



United States
Office of
Personnel Management

Washington, DC 20415-2001

In Reply To:

Your reference:

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DATE: June 11, 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 1105

FEDERAL LABOR RELATIONS AUTHORITY DECISIONS

62 FLRA No. 8;
62 FLRA 24
0-AR-4173
March 14, 2007

[AFGE, Local 3957 and U.S. Dep't of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Oakdale, La.](#) The FLRA denied the Union's bias, fair hearing, nonfact and essence exceptions to an arbitration award, not otherwise described.

62 FLRA No. 9;
62 FLRA 25
WA-RP-06-0019
March 14, 2007

[NLRB and NLRB Union.](#) The Regional Director (RD) approved the Union's petition to consolidate four units representing NLRB professional and non-professional employees at headquarters and in regional offices. The Agency filed an application for review, objecting to the consolidation of headquarters Board employees with General Counsel (GC) employees because section 3(d) of its implementing statute (29 USC 153) establishes distinct roles for the Board and GC. The Agency contended that the RD effectively repealed section 3(d) by focusing on the history of cooperation between the two components rather than the statutory mandate that they function independently. The FLRA concluded the Agency did not establish that the RD's Decision and Order was deficient. The FLRA noted that neither section 3(d) nor its legislative history address labor relations and explained that it was necessary to balance the intent of 3(d) with that of 5 USC § 7112, which permits unions to seek consolidation in order to create more comprehensive units. The FLRA agreed with the RD's determination that the Agency already had measures in place to ensure the independence of the two components in areas required by Statute. Moreover, the Agency does not separate Board and GC employees in personnel and labor relations authority, budget, training and orientation and that the agreements negotiated with the separate units over a 25-year period have been virtually identical. The FLRA explained that bargaining for GC and Board employees at the same table would not preclude the Agency from insisting on separate agreement provisions for each component where it believes it necessary to satisfy the requirements of 3(d). The FLRA concluded the consolidated unit is appropriate and the RD correctly applied the three criteria--community of interest, effective dealings, and efficiency of agency operations.

62 FLRA No. 10;
62 FLRA 37
0-AR-4031
March 22, 2007

[AFGE, National Border Patrol Council, Local 2455 and U.S. Dep't of Homeland Security, Customs and Border Protection.](#) The Arbitrator denied a grievance alleging the Agency violated the parties' collective bargaining agreement and a firearms policy by reassigning the grievant to administrative duties during the investigation of an incident and withdrawing and revoking his authority to carry a firearm during that period. The Arbitrator was critical of the Agency's handling of the investigation and stated he would like to award the grievant back pay for lost overtime, but he lacked the authority to do so. The Union claimed the award failed to draw its essence from the agreement because the

Arbitrator did not provide a reasoned analysis. The FLRA disagreed because arbitrators are not obligated to provide a rationale for their rulings unless required to do so by contract, submission of the parties, or law. The FLRA also found the Arbitrator's determination he was not authorized to award back pay constitutes a legal conclusion, not a factual determination, and denied the union's nonfact claim in this regard. The FLRA further concluded the Arbitrator could not have awarded back pay, because in finding no violation of the agreement or policy, he could not have found an unwarranted personnel action, the initial requirement for an award of back pay.

62 FLRA No. 11;
62 FLRA 41
0-AR-4111
March 22, 2007

AFGE, Council of Prisons Locals, Local 3977 and U.S. Dep't of Justice, Federal Bureau of Prisons, Federal Prison Camp Seymour Johnson, NC. The Union filed a grievance alleging certain unit employees were required to work late and were not compensated for overtime pursuant to the Portal-to-Portal Act, 29 U.S.C. § 254. The Arbitrator concluded the grievance was not procedurally arbitrable because the Union failed to abide by several provisions of the negotiated grievance procedure, most notably a requirement that informal resolution of all grievances must be attempted before a formal filing. The FLRA denied the Union's claim that the Arbitrator exceeded his authority and failed to conduct a fair hearing by addressing whether informal resolution of the grievance had been tried because that was an issue raised by the Agency at the arbitration hearing and the Arbitrator's action did not affect the fairness of the proceeding as a whole. The FLRA further denied the Union's essence and nonfact claims because they constitute challenges to the Arbitrator's procedural arbitrability determination, which the FLRA generally will find insufficient to reverse an arbitrator's ruling. Finally, the FLRA found the Union did not demonstrate that the award is contrary to public policy because the Union cited no "explicit, well-defined and dominant" public policy to support its exception.

