



United States
Office of
Personnel Management

Washington, DC 20415-2001

In Reply To:

Your reference:

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DATE: July 30, 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 1106

FEDERAL LABOR RELATIONS AUTHORITY DECISIONS

62 FLRA No. 20;
62 FLRA 70
0-AR-4028
April 23, 2007

[U.S. Dep't of the Army, U.S. Army Dental Activity, Headquarters, XVIII Airborne Corps & Fort Bragg, Fort Bragg, N.C. and AFGE, AFL-CIO, Local 1770.](#) In the original award, the Arbitrator sustained, in part, the grievances over the grievants' 5-day suspensions and ordered the Agency to replace the suspensions with written reprimands and provide back pay. In a supplemental award, the Arbitrator explained the reprimands were ordered to conform to the progressive discipline requirements of 5 U.S.C. § 7503(a) and awarded the Union \$15,516.60 in attorney fees. The FLRA found nothing in § 7503 requires progressive discipline or requires reprimand as a first step in disciplinary actions. According to the FLRA, grievances over suspensions under § 7503 present two issues: (1) whether disciplinary action was warranted; and (2) if so, whether the penalty was reasonable. The FLRA concluded the award was contrary to § 7503 because the arbitrator failed to address the reasonableness of the penalty and relied on an incorrect interpretation of law as his reason for reducing the penalty. As a result, the FLRA vacated the award and remanded the case for a determination of the reasonableness of the penalty. However, the vacating of the attorney fees is without prejudice to a petition for fees should the Arbitrator on remand again award back pay.

62 FLRA No. 21;
62 FLRA 75
0-AR-4083
April 27, 2007

[AFGE, Local 1411 and U.S. Dep't of Defense, Defense Finance and Accounting Service, Indianapolis.](#) The grievant's supervisor instructed employees not to request annual leave during both weeks of the Christmas/New Year holiday because staffing requirements precluded the approval of such requests. The grievant ignored the instructions and the supervisor disapproved one of the December weeks. The supervisor met with the grievant in an attempt to convince her to change her leave request and to advise her that, if no change were made, the leave could not be restored. The grievant refused to change her request and lost 31 hours of annual leave. The Arbitrator denied the grievance because the Agency had legitimate staffing needs, the grievant was treated consistently with other employees and the loss of leave was through her fault. The FLRA rejected the Union's claim the award is contrary to § 6304(d)(1), which provides that forfeited annual leave may be restored if it is lost because of: (1) administrative error; (2) the exigencies of the public business, when the annual leave was scheduled in advance; or (3) sickness of the employee, when the leave was scheduled in advance. Citing Comptroller General decisions, the FLRA stated an agency has no discretion but to reschedule leave that would otherwise be lost if it cannot accommodate a leave request because of workload. However, according to the FLRA, if leave is lost through the fault of an employee it may not be restored. Based on the Arbitrator's factual findings, the FLRA concluded

62 FLRA No. 22;
62 FLRA 78
WA-RP-04-0067
May 17, 2007

the Agency attempted to reschedule the grievant's leave, but the grievant chose not to cooperate. The FLRA concluded the Agency met its statutory obligation, and the Agency's refusal to restore the lost leave was not administrative error.

[U.S. Dep't of Homeland Security, Customs and Border Protection and AFGE, AFL-CIO and NTEU.](#) After Customs and Border Protection was established within the Department of Homeland Security, NTEU won the right to represent the affected employees. AFGE filed 19 objections, which were rejected by the FLRA Regional Director (RD). As relevant here, AFGE claimed the Agency violated its obligation to remain neutral in two respects. First, the Agency listed NTEU in its telephone directory and user's guide, but did not list AFGE. The RD concluded this was not improper because the Agency inherited the collective bargaining agreements both Unions had with the predecessor agencies, and the NTEU contract required the listing, while the AFGE contract did not. Second, the Agency's rejection of a pre-election proposal by AFGE that the Agency assist in mailing information provided by both Unions to the homes of bargaining unit employees unfairly assisted NTEU in that it already represented two-thirds of the eligible employees, and AFGE was denied the opportunity to contact those employees. The RD rejected this claim because the mailing was not a routine service the Agency was obligated to provide under the Statute. The FLRA denied the application for review because there was not an absence of precedent for the RD's decision and he correctly applied existing law. The FLRA determined the RD was correct in finding the Agency had no obligation to equalize the positions of the competing Unions in regard to the directory listing. The FLRA also concluded the Union failed to show the Agency's refusal to facilitate the direct mailing interfered with voters' free choice. Specifically, the Agency allowed AFGE to host meetings at its facilities and announce those meetings through the Agency's e-mail system, and AFGE was allowed to leave its literature at the Agency's facilities. In addition, the FLRA found the Agency gave both Unions a list of employees a year prior to the election and that AFGE could have, but did not, use the list to directly contact employees to obtain their home addresses. Finally, the FLRA concluded the RD correctly found the Agency's denial of access to 100 employees at one location was not grounds for overturning the election because it did not impact the outcome.

