedent requires an incumbent union to file a petition to defend its unit when challenged by a rival. The FLRA also found the RD properly applied the factors required to determine that the NAGE unit maintained a community of interest. The FLRA was unconvinced by AFGE that the administrative centralization of the two facilities outweighed the facts relied on by the RD. The FLRA explained that NAGE's prior successful negotiations with the Agency was consistent with the community of interest principle. The FLRA further concluded that the RD's findings on effective dealings and efficiency were also in line with precedent. According to the FLRA, the fact the RD qualified some of these conclusions as "likely" or "evidently" did not detract from the specificity of the findings. Finally, the FLRA found the RD's decision not to hold a hearing because he felt it unnecessary was not a prejudicial error.

61 FLRA No. 176  
61 FLRA 871  
0-NG-2840  
December 5, 2006

[\*NTEU and U.S. Dep't of the Treasury, Office of the Comptroller of Currency, Washington, D.C.\*](#) Proposal 1 requires the Agency to apply its rules, regulations and policies, as well as other applicable law and regulation fairly and consistently to avoid adverse impact on bargaining unit employees. The FLRA found the proposal to be within the duty to bargain because it constitutes an appropriate arrangement under § 7106(b)(3) of the Statute. Specifically, the FLRA found the proposal was narrowly tailored to apply only to those employees victimized by favoritism, arbitrariness or affected by reasons not involving merit or mission. With regard to the Agency's excessive interference argument, the FLRA concluded that the Agency's contention the proposal was too broad to assess its intrusion into these rights failed to specify what burden the Agency would experience as a result of the proposal. Also, according to the FLRA, the Agency did not state how it would be affected by a requirement to administer policies fairly. Proposals 2-5 concern compensation. In an earlier ruling that was upheld by an appeals court, the FLRA concluded that under the Agency's statute, the Agency head has sole and exclusive

discretion in setting compensation and therefore a proposal that concerned compensation was outside the duty to bargain. Based on that precedent, and rejecting the Union's only claim that the prior ruling was wrongfully decided, the FLRA found Proposals 2-5 outside the duty to bargain.

61 FLRA 177  
61 FLRA 879  
WA-RP-05-0033  
December 7, 2006

*U.S. Dep't of Agriculture, Office of the Chief Information Officer, Information Technology Services and AFSCME, Council 26.* The Agency consolidated its information technology functions that had previously been performed by employees in three separate agencies. As a result, the employees involved no longer worked for the separate agencies and were no longer members of any bargaining unit, although their IT duties essentially remained the same. AFSCME sought to represent a bargaining unit of approximately 35 employees located in Washington headquarters. The Regional Director (RD) determined the headquarters unit was not appropriate. The RD found the headquarters employees did not share a community of interest separate and distinct from their coworkers in other locations. As to effective dealings, the RD found that local supervisors have no authority to negotiate or change working conditions and that at some locations, employees do not even have an on site supervisor. Assessing efficiency of agency operations, the RD concluded there was no rational relationship between the structure of the proposed unit and the agency's new organization. The RD noted employees were organized functionally, not geographically. The FLRA rejected AFSCME's contention that the RD's decision was contrary to sound labor relations policy because AFSCME did not argue any specific established policy that should be reconsidered. The FLRA also disagreed with AFSCME's contention that the RD's findings were legally flawed. Specifically, the FLRA determined the RD's community of interest finding weighed the appropriate factors and her conclusion that the employees did not share a separate and distinct community of interest was in accordance with precedent. The FLRA further determined that the RD's finding on effective dealings properly considered the fact that the unit proposed by the Union would require the Agency to create additional responsibilities to maintain uniform policies and procedures. Finally, the FLRA found the RD considered the relevant factors regarding the effect of the proposed unit on agency operations.

#### **FEDERAL SERVICE IMPASSES PANEL DECISION**

06 FSIP 119  
January 11, 2007

*Dep't of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Englewood, Littleton, CO and Local 709, 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) with Monday as the regular day off for an employee who supervises inmates in the facility's Tool and Die Shop is supported by evidence that the schedule is likely to cause an adverse agency impact. The Agency argued that Monday is the day many employees take annual or sick leave, and providing coverage for the individual with a regular day off would detract from productivity elsewhere. The Agency also contended that, because of the nature of the work performed by the inmates, double supervisory coverage is needed. The Union claimed the Agency failed to provide sufficient evidence to support its assertions. The Panel found the Agency failed to meet its burden of proving adverse agency impact and ordered the parties to bargain over the Union's proposal. The Panel found the Agency's argument regarding coverage problems on Mondays and the resulting reduction in the productivity of other employees speculative. The Panel further determined that the Agency's claim that two employees are required to supervise inmates is undercut by its offer to implement a six month test of a 5-4/9 schedule for the employee, with a day off in the middle of the week, and by the fact that inmates had recently worked several months on an overtime project with only one supervisor present.

## MERIT SYSTEMS PROTECTION BOARD DECISIONS

AT-0752-06-0043-I-1  
March 15, 2007  
2007 MSPB 72

*Rosenberg v. Department of Transportation.* The Board held that an agency may not discipline an employee for charging amounts to his government credit card in excess of the pre-travel estimates listed on the travel authorization, so long as they are legitimate official travel expenses. The Board reviewed the agency's suspension of the appellant for 30 days on the basis of two charges relating to the use of his government travel card: "Obtaining travel advances through automated teller machine (ATM) withdrawals, which exceeded the amount authorized by your travel authorization," and "Misuse of Government Contractor-issued Citibank Credit Card." The Board sustained the first charge that the appellant took out more cash via ATM withdrawals than the amount authorized as a cash advance. Regarding the second charge, the Board held that nothing in the travel regulations indicates that the agency was entitled to place a limit on the total amount the appellant could spend on his government travel card during a particular trip. As long as the appellant was using his government travel card only for legitimate travel expenses, he was not prevented from exceeding the estimated amount on the travel authorization form. The Board mitigated the penalty to a 15-day suspension because the agency did not prove the second charge, which the Board found to be the far more serious charge. Also impacting the Board's penalty determination was the fact that at the hearing the deciding official disavowed having contributed to the decision and said that the action was dictated by other officials in the agency. Chairman McPhie issued a concurring opinion and member Sapin issued a dissenting opinion.

