



United States  
Office of  
Personnel Management

Washington, DC 20415-2001

In Reply To:

Your reference:

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DATE: September 19, 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 1107

## FEDERAL LABOR RELATIONS AUTHORITY DECISIONS

62 FLRA No. 29;  
62 FLRA 107  
0-AR-4162  
June 20, 2007

[U.S. Dep't of Agriculture, Food Safety and Inspection Service and AFGC, National Joint Council of Food Inspection Locals](#). The Arbitrator sustained the grievance over the grievant's suspension for two pay periods and ordered the Agency to cancel the suspension. The Agency filed exceptions and the Union claimed the FLRA lacked jurisdiction. The FLRA stated that, under § 7122(a) of the Statute, it lacks jurisdiction to review an arbitration award "relating to a matter described in section 7121(f)" of the Statute, which includes adverse actions, such as suspensions for more than 14 days, that are covered under 5 U.S.C. § 4303 or § 7512. Rather, these matters are reviewable by the U.S. Court of Appeals for the Federal Circuit. According to the FLRA, an award relates to a matter described in § 7121(f) when it resolves, or is inextricably intertwined with, a § 4303 or 7512 matter. In making that determination, the FLRA looks to whether the claim advanced in arbitration is reviewable by the MSPB and, on appeal, by the Federal Circuit. Rejecting the Agency's argument the FLRA has jurisdiction because the Agency filed a fair hearing exception and not an exception regarding the alleged adverse action, the FLRA found the award resolved a claim over the Agency's suspension of the grievant for two pay periods and that such a suspension constitutes a suspension for more than 14 days. Finding the claim advanced in arbitration concerned the suspension of the grievant for more than 14 days, the FLRA concluded the award relates to a § 7121(f) matter. Accordingly, the FLRA dismissed the Agency's exceptions.

62 FLRA No. 30;  
62 FLRA 109  
0-AR-4123  
June 20, 2007

[AFGC, Local 2923 and U.S. Dep't of Health and Human Services, National Institutes of Health, National Institutes of Environmental Health Sciences](#). Following an injury, the grievant was allowed to work full time at home. A recommended promotion was put on hold when a manager questioned her ability to perform the full range of the higher graded duties and the Union filed a grievance claiming the delay constituted race and disability discrimination. Although the Arbitrator ultimately found the grievance untimely, she nonetheless addressed the discrimination claims. She found no evidence of race discrimination and rejected the disability discrimination claim because the manager reasonably concluded the grievant could not perform all of the essential duties contained in the new position description while at home. The FLRA denied the Union's claim the award is contrary to the Rehabilitation Act. The FLRA noted that one requirement for a *prima facie* case of disability discrimination is a showing the complainant is qualified. The FLRA explained that it defers to an arbitrator's factual findings and the Arbitrator found the Agency reasonably concluded the grievant could not perform the essential functions outlined by the Agency if her request for accommodation, i.e. working at home, were granted. The Union did not contend in its exceptions that the duties relied on by the Agency to reach this conclusion were not essential to the position. In the absence of such a showing, the FLRA concluded the Union failed to establish the grievant was qualified and thus failed to put forth a *prima facie* case of disability discrimination.