62 FLRA No. 23;
62 FLRA 84
WA-RP-04-0048
May 17, 2007

[U.S. Dep't of Health and Human Services, Nat'l Institutes of Health, Nat'l Institute of Environmental Health Sciences, Research Triangle Park, N.C. and AFGE, Local 2923, AFL-CIO.](#) A reorganization split 11 employees in North Carolina from a larger bargaining unit at that location. They became part of a new division of more than 600 employees who, except for the 11, work in Maryland and are not part of a bargaining unit. The Union sought a bargaining unit for the 11 employees claiming the new division in North Carolina was a successor employer. The FLRA Regional Director (RD) applied the FLRA successorship criteria and concluded the first criterion was not met because the proposed unit did not constitute a separate, appropriate unit. The RD found the employees did not have a community of interest separate from their Maryland coworkers, and the proposed unit would not promote effective dealings with the Agency or efficient operations. The FLRA denied the application for review. In reaching this conclusion, the FLRA determined the RD correctly found the reorganization was more than a simple change in chain of command. He concluded the North Carolina employees were no longer part of the entity where they were located and that authority and responsibility for labor relations and personnel policy now rested in Maryland. The RD also found that two Maryland employees have moved to North Carolina indicating a degree of interchange. The FLRA also rejected the Union's claim the RD committed prejudicial errors in substantial factual findings. According to the FLRA, the record supported the RD's findings that there is interchange between the Maryland and North Carolina employees (despite the fact they are 500 miles apart) and the employees used the same work procedures by using the same computer system. The FLRA further concluded the RD's findings that employees have uniform position descriptions and that employees in North Carolina and Maryland have a unified mission were supported by the record.

62 FLRA No. 24;
62 FLRA 90
0-AR-4070
May 31, 2007

U.S. Dep't of Transportation, FAA, Alaskan Region and NATCA. The Arbitrator found the Agency violated Section 9 of a Memorandum of Understanding (MOU) between the parties concerning a demonstration project. She ordered the Agency to bargain with the Union with respect to operational and/or safety impacts of the project and, if the parties could not agree to a resolution of those impacts, she ordered the Agency to abide by the terms of Section 9 and discontinue the use of project equipment and procedures. Applying the BEP framework, the FLRA rejected the Agency's claim the award is contrary to management's right to assign work under § 7106(a)(2)(B) of the Statute. Under Prong I, the FLRA examines, as relevant here, whether the award provides a remedy for a violation of a provision in the agreement that was negotiated pursuant to § 7106(b) of the Statute. The FLRA found that with regard to Section 9, the Agency specifically conceded it elected to bargain on matters relating to the technology, methods and means of performing the Agency's work within the meaning of § 7106(b)(1). The FLRA determined that because the Arbitrator was enforcing a provision that was concededly negotiated under § 7106(b)(1), the award satisfies prong I of the BEP framework.

62 FLRA No. 25;
62 FLRA 93
0-NG-2911
May 31, 2007

AFGE, Local 2755 and NASA, Goddard Space Flight Center, Greenbelt, Md. The Agency conducted a reorganization of the Safety Office and the Union proposed to add two full-time positions to a branch as relief for employees whose workload increased when non-supervisory positions were transferred to other components. The FLRA found the proposal outside the duty to bargain and dismissed the petition for review. The FLRA stated that an agency's decision whether to fill positions is encompassed within management's rights to "hire" and "assign" employees under § 7106(a)(2)(A) of the Statute and that by requiring the Agency to hire an additional two employees, the proposal affects those rights. The FLRA also found the proposal does not constitute an appropriate arrangement for adversely affected employees pursuant to § 7106(b)(3) of the Statute. With respect to the Union's initial claim that employees were adversely affected by the transfer of non-supervisory positions to other components, the Union does not dispute in its response that the transfer of these positions had no impact on employees, because those positions were vacant prior to the reorganization. This fact, according to the FLRA, demonstrated that the adverse impact the Union claimed in its petition did not exist. The Union later maintained that the actual basis of its proposal was to increase staff because there has been an increase in workload generally. The FLRA found the Union's evidence showing an overall demanding workload failed to prove an increase in workload, that the workload was an adverse effect resulting from the exercise of a management right, or that it was caused by the reorganization. The FLRA also determined the Union failed to explain how the increase of two unspecified positions would ameliorate adverse effects.

62 FLRA No. 26;
62 FLRA 97
0-AR-3961
May 31, 2007

U.S. Department of the Army, Corps of Engineers, Portland District and United Power Trades Organization. The Union filed a motion for reconsideration of the FLRA's decision in *NTEU*, 61 FLRA 599, where the FLRA concluded an arbitrator's award limiting the agency's right to select an applicant from the student career experience program was contrary to OPM regulation 5 C.F.R. § 213.3202(b)(15). 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 it did not raise the issue of delegated authority *sua sponte* because the question whether the Agency had received authority to fashion a system apart from OPM requirements was argued before the Arbitrator. The FLRA also found the Union's claim that the Arbitrator erred in finding the test in question was an OPM test was untimely because the Union did not contest this finding on exceptions. Finally, the FLRA stated that, contrary to the Union's assertion, it did not mischaracterize the Arbitrator's remedy.