## FEDERAL CIRCUIT DECISIONS

Fed. Cir. No. 3038,  
MSPB Docket Nos.  
AT-3443-05-0147-I-1  
and  
AT-3443-05-0179-I-1  
February 28, 2007

*Dean v. Consumer Product Safety Commission.* In a nonprecedential decision, the Court concluded the Board erred in declining the appellant's request to consider the validity of the agency's use of the procedure whereby it develops two lists of candidates for a position, one a "competitive" list and the other a "non-competitive" list and then makes a selection from only one list. The vacancy announcement stated that individuals who want to be considered for both merit promotion or special hiring authorities ("non-competitive" authorities) and competitive procedures must submit two complete applications; and if only one application is received it will only be considered under the special hiring authority or the merit promotion procedure. Only one application was received from the appellant and his application was placed on the non-competitive list. The selection was made from the competitive list. The appellant argued that the practice of creating two hiring lists "enables the Agency to manipulate appointments, to circumvent merit selection, and to discriminate against disabled veterans." The Court concluded the appellant's employment application apparently received no consideration. The Court found the record undeveloped and noted the agency did not explain the reasons for this procedure. The decision was remanded for the Board's determination of whether the agency's practice is in accordance with law and merit principles.

Fed. Cir. No. 3124,  
MSPB Docket No.  
CH-0752-05-0326-I-1  
March 2, 2007

*Cheney v. Department of Justice.* The Court held that the agency failed to meet the procedural requirements of 5 U.S.C. § 7513 to provide the appellant with the information he needed to make "a meaningful response" to the charges against him when he was indefinitely suspended based on the suspension of his security clearance. In the letter proposing his indefinite suspension, the agency told him that his security clearance was being suspended "based on allegations of potentially derogatory personal conduct" and possible violations of law and the agency's standards of conduct. The notice of suspension also stated that he had "failed to comply with security regulations" and that he had "demonstrated a pattern of dishonesty and/or rule violations." The agency also subsequently provided a

separate memorandum informing the appellant that his security clearance had been suspended because he had “inappropriately queried or caused to be queried Law Enforcement Data Bases,” had “abused the Administrative Subpoena process,” and had acted “in violation” of the confidentiality agreement into which he had entered during the agency’s investigation.

The appellant argued that he was entitled to a statement of the “specific reasons” underlying the suspension of his security clearance and without such a statement, he was unable to make a meaningful response to the proposed action. The Court first acknowledged that in cases involving a suspension resulting from the suspension of a security clearance, neither the Board nor the court may review the underlying merits of an agency’s decision to suspend a security clearance. The Court went on to state that while the appellant clearly was not entitled to the detailed information he requested, he was entitled to more information than the agency provided, which it characterized as information sufficient to allow a “meaningful response” to the charges against him. It concluded that by not providing information as to the nature of his alleged derogatory personal conduct, the laws and agency standards of conduct he had violated, or when he had allegedly improperly caused the database to be queried; the agency had failed to meet this standard. The Court ordered the appellant’s immediate reinstatement with back pay.

Fed. Cir. No. 3420,  
MSPB Docket No.  
AT-315H-05-0799-I-1  
March 8, 2007

*Amend v. Merit Systems Protection Board, and Department of Justice.* In this nonprecedential decision, the Court first noted that the issue of whether service in more than one agency satisfies the one year requirement of current continuous service in the same or similar positions – “in an executive agency” under 5 U.S.C. § 7511 (a)(1)(B), or whether such service must be completed within a single agency, is “an open question” (compare the Court’s nonprecedential decision in *Illich v. MSPB*, 104 Fed. App’x 171 (2004) with *Greene v Defense Intelligence Agency*, 100 MSPR 447 (2005). The Court declined to address this issue in the instant case because it agreed with the Board that the appellant’s positions of Immigration Inspector and ATF Inspector are not “similar positions” under the statute because they require different qualifications and the actual work performed is not similar. Thus, the appellant was not an “employee” with adverse action appeal rights under § 7511(a)(1)(B).

Fed. Cir. No. 3012,  
MSPB Docket No.  
CH-0752-05-0040-I-1  
March 12, 2007

*Kelly v. Department of Agriculture.* In this nonprecedential decision, the Court determined the *ex parte* communications of the deciding official with two officials of the agency rose to the level of a procedural due process violation that could not be excused as harmless error. On appeal to the Court were two specifications which supported a charge of improper conduct – allegedly false statements, given under oath, and improper use of the employee’s computer for personal use. In this case, subsequent to receiving the appellant’s response to the proposed action, the agency deciding official contacted two agency officials, knowing they had already taken a position adverse to the appellant in the record, and received further negative comments. The Court stated that at that point the deciding official had a duty to notify the appellant and provide her an opportunity to respond before reaching a decision. The appellant’s opportunity to address these comments before the Board after the agency’s decision was final and on appeal does not render the error harmless. The Court concluded this procedural defect overrides the contention that the appellant would likely have been removed on the merits of the charge without this procedural defect. The Court vacated the Board’s decision and remanded the case back to the Board.