62 FLRA No. 31;  
62 FLRA 113  
0-AR-4117  
June 21, 2007

[AFGC, Local 1741 and U.S. Dep't of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Milan, Michigan](#). The issue before the Arbitrator concerned whether the grievants must be compensated for performing pre-shift and post-shift activities. In a preliminary award, the Arbitrator found the grievance timely because the alleged violation was continuing. He concluded that if the Agency is required to pay the grievants, the liability would begin at the time the parties requested a list of arbitrators. On the merits, the Arbitrator denied the grievance because the Agency did not require employees to report to work early. The Arbitrator determined that although the Agency did not pay employees for waiting in line for their equipment, it properly compensated them once they had obtained the equipment. On the post-shift activities, the Arbitrator concluded a 10-minute shift overlap gave employees adequate time to travel from duty posts, and that requests for overtime were granted when they were delayed. The FLRA found the preliminary award contrary to the Fair Labor Standards Act (FLSA). The FLRA explained that absent an agreement between the parties, an arbitrator does not have the discretion to ignore the recovery period set forth in § 255(a) of the FLSA (2 or 3 years prior to the time the grievance was filed, depending on whether a violation is determined to be willful). The FLRA upheld the Arbitrator's ruling on the merits because his finding that employees are entitled to be paid once they pick up their equipment was consistent with FLRA precedent. With regard to the post-shift activities, the FLRA found the Arbitrator properly applied the burden of proof in finding the Agency's time keeping system was adequate and the Union failed to provide the documentation necessary to support an overtime claim. Rejecting the

Agency's contention the matter had become moot, the FLRA remanded the preliminary award because the Union may have an interest in pursuing alleged violations prior to the recovery date wrongfully established by the Arbitrator.

62 FLRA No. 32  
62 FLRA 121  
0-AR-3928  
July 12, 2007

[\*U.S. Dep't of the Air Force, Kirtland Air Force Base, Air Force Materiel Command, Albuquerque, N.M. and AFGE, Local 2263.\*](#) The grievant, a disabled veteran, applied for vacant positions as both an internal and external applicant. The Arbitrator found the Agency violated the parties' collective bargaining agreement by not giving sufficient consideration to internal applicants. The Arbitrator also ruled the Agency violated law by not crediting the grievant's veterans' preference as an external applicant. As a remedy, the Arbitrator gave the Agency the option of granting the grievant a retroactive promotion with back pay or providing priority consideration for a future vacancy. The Arbitrator also awarded the Union attorney's fees. The FLRA first found the Agency's exceptions were not interlocutory because the Arbitrator resolved all issues before him. The FLRA denied the Agency's claim the award was contrary to veteran's preference law. According to the FLRA, when an arbitrator has based an award on separate and independent grounds, an appealing party must establish that all of the grounds are deficient in order to establish that the award is deficient. Here, the Arbitrator found the Agency had committed violations based upon two, independent grounds (law and the parties' agreement) and the Agency does not except to the finding of a contract violation. The FLRA did, however, find the award of attorney fees contrary to the Back Pay Act and set it aside. The FLRA determined that because the Arbitrator failed to explain how the grievant lost pay as a result of the contract violation, he did not make the required finding that the grievant would have been promoted had the Agency given proper consideration to internal applicants.

62 FLRA No. 33;  
62 FLRA 129  
0-AR-4043  
July 17, 2007

[\*U.S. Dep't of Homeland Security, U.S. Customs and Border Protection, JFK Airport, Queens, NY and AFGE, Local 1917.\*](#) The Arbitrator found the Agency violated Article 9(A) of the parties' collective bargaining agreement by failing to notify the Union about, and bargain over, changes in the implementation of a new overtime and scheduling system. As relevant here, the Arbitrator rejected the Agency's claims it had no obligation to bargain based on the Agency's National Inspection Assignment Policy (NIAP) or that the NIAP superseded the parties' agreement. The Arbitrator also found the Agency's notice of the change was not specific enough to meet the requirements of Article 9(A). The FLRA denied the Agency's claims that the Arbitrator's erroneous determinations that the NIAP had not been implemented and the Agency failed to satisfy the agreement's notice requirements constituted nonfacts because those issues were disputed before the Arbitrator. The FLRA also rejected the Agency's contention the award is contrary to the Statute because it requires indefinite extension of the parties' agreement based solely on management guidance. The FLRA stated it has uniformly held the existence of a collective bargaining agreement is a question of fact and not a question of law, and that such existence can be shown by conduct manifesting an intention to abide by agreed-upon terms. The FLRA explained that the Arbitrator's finding that management guidance indicated the parties' agreement was still in effect is a factual determination to which it defers and the Agency's claim, therefore, provides no basis for finding the award deficient. Finally, the FLRA denied the Agency's essence claims because the Agency failed to demonstrate that the Arbitrator's ruling that the notice provided by the Agency did not meet the requirements of Article 9(A) was irrational or implausible.