62 FLRA No. 27;
62 FLRA 100
0-AR-3995
May 31, 2007

U.S. Dep't of Justice, Federal Bureau of Prisons, Federal Correctional Complex, Beaumont, Texas, and AFGC, Local 1010. The Arbitrator found the Agency violated the fairness and equity clause of the parties' collective bargaining agreement by assigning the grievant duties that were not required of other employees in the same position. The FLRA concluded the award excessively interfered with management's right to assign work under § 7106(a)(2)(B) of the Statute and set it aside. Specifically, the FLRA found the Arbitrator's interpretation of the agreement would preclude the Agency from assigning duties to an employee that are not contained in the employee's position description (PD) unless it either amended an employee's PD each time it made an assignment not contained in the PD, or assigned the same duty to each employee occupying the same position. The FLRA determined the burden on management's right to assign work outweighed the benefit to the grievant of suffering fewer time management challenges.

62 FLRA No. 28;
62 FLRA 104
AT-RP-07-0001
June 1, 2007

U.S. General Services Administration, Washington, D.C. and National Federation of Federal Employee. The Union filed a petition seeking to represent all unrepresented professional and non-professional employees in the Agency's region. The FLRA Regional Director (RD) issued a notice of representation hearing and a pre-hearing conference. After reviewing submissions from the parties, the RD cancelled the hearing and issued a direction of election without a decision and order on the appropriateness of the bargaining unit. The RD determined the Agency had not provided sufficient evidence to question the appropriateness of the unit. The Agency filed a petition for review, arguing the RD directed an election while a question concerning the appropriateness of the unit was unresolved and that the RD's decision not to hold a hearing was arbitrary and capricious. The FLRA stated that a direction of election without a decision and order is permitted by regulation and the regulations also provide that a direction of election does not prejudice the right of any party to subsequently file objections to the election itself. The FLRA explained that taken together, these regulations support a conclusion that a direction of election is a preliminary matter to which there is no right to file an application for review. The FLRA further explained that consistent with this conclusion it has consistently dismissed applications for review of preliminary matters as interlocutory. The FLRA noted that while interlocutory appeals may be reviewed if a party can show extenuating circumstances, no such circumstances existed in this case. Accordingly, the FLRA dismissed the Agency's application for review on the ground that it is interlocutory, without prejudice to the Agency's right to refile an application for review after the RD issues a final decision and order on the petition.

FEDERAL SERVICE IMPASSES PANEL

07 FSIP 9
May 15, 2007

Dep't of Agriculture, Risk Management Agency, Kansas City, Missouri and Local 858, NFFE, Fed. Dist. 1, IAMAW, AFL-CIO. The impasse before the Panel concerned the parties disagreement over three provisions in a ground rules agreement: (1) the time frames for the parties to exchange their proposals for a new collective bargaining agreement and when contract bargaining should begin; (2) official time and assurances against reprisal for serving as Union representatives during the bargaining process; and (3) a requirement that the parties fully disclose during negotiations the rationale for their proposals.

1. 1. Bargaining schedule - The Agency proposed the parties exchange proposals 15 days after signing a ground rules agreement and begin bargaining 10 days later. The Union proposed an exchange of proposals 90 days after signing ground rules and commencement of bargaining 60 days later. The Panel ordered the parties to exchange proposals 30 business days following the ground rules agreement and begin bargaining 20 business days later. The Panel found expansion of the time frames beyond those proposed by the Agency warranted because the parties will be bargaining a successor agreement that may require significant changes.
2. 2. Official Time for Negotiations - The Agency proposed 32 hours per pay period for Union negotiators and the Union proposed only to follow the terms of the Statute and the current agreement. The Panel ordered the parties to adopt the Agency's proposal because nothing in the current agreement relates to official time for bargaining a successor agreement and the Union's approach would leave its representatives without a specific allotment of hours for preparation during bargaining.
3. 3. Full Disclosure During Bargaining - The Union proposed that each party share its "language and concerns at the table in order to resolve disputes" and the Agency stated it was unnecessary to include such a provision. The Panel ordered the Union to withdraw its proposal because the record failed to support the need for such wording, and it would be difficult to enforce.