62 FLRA No. 12;
62 FLRA 45
0-AR-4024
March 22, 2007

NTEU and U.S. Dep't of the Treasury, IRS, Office of the Chief Counsel. The Agency notified the Union it would fill 125 attorney positions and the parties negotiated a Memorandum of Understanding (MOU) allowing the Agency to use its executive resources board process rather than the selection process set forth in the parties' agreement. The Agency filled only 102 positions and the Union filed a grievance alleging that the Agency violated § 7116(a)(1) and (5) of the Statute by repudiating the MOU. The Arbitrator denied the grievance, finding the MOU concerned only the process used to fill the positions and not an agreement to fill all 125 jobs. The FLRA denied the Union's claim the award fails to draw its essence from the agreement because the Arbitrator specifically examined the language of the MOU and his conclusion the MOU was limited to process was not implausible or irrational. The FLRA also denied the Union's claim the Arbitrator exceeded his authority by altering the MOU because that claim essentially reiterates its essence argument. In addition, the FLRA rejected the Union's argument the award is contrary to law by failing to find the Agency patently breached the MOU and violated § 7116(a)(1) and (5). Deferring to the Arbitrator's finding that the Agency did not repudiate the MOU and his interpretation of the MOU as only applying solely to the process the Agency would use to fill the position, the FLRA concluded the Agency did not commit a clear and patent breach of the MOU. Finally, the FLRA denied the Union's claim the Agency was required to raise the issue of whether there was an agreement under § 7106(b)(1) as a threshold matter of arbitrability, holding that such a question is one of contract interpretation and the parties appropriately submitted this dispute to the Arbitrator for his construction of the MOU.

62 FLRA No. 13;
62 FLRA 49
0-AR-4134
March 23, 2007

U.S. Dep't of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Big Spring, TX, and AFGE, Local 3809. The Arbitrator sustained a grievance alleging the Agency violated the parties' agreement by denying the grievants' requests for a certain number of official time hours to prepare for a hearing. As a remedy, the Arbitrator ordered the Agency to restore to the grievants any annual leave used in lieu of official time and pay them at a straight time rate for any additional hours used. The FLRA denied the Agency's claim that the remedy conflicts with FLRA precedent because the grievants' requests for official time were not made in advance, with respect to the specific days and hours for which the Arbitrator ordered a remedy. The FLRA explained there is no precedent establishing requirements for official time requests. The FLRA further stated that, in order to award straight time pay, an arbitrator must find that an employee requested official time to perform appropriate representational duties during regular working hours, the official time was wrongfully denied and the employee performed the requested duties during non-duty hours. The FLRA found

the Arbitrator made all three findings. Finally, the FLRA denied the Agency's claim the award fails to draw its essence from the parties' agreement because the grievants did not request in advance the particular days and hours of official time for which the Arbitrator awarded a remedy. The FLRA concluded the Arbitrator's interpretation of the agreement as not requiring employees to specify the days and hours that they will use requested official time was not implausible or irrational.

62 FLRA No. 14;
62 FLRA 52
0-AR-4099
March 23, 2007

[U.S. Dep't of Housing and Urban Development and AFGE, Local 3258](#). The grievance contested the confiscation of the grievant's ID card. The Agency claimed before the Arbitrator that the ID card issue was not arbitrable under the parties' collective bargaining agreement and § 7106(a)(1) of the Statute. The Arbitrator determined he would resolve that claim first, then hold a hearing on the merits if he should find the matter arbitrable. The Arbitrator concluded the matter was arbitrable. The FLRA found the Agency's exceptions were interlocutory and dismissed them without prejudice. Citing § 2429.11 of its regulations, the FLRA stated that it ordinarily will not resolve exceptions to an arbitration award unless the award constitutes a complete resolution of all the issues submitted to arbitration. The FLRA further stated that it may review arbitration awards that are not final where the interlocutory appeal raises a plausible jurisdictional defect, the resolution of which would advance the ultimate disposition of the case. The FLRA rejected the Agency's claim the award was final because the only issue before the Arbitrator was the question of arbitrability. The FLRA noted the Arbitrator's statement that he would hold a hearing on the merits should he find the dispute arbitrable and concluded the arbitrability ruling was preliminary and did not resolve all issues. Citing precedent, the FLRA also rejected that Agency's claim that it raised a plausible jurisdictional defect in the award because management's right to determine internal security practices precludes arbitration under § 7106(a)(1). The FLRA held that the proper phase of the arbitration proceeding in which to determine the impact or application of § 7106 is not at the outset, effectively precluding an arbitrator from having jurisdiction over the matter, but, rather, when the arbitrator considers the substantive issues presented by the grievance and any possible remedy.