62 FLRA No. 34  
62 FLRA 134  
0-AR-4033  
July 17, 2007

[U.S. Dep't of Defense, Defense Logistics Agency and U.S. Dep't of the Air Force, Air Force Material Command and AFGE, Local 916](#). As background, the DLA and AFGE, Local 916 (Union), which represents the grievant, are parties to a master labor agreement. A separate and distinct union, AFGE, Council 214, represents employees in the AFMC. The grievant was issued a traffic ticket by the AFMC for not wearing proper safety equipment while driving a motorcycle. The grievant filed a grievance under the master agreement between DLA and the Union, which sought to enforce a memorandum of agreement (MOA) on motorcycle safety between the AFMC and AFGE, Council 214. The AFMC denied the grievance on the grounds the grievant was not a member of the AFMC bargaining unit and was not covered by the agreement between the AFMC and AFGE, Council 214. The matter proceeded to arbitration and the Arbitrator held two separate hearings on separate dates. Neither the DLA nor the AFMC attended either of the hearings. The Arbitrator ruled the grievance was arbitrable at the first hearing and after the second hearing, the Arbitrator sustained the grievance and directed the Agencies to expunge the traffic ticket from the grievant's record and to comply with the MOA. The FLRA found the award is based on a nonfact and fails to draw its essence from the agreement, and set it aside. Specifically, the FLRA concluded the Arbitrator erred in finding the MOA applied to the grievant because it is undisputed the Union was not a party to the MOA. If the Arbitrator had understood the MOA was not enforceable by the Union, he would not have sustained the grievance that sought to enforce the MOA. Thus, according to the FLRA, the award is deficient because the central factual finding underlying his award is clearly erroneous, but for which he would have reached a different result. With regard to the essence finding, the FLRA rejected the Arbitrator's construction of the DLA master agreement as implausible and contrary to its purpose because he found the negotiated grievance procedure in that master agreement was available to enforce an MOA to which neither the Union nor DLA is a party. As it is undisputed the AFMC is not a party to that master agreement, it follows that the negotiated grievance procedure does not apply to the AFMC. The FLRA also found the Arbitrator's construction of the MOA implausible because he found the MOA enforceable by the Union even though the Union was not a party to the MOA.

62 FLRA No. 35;  
62 FLRA 137  
0-AR-4196  
July 25, 2007

[AFGE, Locals 1007 and 3957 and U.S. DOJ, Fed. Bureau of Prisons, Federal Correctional Complex, Oakdale, Louisiana](#). The FLRA denied the Union's evaluation of the evidence and essence exceptions to an arbitration award, not otherwise described.

### FEDERAL SERVICE IMPASSES PANEL DECISIONS

07 FSIP 48  
June 26, 2007

[Dep't of Veterans Affairs, VA San Diego Healthcare System, San Diego and Local R12-228, NAGE, SEIU](#). The impasse before the Panel concerned the Agency's decision to close a particular designated outdoor smoking area. The Agency cited a number of complaints of second hand smoke entering the building and maintained it closed the area to protect the health of employees and visitors. The Agency claimed the three existing smoking areas were sufficient and in accordance with Executive Order 13058. The Union argued the Agency failed to provide scientific or empirical evidence the smoking area caused a health risk. The Union claimed the Agency's anecdotal evidence of complaints existed because the Agency permitted people to use an emergency door that should have remained locked. The Panel ordered the Agency to re-establish the disputed designated smoking area, concluding the Agency failed to prove that the disputed smoking area resulted in any adverse impact on employees, patients, or visitors during the 4-month period before it was unilaterally closed. The Panel found the record established there is no access to the main building from that area, other than through an emergency door, and there are no air intake ducts nearby that would result in smoke entering the building. Therefore, according to the Panel, there would be no adverse impact on any person inside the building unless there is unauthorized use of the emergency door, a circumstance management should not permit.