07 FSIP 36
May 21, 2007

Dep't of the Air Force, Air Force Materiel Command, Wright-Patterson AFB and Local F-88, Int'l Association of Firefighters, AFL-CIO. The Agency provided bottled water at no expense to employees in the Fire Protection Division because the running water had been intermittently turned off and continued this practice after the problem was resolved. An auditor informed the Agency that this practice was illegal and the impasse before the Panel concerned whether the Agency should continue to provide bottled drinking water. The Agency proposed to discontinue the practice in four months and during that time the employees would receive 4 hours administrative time to work with the Union to determine whether they want to purchase water as a group. The Agency agreed the water in the fire stations smelled and tasted foul, but noted it was certified as potable and that the quality of the water was not the reason bottled water had been provided. The Union contended the practice should continue until the water quality issue is resolved. The Panel ordered the parties to adopt the Agency's proposal. The Panel found it clear from the record that this practice was not established because of the odor and taste of the installation's drinking water, but for other reasons that no longer exist. The Panel was "persuaded" that a 4-month transition period, with administrative leave for employees to decide alternative arrangements, is more reasonable than the Union's approach, where the purchase of bottled water with appropriated funds could continue indefinitely.

07 FSIP 66
May 30, 2007

[DOJ, Federal Bureau of Prisons Federal Correctional Institution Schuylkill, Minersville, Pa. and Local 3020, American Federation of Government Employees, AFL-CIO](#). The impasse before the Panel concerned whether the Agency's decision to terminate a 4/10 compressed work schedule (CWS) in the Education Department is supported by evidence that the schedule is causing an adverse agency impact. The Agency contended the schedule has resulted in a loss of instructional hours, failure to meet educational goals, an increase in idle hours and failure to meet a policy requirement regarding the percentage of time a teacher should be in contact with inmates. The Union claimed the decline in instructional hours was caused by the Agency's decision to discontinue the practice of allowing teachers to cover for each other on their regular days off and that the Agency failed to prove the work schedule contributed to the allegation that educational goals were not met. The Union also contended the Agency can increase teaching hours to any amount it chooses and that the Agency's methodology for computing the percentage of time teachers are in contact with inmates was flawed. Finding the CWS is causing an adverse agency impact by reducing Agency productivity, the Panel ordered it to be terminated. The Panel found that teachers on CWS spend 4 1/4 hours, rather than the 2 3/4 hours under an 8-hour schedule, in tasks that do not involve the direct instruction of inmates. The Panel also determined that although the Agency may have the ability to lengthen classroom hours, as the Union contended, it should not be required to disrupt the schedule of the entire institution merely to accommodate a CWS in the Education Department.

07 FSIP 34
May 31, 2007

[DHS, Bureau of Customs and Border Protection Washington, D.C. and National Border Patrol Council, American Federation of Government Employees, AFL-CIO](#). The impasse before the Panel concerned the Agency's decision to require Customs and Border Protection Officers (CBPOs) and Border Patrol Agents (BPAs) to take annual Web-based training on the proper treatment of unaccompanied minors. Specifically, the parties disagree over five issues involving: (1) whether their agreement should include wording that limits the training to "lawfully implemented" procedures; (2) the amount of remedial training BPAs should receive if they fail to complete initial training requirements; (3) the number of times BPAs may take the exam during remedial training; (4) how successful completion of the course during remedial training should be determined; and (5) how the consequences of failing to pass the exam during remedial training should be addressed.

1. 1. Scope of Training. The Union proposed the training be limited to include only those procedures that have been "lawfully implemented" so the Agency would be precluded from expanding the training to include procedures that have not been the subject of collective bargaining as required by Statute. The Agency offered alternative language but also contended the proposal was non-negotiable and unnecessary. The Panel ordered both parties to withdraw their proposals, explaining that if the Agency implements policies illegally, the Union is well aware of the mechanisms it can use to enforce its bargaining rights under the Statute.
2. 2. Remedial Training. The Union proposed that employees who fail to successfully complete the course after three attempts will be provided sufficient remedial training to enable them to successfully complete the course. The Agency proposed that employees will be provided remedial training and one final attempt to successfully complete the course. The Panel ordered the parties to adopt the Agency's proposal because it is more than adequate to meet employees' needs. According to the Panel, there is significant previous experience and employee success in meeting the course requirements.
3. 3. Re-examination. The Union proposed that an employee may take the examination during remedial training as many times as necessary to successfully complete the course and the Agency's proposal permits an employee, who has failed after four previous attempts, a fifth and final opportunity to successfully complete the course during personal remedial training. The Panel ordered the parties to adopt the Agency's proposal because, consistent with the rationale provided in connection with its decision on remedial training, the Union failed to demonstrate a need for providing employees with an unlimited number of opportunities to take the examination during remedial training.
4. 4. Certification – The Union proposed that once an employee passes the examination, the employee

be certified as having successfully completed the course and the remedial training cease unless the instructor believes that additional remedial training is required. The Union asserted this language would remove the possibility of an instructor "arbitrarily" withholding certification, while preserving management's ability to require additional remedial training to ensure an employee fully understands the material. The Agency proposed that when an employee passes the examination, the remedial training will normally cease and the employee will be certified as having successfully completed the course. The Panel ordered the parties to adopt the Agency's proposal because there is no basis in the record to support the Union's concern that an instructor would arbitrarily withhold certification.