62 FLRA No. 15;
62 FLRA 54
0-AR-4141
March 23, 2007

[U.S. Dep't of Transportation, FAA and NATCA](#). On the same day, the Union filed a ULP charge alleging the Agency violated the Statute by placing individuals on a new schedule without completing an appropriate bidding process and a grievance alleging the Agency implemented a unilateral change in the basic watch schedule in violation of the parties' agreement. The Union later withdrew the ULP charge and pursued its claim to arbitration, where the Agency asserted the grievance was barred by 5 USC 7116(d), requiring the Union to elect either the grievance or ULP procedure. The Arbitrator found the grievance arbitrable. The FLRA denied the Agency's claim the award was based on a nonfact because the Arbitrator incorrectly found the Union official perceived the subject matter of the ULP charge and the grievance to be different at the time he filed the ULP charge. The FLRA found the Arbitrator made no factual finding about the Union official's perception at the time of the filing. However, the FLRA found the award contrary to § 7116(d) and set it aside. The FLRA stated that, as relevant here, in order for a grievance to be precluded under § 7116(d) by an earlier-filed ULP charge such issue must have been earlier raised under the ULP procedure. The FLRA found the Union asserted before the Arbitrator and the FLRA that the issues were filed simultaneously and this, the FLRA concluded, renders the grievance non-arbitrable unless it can be found the Union filed the grievance before it filed the ULP charge. The FLRA determined there was no claim made by the Union that it filed the grievance first or any such finding by the Arbitrator.

62 FLRA No. 16;
62 FLRA 56
0-AR-3942
March 29, 2007

[U.S. Dep't of the Treasury, IRS and NTEU, Chapters 22, 34 & 60](#). This matter was before the FLRA on remand from the United States Court of Appeals for the D.C. Circuit in [Nat'l Treasury Employees Union v. FLRA](#), 466 F.3d 1079 (2006) (NTEU). In that decision, the Court set aside the FLRA's decision in [United States Dep't of the Treasury, IRS](#), 61 FLRA 168, where the FLRA found an award contrary to law because it required time-off awards for volunteers whose customer-service work fell below a minimally successful level. The Court found the Arbitrator made no conclusion as to whether the agreement contemplated an award for employees who performed below the minimum level. The Court stated that the agreement required an award for all volunteers that were utilized, but it was silent on whether the agency is required to utilize non-performing volunteers. According to the Court, the FLRA did not address this textual ambiguity, nor did it offer its own interpretation of the agreement. The Court also noted that witness testimony contained in the record provided contradictory evidence concerning the parties' understanding of the intent of the provision in

question and the record did not indicate whether, in practice, any non-performing employee received an award. Because the FLRA failed to address the agreement's ambiguity, the conflicting testimony regarding the meaning of the provision or the practices of the parties, the Court declared the FLRA ruling arbitrary and capricious. On remand, the FLRA explained that, consistent with the Court's reasoning, it was unable to resolve the Agency's exceptions. Accordingly, it remanded the case to the parties for resubmission to the Arbitrator.