5. Performance Improvement Plan – The Union proposed that employees failing to pass the course would receive unlimited opportunities to take the exam as part of a performance improvement plan. The Agency proposed that failure would be considered in performance evaluation but would not serve as a lone reason for termination. The Panel ordered the parties to adopt the Agency's proposal because the rate of success that other employees have had in completing the course successfully without the need for retests or remedial training clearly establishes that the Union's concerns are unrealistic.

07 FSIP 26
June 1, 2007

Dep't of the Air Force, Luke Air Force Base, Luke AFB, AZ and Local 1547, AFGE, AFL-CIO. The Agency decided to conduct a reduction in force (RIF) affecting bargaining unit employees. The impasse before the Panel concerned whether: (1) the Agency should be required to provide the Union with RIF retention registers that include the names of non-bargaining unit employees; and (2) bargaining unit employees should be offered vacant National Security Personnel System (NSPS) positions for which they are qualified in lieu of separation.

1. Retention Registers - The Union proposed the Agency provide, upon request, a complete copy of all retention registers concerning bargaining unit positions so the Union can ensure the RIF is "administered in a fair and equitable manner." The Agency proposed to provide the Union with a copy of the sections of the retention register that apply to bargaining unit employees because information from the retention register regarding non-bargaining unit employees is not necessary for the Union to perform its representational functions. The Panel ordered the parties to adopt the Union's proposal because the Union demonstrated a legitimate need for complete retention registers so it can assess whether the RIF has been conducted in accordance with the law, regulations, and the parties' agreement. The Panel also stated that to the extent the Agency is concerned about releasing information protected by the Privacy Act, its concerns can be "assuaged" by sanitizing the retention registers before providing them to the Union.

2. Vacant NSPS Positions - The Union proposes that before any bargaining unit employee is separated because of the RIF, he or she be offered vacant NSPS positions for which they qualify. The Union contended that prior to the creation of NSPS, bargaining unit employees would have appeared on the same RIF retention register as employees who are currently part of NSPS and the Agency is attempting to use its discretion to not give bargaining unit employees vacant NSPS positions. The Agency claimed the proposal is inconsistent with the Department of Defense (DoD), NSPS Workforce Shaping Issuance, DoD 1400.25-M, Subchapter 1960, which states that "components are not required to offer vacant positions," but may do so to eliminate or mitigate the disruption and impact of a RIF. The Panel ordered the parties to adopt the Agency's proposal because the Union's proposal is inconsistent with NSPS's Workforce Shaping Issuance, which reflects Congressional intent to grant DoD the authority to create its own personnel system.

MERIT SYSTEMS PROTECTION BOARD DECISIONS

DA-0752-07-0077-
I-1
2007 MSPB 136
May 22, 2007

Brown v. United States Postal Service The Agency issued a final agency decision (FAD) dismissing the appellant's EEO complaint. The appellant filed an appeal with the Board 47 days after the FAD was issued, alleging his removal was improper and the Agency violated the USERRA. The Administrative Judge (AJ) dismissed the appeal as untimely filed by nine days without good cause. In the petition for review, the appellant argued for the first time that: 1) he did not accept delivery of the FAD on the date noted by the AJ because he was serving in the Navy Reserve at the time; and 2) his appeal was timely filed because he filed it within 30 days after returning from his reserve duty. The Board denied the petition for review because he did not show his new arguments were based on new and material evidence that was previously unavailable. However, under its authority to reopen and reconsider a case on its own motion, the Board reopened the appeal to consider the effect of the tolling provision of the Servicemembers Civil Relief Act of 2003 (SCRA) on the timeliness issue. The SCRA provides, in pertinent part, that the service member's military service may not be included in computing any period limited by law, regulation, or order for bringing an action or proceeding by or against the service member. Finding the record insufficient to determine whether the appellant's claimed military duty was "military service" under the SCRA, the Board remanded for further adjudication of the SCRA issue. The Board also instructed the AJ to consider whether the appellant's reserve duty constituted good cause for his late appeal in the event the appellant's reserve duty was not covered by the SCRA. In addition, the Board remanded the appellant's USERRA claim, which the AJ did not address in the initial decision.

CH-3443-06-0582-
I-1
2007 MSPB 138
May 30, 2007

Gingery v. Department of Defense The Agency did not select the appellant for an auditor's position, but instead hired two applicants under the Federal Career Intern Program (FCIP). The appellant alleged that their selection violated his rights as a compensably disabled preference eligible by improperly circumventing his preference rights. The Board denied the appellant's petition for review. The Board found the appellant misinterpreted Board decisions he relied upon in making his argument. According to the Board, those decisions did not hold that noncompetitive hiring authorities could never be used to hire candidates who were not entitled to preference when qualified preference eligibles were available. Instead, the Board held that, under 5 USC 3304, an individual could be appointed in the competitive service only if he passed an examination or qualified for appointment under a valid noncompetitive appointing authority. The Board determined that although there is no indication that the two FCIP appointees in this case "passed an examination," the FCIP authority used here was different from the other cases because it represents a valid exception to the competitive examination requirement.

NY-3443-05-0222I-
3
2007 MSPB 139
May 30, 2007

Caracciolo v. Department of Treasury Approximately 8 years after her retirement on disability, the appellant informed the Agency she believed an earlier within-grade increase was delayed by 22 pay periods and she was entitled to back pay for a 9-month time period that occurred 11 years ago. On appeal, the Administrative Judge (AJ) dismissed for lack of jurisdiction, finding the appellant failed to make a nonfrivolous allegation of Board jurisdiction because she was covered by a collective bargaining agreement (CBA) that provided the exclusive remedy for raising claims related to within-grade increases. The Board ruled the AJ erred by dismissing on this basis because the appellant was a supervisor who was not covered by the CBA. However, the Board still dismissed the claim for lack of jurisdiction because the appellant did not non-frivolously allege that she suffered a reduction in pay. The Board found the appellant never claimed that her pay was lowered, but merely that her increase in pay was not timely remitted to her. With regard to the AJ's failure to provide complete Burgess notice, the Board found the appellant's substantive rights were not prejudiced because the AJ's initial decision put the appellant on notice she was required to show she suffered an actual lowering of her pay. Finally, the Board concluded the appellant's claim the AJ was "unresponsive" in another appeal and the fact the AJ made rulings in that appeal with which the appellant does not agree is insufficient to require the AJ to recuse herself.

DC-0752-05-0760-
I-1
DC-0752-06-0094-
I-1
2007 MSPB 141
June 4, 2007

[Wallace and Martin v. Department of Commerce](#) The Board consolidated two appeals and reversed the removals of the appellants. After an investigation by the Office of the Inspector General (OIG) into the appointment of Valencia Wallace's sister, Jacintha Martin, to a position subordinate to hers, the agency proposed Wallace's removal for conduct unbecoming a federal employee; and violations of ethics regulations and law prohibiting nepotism. The agency subsequently cancelled Martin's appointment on the grounds the appointment allegedly violated 5 U.S.C. §§ 3110 and 2302. The Board reversed Wallace's removal because, among other things, she had recused herself from the selection process and she did not approve Martin's selection. Instead, Wallace's supervisor approved Martin for the position. The Board also found it had jurisdiction over Martin's appeal because her appointment was not contrary to an absolute statutory prohibition such that she was not qualified for appointment in the civil service. Here, there was no evidence in the record that Martin was not qualified for appointment in the civil service or, in the absence of nepotism, not qualified for appointment to the particular position to which the agency appointed her. Further, the Board observed that the prohibition of appointments in which a public official has engaged in nepotism, under 5 U.S.C. § 3110(b), is not absolute.

AT-3443-06-0957-
I-1
2007 MSPB 145
June 5, 2007

[Brooks v. Department of the Treasury](#) The Board remanded this case regarding the appellant's request for corrective action under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) due to the Federal Circuit's issuance of *Kirkendall v. Department of the Army*, 479 F.3d 830 (Fed. Cir. 2007) (en banc). In that decision the Court held that USERRA claimants are entitled to a hearing before the board and that the denial of a hearing in USERRA appeals is contrary to law. *Kirkendall* was decided while the appellant's petition for review was pending before the Board.

CB-7121-07-0007-
V-1
2007 MSPB 143
June 5, 2007

[Byrne v. Department of Labor](#) The Board sustained the arbitrator's decision which denied the grievance and sustained the appellant's removal from his Staff Attorney position for performance-related reasons, finding no legal error which warranted modifying or setting aside the final arbitration decision. The appellant asserted the agency did not reasonably accommodate him for his mental condition. The Board concurred with the arbitrator's assessment that reasonable accommodation does not require an agency to lower production or performance standards, as the appellant had requested. The appellant was not a qualified individual under the Americans with Disabilities Act because he could not perform the essential functions of his position with or without reasonable accommodation. As to the appellant's claims the agency did not properly follow the requirements of 5 U.S.C. chapter 43 in effecting his removal, the Board found the appellant failed to demonstrate that the arbitrator improperly prorated the appellant's yearly production standard to account for the length of the performance improvement period. Further, the arbitrator properly concluded that the agency was not required to afford the appellant the opportunity to demonstrate acceptable performance under the performance standards that went into effect after the appellant's performance improvement period ended.

AT-3443-05-0147-
M-1
AT-3443-05-0179-
M-1
2007 MSPB 144
June 5, 2007

[Dean v. Consumer Product Safety Commission](#) Dean applied for a position with the agency and when not selected for it filed two appeals with the MSPB, one alleging a violation of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) and the other alleging a violation of his rights under the Veterans Employment Opportunities Act of 1998 (VEOA). Among other things, the appellant challenged the validity of creating multiple lists as practiced by the agency and then using only one list to select a candidate. The agency argued the appellant was placed on the merit promotion certificate only (where veterans preference points are not applicable) because he submitted one application and specifically requested consideration under non-competitive hiring authorities. The AJ dismissed both appeals for failure to state a claim on which relief may be granted and the full Board affirmed. The U.S. Court of Appeals for the Federal Circuit reversed and remanded, finding the Board erred in declining to consider the appellant's argument regarding the validity of creating multiple lists of eligibles as the agency did in this case. Finding the record incomplete on this issue, the Board remanded to the regional office for further adjudication.