62 FLRA No. 17;
62 FLRA 59
0-AR-4039
March 29, 2007

[*U.S. Dep't of Homeland Security, Customs and Border Protection and AFGE, Local 1917*](#). The Arbitrator found the Agency violated the parties' collective bargaining agreement when it discontinued dues withholding for a group of employees. As his remedy, the Arbitrator ordered the Agency to provide the Union a list of all bargaining unit employees as well as all non-supervisory, non-bargaining unit employees in the New York District during the years 2004 and 2005, indicating those who are or were members of the Union's bargaining unit and the dates of any changes in their bargaining unit status. The Arbitrator also directed the Agency to issue to each member of the bargaining unit a statement indicating the amount of dues withheld during the years 2004 and 2005. The FLRA rejected the Agency's claim the award fails to draw its essence from the agreement because it requires the Agency to provide, on more than an annual basis, different information to a different party than provided in the agreement and a dues withholding statement for individual employees. The FLRA concluded the Arbitrator did not establish a more than annual reporting requirement and because the agreement was silent on the matter of a dues withholding statement for each employee, the Arbitrator's interpretation of the agreement regarding that issue was not implausible. The FLRA also rejected the Agency's claim that the Arbitrator exceeded his authority in directing the Agency to provide a list of employees because arbitrators have broad discretion in fashioning remedies, and this particular remedy was responsive to the issues before the Arbitrator. However, the FLRA found the Arbitrator exceeded his authority in ordering a dues withholding statement for all bargaining unit employees, rather than only for those employees whose dues had been terminated because the remedy extends to employees not encompassed by the grievance. The FLRA set aside that portion of the remedy and modified the award accordingly.

62 FLRA No. 18;
62 FLRA 63
0-AR-3971
March 29, 2007

[*AFGE, Local 2328 and Dep't of Veterans Affairs, Medical Center, Hampton, VA*](#). The Arbitrator found the Agency did not violate law or the parties' collective bargaining agreement when it carried an employee in an absence without leave (AWOL) status, until she provided documentation concerning her seriously ill mother and entered a proper leave request into the computer system. The Arbitrator concluded the Family and Medical Leave Act (FMLA) was not relevant, but that the issue concerned the established process for obtaining leave approval. The Arbitrator also found the Agency did not discriminate against the grievant on the basis of national origin. The FLRA rejected the Union's claim the award violates the FMLA because the Arbitrator erred by requiring the grievant to specifically refer to the FMLA in requesting leave. The FLRA determined that although the Arbitrator found the grievant did not request FMLA leave, his award was based on his conclusion that the AWOL was proper because the grievant failed to follow an established internal process for requesting leave. The FLRA also denied the Union's contention that the Arbitrator's finding on the discrimination claim was contrary to Title VII because he erroneously required the Union to show a pattern of discrimination rather than a *prima facie* case of discrimination. Although the FLRA agreed the Arbitrator failed to apply the proper test, it explained that this does not render an award deficient if the Arbitrator's legal conclusions are supported by his factual findings. Here, the Arbitrator found significant differences between the comparison cases cited by the Union and the grievant's situation and that these factual determinations, to which the FLRA defers, support his legal conclusion the grievant was not disparately treated.

62 FLRA 19;
62 FLRA 67
0-AR-4108
April 2, 2007

[*Office and Professional Employees International Union, Local 2001 and U.S. Dep't of Energy, Oak Ridge Office, Oak Ridge, Tenn.*](#) The Arbitrator denied a grievance concerning the proper General Schedule (GS) pay grade for three grievants. The Union argued the award was based on a nonfact and contrary to law. The FLRA set aside the award without considering the merits of the exceptions, finding the matter non-arbitrable because it involved the classification of the grievants' positions. The FLRA held it has the authority to find matters covered by 5 USC 7121(c) non-arbitrable even when neither party raises such claim before the FLRA or the arbitrator because such matters, including the classification of a position, are precluded from arbitration by statute. The FLRA

explained that it distinguishes between an award that determines the grade level of duties permanently assigned to and performed by a grievant and one that merely decides whether a grievant was entitled to a temporary promotion, under the terms of a collective bargaining agreement, by virtue of performing the established duties of a higher graded position. The latter case is grievable because it does not involve the classification of the position. In this case, however, the Arbitrator defined the issue as "the proper GS pay grade, GS-13 or GS-14" and that the Union was not seeking temporary promotions for the grievants. Instead, according to the FLRA, the Union contended the grievants should have received permanent promotions at the time the positions were reclassified from GS-13 to GS-14. As such, the FLRA found the Arbitrator did not have jurisdiction to resolve the merits of the grievance.

MERIT SYSTEMS PROTECTION BOARD DECISIONS

AT-0752-03-0286-
P-1
April 13, 2007
2007 MSPB 115

Robert E. Boots v. United States Postal Service. The Board overruled an AJ decision which held that the agency was relieved of its liability for compensatory damages because the agency made "good faith efforts" to reasonably accommodate the appellant. This case began with a decision by the agency that the appellant's use of anti-seizure medication disqualified him for his position as a Tractor-Trailer Operator. After conflicting decisions by the MSPB and EEOC, the Special Panel was convened and held the agency discriminated against the appellant by relying on DOT regulations and failing to make an individualized assessment of whether his employment would pose a direct threat to his safety or that of others (see *Boots v. U.S. Postal Service*, 100 MSPR 513 (2005)). Pursuant to that decision, a claim for compensatory damages was filed and resulted in an initial MSPB decision denying the claim.

Under 42 U.S.C. §1981a(a)(3), damages may not be awarded where the employer demonstrates good faith efforts to identify and make a reasonable accommodation. Contrary to the initial decision, the Board concluded that neither of the two actions the agency took constituted a good faith effort to make a reasonable accommodation. The two agency actions were offering the appellant alternative employment outside of his craft and proposing he cease taking seizure medication to ascertain his fitness to drive and thereby keep his position as a Tractor-Trailer Operator. Chairman McPhie issued a concurring opinion that the agency was liable for compensatory damages based on its failure to make an individualized assessment of whether he posed a direct threat. He concluded the case did not involve a denial of reasonable accommodation and thus 42 U.S.C. § 1981a(a)(3) was not applicable.

SF-3443-06-0187-
I-1
April 13, 2007
2007 MSPB 119

Jennieva Randall v. Department of Justice. Relying on the appellant's specific factual allegations of harassment based on her obligation to perform military service, the Board held it had jurisdiction over this appeal under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). The Board reversed an initial decision which dismissed the appeal for failure to make nonfrivolous allegations of fact which, if proven, would establish the Board's jurisdiction. The full Board held USERRA claims should be broadly construed and the weakness of assertions in support of a claim is not a basis for a jurisdictional dismissal. Rather, if the appellant fails to develop her contentions, the claims should be denied on the merits. Consistent with the Federal Circuit decision in *Kirkendall v. Department of the Army*, the Board concluded the appellant is entitled to a hearing.

CH-0752-07-0022-
I-1
May 4, 2007
2007 MSPB 128

Michael Bobie v. Department of the Army After the appellant was promoted from the position of Staff Action Officer, GS-13, Step 7, to the new position of Supervisory Strategic Planning Specialist, GS-14, the agency officially reclassified the new position to the GS-13 level due to a classification error. The employee filed an appeal with the Board arguing his position was properly classified at the GS-14 level. The Board held the agency action reclassifying the appellant's position to a lower grade was appealable to the Board because his position had been classified at the higher grade level for only 7 months. The Board noted that under 5 U.S.C. § 5362(b)(2), grade retention does not apply to the reduction in grade of a position that was classified at the higher grade for a continuous period of less than a year immediately before the reduction in grade. Since there was no entitlement to grade retention, the appellant suffered an appealable reduction in grade and therefore was entitled to a hearing before the Board. The Board remanded the case to the AJ, noting the scope of review is limited and the merits of the classification determination will not be reviewed. Instead, the AJ is only to determine whether the agency acted in accordance with the law.

CB-7121-07-0005-
V-1
May 4, 2007
2007 MSPB 129

Willie W. Berry, Jr. v. Department of Commerce In this appeal from a final arbitration award, the Board concluded there was no basis to disturb the arbitrator's findings that the appellant failed to prove his affirmative defenses of retaliation for his prior equal employment opportunity complaint and discrimination based on race and color. The Board observed that an arbitrator's finding that an appellant did not prove his discrimination and EEO retaliation claims is a factual determination entitled to deference, unless the arbitrator erred in his legal analysis. The Board concluded the appellant's allegation that the arbitrator failed to consider his discrimination claims separately from his retaliation claim does not show the arbitrator erred as a matter of law in interpreting civil service law, rule or regulation. While the Board found the arbitrator erred by considering the race and color of the proposing official in analyzing the appellant's affirmative defense, it concluded the error was not a misallocation of the burden of proof or use of the wrong analytical framework. Therefore, the arbitrator's finding was a factual determination entitled to deference.