AT-0752-05-0901-
I-2

[Smith v. Department of Transportation](#) The Board sustained three of the four charges related to the appellant's unauthorized use of official government information and sustained the agency's

2007 MSPB 142
June 5, 2007

imposition of a 30-day suspension. Following his non-selection for a supervisory position, the appellant, a collateral duty EEO counselor, filed an EEO complaint alleging that his non-selection was the result of discrimination based on race and reprisal for prior EEO activity. During depositions conducted by the appellant's attorney, it became apparent that the appellant had obtained and was using to support his own EEO complaint private information regarding two EEO complaints the selectee had filed in a previous position and in a different region. The Board concluded that the seriousness of the appellant's misconduct in compromising private information about another employee's EEO complaints was sufficient to outweigh any agency motive to retaliate against the appellant and that there was no genuine nexus between the appellant's prior EEO activity and the suspension. The Board determined the agency's action did not violate the appellant's First or Fifth Amendment rights. Although some of the conduct with which the appellant was charged constituted protected activity, the record made clear the agency had legitimate reasons for taking disciplinary action in this case. Member Sapin provided a dissenting opinion.

PH-0752-04-0067-
I-2
2007 MSPB 147
June 7, 2007

[Helmstetter v. Department of Homeland Security](#) The appellant filed the petition for review on February 19, 2007, of a June 24, 2004, initial decision that affirmed the agency's removal action. The Board dismissed the appellant's petition for review as untimely filed without a showing of good cause for the delay. The appellant filed a motion to waive the time limits, admitting in his motion that he received the initial decision on June 25, 2004. The Board held that regardless of what the appellant believed his attorney would file on his behalf, the appellant remained responsible for the prosecution of his petition. In addition, the Board held that even if the appellant had shown his efforts to diligently prosecute were thwarted without his knowledge by his attorney's negligence, the Board would not waive the filing deadline now, several years after his submissions show that he should have become aware of that negligence.

AT-0752-06-0144-
N-1
2007 MSPB 148
June 8, 2007

[Guerrero, Jr. v. Department of Veterans Affairs](#) The agency requested to stay enforcement of the Board's final decision in *Guerrero v. Department of Veterans Affairs*, AT-0752-06-0144-I-2 (May 8, 2007) for 15 days while the agency consulted with the Office of Personnel Management on filing a petition for reconsideration. (In the underlying case, the Board held that the agency failed to prove its charges that the appellant made false statements on two employment application forms for the position of GS-13 Supervisory Biomedical Engineer and misrepresented his qualifications for employment. The Board ordered the agency to cancel the appellant's removal and restore him to employment, effective October 28, 2005.) The appellant responded in opposition to the stay request. The Board denied the agency's request, finding the agency failed to meet the four criteria for granting a stay. Chairman McPhie issued a dissenting opinion.

AT-315H-06-0986-
I-1
2007 MSPB 159
June 19, 2007

[Liu v. Department of Agriculture](#) The appellant received a temporary one-year appointment to an excepted service position. Five months later, without a break in service, the Agency appointed her to a career conditional position with the same title, subject to one-year probation. The Agency terminated her one day prior to completing her first year. The Administrative Judge (AJ) dismissed her appeal for lack of jurisdiction because the Agency terminated the appellant during her probationary period. The Board agreed with the AJ that the appellant could not satisfy subsection (ii) of 5 U.S.C. § 7511(a)(1)(a) because her prior service was pursuant to a temporary appointment. However, the Board determined the appellant nonfrivolously alleged she completed her probationary period because she was in leave without pay status on her last day and, therefore, was entitled to a jurisdictional hearing. The Board further concluded that she raised nonfrivolous allegations that she served in the same line of work throughout her 17 months of service and, therefore, she was entitled to a hearing on whether she was an "employee" within the meaning of 5 U.S.C. 7511(a)(1)(A)(i) because her prior service was creditable toward completion of her probationary period. Accordingly, the Board remanded the appeal.

DC-0432-07-0132-
I-1
2007 MSPB 160
June 19, 2007

[Dey v. Nuclear Regulatory Commission](#) The Agency removed the appellant for unacceptable performance and misconduct. The appellant sought arbitration of the misconduct removal, but appealed the unacceptable performance removal to the Board. The Administrative Judge (AJ) dismissed without prejudice to refile pending a final arbitration decision because the arbitration decision could effectively moot the performance removal appeal. The Board ruled that dismissal

without prejudice was inappropriate because it was improper to allow the refiling date to be solely contingent on the issuance of an arbitration decision. The Board further concluded that dismissal without prejudice would be inappropriate even if a date certain for refiling was set. In this regard, the AJ erred in finding the arbitration decision could moot the current appeal because the appellant could still obtain relief as consequential damages or referral to the Office of Special Counsel if he proved his whistleblower claim. Accordingly, the Board vacated the initial decision and remanded for further adjudication.

NOTEWORTHY COURT DECISIONS

Fed. Cir. No. 2006
3154, May 15, 2007
MSPB Docket
Nos. CH-0752-03
0220-X-1
December 9, 2005

[*Lutz v. United States Postal Service*](#) The appellant and the USPS negotiated a settlement resolving his appeal of his demotion. The USPS agreed "to take all necessary steps to cooperate and facilitate the acceptance of Appellant's application" and "not to place negative statements in the supervisor statement" that was to be submitted for the appellant's disability retirement application. The Office of Personnel Management (OPM) denied his application. The appellant petitioned for enforcement of the settlement, claiming the USPS breached the agreement by including negative remarks in the supervisor's statement. The Board determined the USPS did not materially breach the settlement, finding that OPM still would have denied the application based on lack of relevant and credible medical evidence. The Court disagreed, ruling that the negative statements prejudiced the disability proceedings and that the breach was material. According to the Court, OPM explicitly relied on the supervisor's statements as one of two factors in denying the disability retirement application. The Court declined to rule on whether the settlement agreement should be rescinded and the case remanded for adjudication of the underlying appeal, or to remand the case to the MSPB for a further remand to OPM for a redetermination based on a clean record devoid of the negative remarks. Instead, the Court remanded the case to the Board to allow it to decide how to proceed.

Fed. Cir. No. 2006-
3263, May 15, 2007
MSPB Docket Nos.
NY-3443-05-0113-
I-1
April 6, 2006

[*Pittman v. Department of Justice*](#) After reemploying the appellant upon serving time in Operation Iraqi Freedom and then finding out he had been convicted of charges under the Uniform Code of Military Justice which were directly related to the duties of his job as a Senior Officer Specialist, the Agency removed him. The appellant grieved the removal under the Agency's negotiated grievance procedures and while the grievance was pending filed an appeal with the Board arguing the removal violated his USERRA rights. The Court agreed with the Board's denial of the appellant's "failure to reemploy" claim because the appellant was reemployed after completing his military service in compliance with the USERRA. The Court also concluded the appellant's USERRA claims for "improper removal" were similar matters arising under other personnel systems that he previously raised through his grievance. Therefore, the Court determined the Board lacked jurisdiction and that its denial of the improper removal claims on the merits was in error. Accordingly, the Court vacated the Board's denial of these claims and remanded with instructions to dismiss them.

Fed. Cir. No. 3340,
MSPB Docket No.
NY-0752-06-0015-
I-1
June 2, 2006

[*Rhodes v. Merit Systems Protection Board*](#) The Department of Homeland Security (DHS) indefinitely suspended the appellant pending further investigation or resolution of felony criminal charges filed against him. The Union invoked arbitration to challenge the suspension, but the parties later agreed to hold the arbitration in abeyance pending the outcome of the criminal case. The appellant was found not guilty, and the Union withdrew its invocation of arbitration. The DHS continued the suspension for more than 60 days. The Board dismissed for lack of jurisdiction because the appellant's election to grieve the reasons for the suspension included any subsequent action challenging DHS's alleged failure to end the indefinite suspension. The Court found the imposition of an indefinite suspension and the failure to terminate it were not the same matter. In making this determination, the Court noted that the Board's treatment of cases involving the imposition and the continuation of an indefinite suspension acknowledge that an agency's failure to terminate an indefinite suspension after a condition subsequent is a separately reviewable action. As a result, the appellant's election to grieve the imposition of the suspension did not preclude an appeal to the Board on the continuation of the suspension. Accordingly, the Court dismissed the Board's dismissal for lack of jurisdiction and remanded for further adjudication.

2007 WL 1702870
Supreme Court
Docket No.
06-5306
June 14, 2007

Bowles v. Russell, Warden After unsuccessfully challenging his murder conviction and sentence of 15 years to life imprisonment, the appellant failed to file a notice of habeas corpus appeal within the filing period of 30 days. The District Court granted his motion to reopen the filing period but inexplicably exceeded the additional 14-day time limit by three days. Relying on the time frame set by the District Court, the appellant filed his notice within the 17 days, but after the 14-day period allowed by law. The Court of Appeals denied his petition as untimely. The appellant contended his untimely appeal should be excused because he satisfied the “unique circumstances” doctrine. The U.S. Supreme Court held that a District Court does not have the jurisdiction to extend the time limit for filing a notice of appeal. The Supreme Court stated it has long held that the taking of an appeal within the prescribed time is “mandatory and jurisdictional.” According to the Supreme Court, it has no authority to create equitable exceptions to jurisdiction requirements, and thus use of the “unique circumstances” doctrine is illegitimate. Further, the Supreme Court noted it saw no reason to resurrect this doctrine which has been applied only once in the last half century and has been rightly questioned by several courts. A dissenting opinion was issued.