PH-3443-06-0506-
I-1
May 7, 2007
2007 MSPB 130

Ronald A. Davis v. Department of Defense The Board reviewed the appellant's claim that he met the jurisdictional requirements for Uniformed Services Employment and Reemployment Rights Act (USERRA) and Veterans Employment Opportunities Act (VEOA) appeals. It found the appellant should be afforded a hearing on the merits of his USERRA claim and the opportunity to show there is a genuine dispute of material fact necessitating a hearing on the appellant's VEOA claim. The appellant claims that, after he applied for a position with the agency, the referral list on which his name appeared for the vacancy was cancelled and the agency subsequently selected an internal candidate who is not preference eligible. The appellant requested a hearing in his petition for appeal, but the AJ disposed of the appellant's USERRA claim without a hearing. After the issuance of the initial decision, the Federal Circuit held that an individual who brings a USERRA appeal has an unconditional right to a hearing on the merits (*Kirkendall v. Department of the Army*, 479 F.3d 830, 844-46 (Fed. Cir. 2007)). As to the appellant's VEOA claim, the Board concluded the appellant made a nonfrivolous allegation that the agency violated his rights under a statute or regulation relating to veterans' preference when he alleged the agency violated specific rules that generally apply to selections for competitive-service positions. The Board determined the dispute – whether the agency violated his preference rights when it appointed a non-preference eligible to the position under merit promotion procedures – would require a hearing only if it is determined on remand the dispute is “genuine,” i.e., there is sufficient evidence supporting the appellant for the factfinder to resolve the dispute in the appellant's favor. The Board concluded the appellant did not show his other claims of alleged violation of merit system principles and prohibited personnel practices were tied to an otherwise appealable action and therefore could not be considered.

AT-0752-06-0144-
I-2
May 8, 2007
2007 MSPB 132

Salvador I. Guerrero, Jr. v. Department of Veterans Affairs The Board held the agency failed to prove its charges of false statements on Optional Form 306 (“Declaration for Federal Employment”), false statements on Optional Form 612 (“Application for Federal Employment”) and misrepresentation of qualifications and reversed the appellant's removal. Holding that the agency's notice of proposed removal failed to inform the appellant of any specific information on the appellant's Optional Form 306 the agency believed was inaccurate or false, the Board did not sustain that charge. The Board merged the latter two charges into a single charge of falsification since they were each based on the same act of alleged misconduct, false statements made by the appellant on his Optional Form 612. The agency argued the appellant (1) falsely stated he occupied a GS-12 position from 1978 through 1985 with the intent to mislead the agency as to his qualifications for a GS-13 position and (2) intended to mislead the agency into believing he had degrees from accredited educational institutions. The Board found the agency failed to establish the appellant knowingly supplied the disputed information with the intent to mislead the agency. Rather, considering the appellant's entire application as a whole, the Board concluded he appeared to have completed his Optional Form 612 in haste and failed to carefully review each request for information in the context of the category in which it appeared in the form. The Board noted the Optional Form 612 does not inform applicants that when applying for Federal employment, they may only include degrees from accredited colleges and universities. Although the agency asserted the administrative judge committed a variety of errors, none were found to exist or to be of sufficient weight to change the outcome of the appeal. Chairman McPhie issued a dissenting opinion.

DC-0752-06-0139-
I-1
May 9, 2007
2007 MSPB 133

Eric Bennett v. Department of Transportation The Board vacated the part of the initial decision in which the administrative judge ordered the agency to provide the appellant with back pay and “to adjust [his] benefits with appropriate credits and deductions” After the initial decision was issued, the Board issued its decision in *Ivery v. Department of Transportation*, 102 MSPR 356 (2006), a case in which the employee had filed a petition for enforcement of a Board order. In that decision, the Board held that the Back Pay Act had been made inapplicable to the Federal Aviation Administration (FAA) as a result of the Wendell H. Ford Aviation Investment and Reform Act for the Twenty-First Century, Pub. L. No. 106-181. The appellant in the present appeal was placed on sick leave during his constructive suspension and, when his sick leave was exhausted, the FAA placed him on leave without pay. The Board held that like Ivery, the appellant lost the opportunity to earn pay and benefits when he was placed on leave without pay. The Board concluded the plain language of 5 U.S.C. § 702 does not support a finding that the Board is authorized to award equitable relief (in effect, require the agency to restore the sick leave the appellant took during the period of his constructive suspension) in cases like this. The Board recognized the appellant withdrew his affirmative defenses and his request for a hearing on his discrimination claims under circumstances in which he had reason to believe the Board could award him back pay. Under the circumstances of this case and in light of the appellant’s expressed interest in pursuing his discrimination and reprisal claims if they have not become moot, the Board remanded the appeal for a hearing on those claims. Board member Sapin issued a dissenting opinion.