07 FSIP 38  
July 6, 2007

[SSA, Baltimore, MD and Council 220, AFGE, AFL-CIO](#). The Agency notified the Union it was planning to implement a new hardship reassignment policy governing SSA field offices and teleservice centers. The impasse before the Panel concerned, among other things, the following issues:

1. Suspension of Implementation of Hardship Reassignment Policy Until Related Grievance and ULP Charges are Resolved. The Union proposed restoring the long-standing practice of seeking Union concurrence before the Agency makes hardship reassignment decisions because, it claimed, the Agency's unilateral termination of this practice is illegal, and its restoration until litigation on the matter is resolved would minimize employees' "perception of favoritism" concerning the Agency's hardship reassignment decision-making process. The Agency proposed the Union withdraw its proposals because they interfere with management's right to assign and direct employees and involve an issue that was never "on the table." The Panel ordered the Union to withdraw its proposals because regardless of whether they interfere with management's rights, they were raised for the first time at the conclusion of the informal conference. Thus, the proposals were never the subject of negotiations or mediation assistance and, therefore, are not within the Panel's authority to resolve as part of the impasse between the parties in this case.

2. Definition of Hardship. The Union contended that its proposed definition of "hardship" is consistent with the wording in the 1992 MOU, and has served the parties well. The Union asserted that including the phrase "beyond the employee's control" as a criterion, as the Agency proposed, would "severely limit" employees who need hardship reassignments by providing management with "additional denial reasons." The Agency claimed that its definition would make it clear to all affected parties that employees "who create their own situation" (for example, by purchasing a house in a geographical location where they desire to move "for non-hardship reasons") do not meet the definition of a "hardship." The Panel ordered the parties to adopt the Agency's proposal because that definition is more likely than the Union's to ensure that employees' requests for hardship reassignments are *bona fide*.

3. Union Concurrence on All Hardship Reassignment Requests. The Union claimed that its proposal would re-establish the practice of seeking Union concurrence before management makes decisions on hardship reassignment requests. The Union alleged that without such Union involvement, "there will not be any checks and balances and management's unilateral decisions will result in increased and inconsistent decisions in hardship cases that will increase litigation." The Agency asserted that its proposal preserves management's right to make determinations with respect to hardship reassignments without the Union's concurrence or direct involvement. The Panel ordered the parties to adopt the Agency's proposal because the record does not demonstrate that management's decisions concerning hardship reassignment requests have been based on personal favoritism or that there would be no "checks and balances" regarding management's decisions in this area unless the past practice is re-established. The Panel stated the Union can continue to monitor the integrity of the decision-making process through its traditional role of representing employees under the parties' negotiated grievance procedure.

4. Use of Opinions of Medical Sources in Hardship Reassignment Decisions. The Union's proposal would prevent the Agency from requiring employees and/or their family members to submit "excessive medical documentation" to support requests for reassignment based on a medical hardship. The Agency claimed its proposal "clearly defines" management's right to request appropriate documentation in making its decision to reassign an employee on the basis of medical hardship. The Panel ordered the parties to adopt the Agency's proposal because it was not "persuaded" the Agency previously has requested excessive documentation to substantiate hardship requests, or that it has been unreasonable when using its own medical experts to evaluate.

5. Specificity of Explanation of Denials of Hardship Reassignment Requests. The Union proposed the Agency be required to provide hardship reassignment applicants and the Union with a "specific explanation," directly related to the employee's personal hardship circumstances, as to why the request cannot be accommodated. The Agency alleged that under its proposal, the "brief explanation" it would provide to unsuccessful applicants would "certainly include enough specificity to inform employee[s] why their request was denied." The Panel ordered the parties to adopt the Agency's proposal because applicants can challenge the adequacy of management's explanation in the grievance forum if they have any doubts as to why their request was denied. The Panel was also "persuaded" that applicants should determine for themselves whether to share management's

explanation with the Union, given the personal nature of the information involved.

6. Retention of Files and Availability to the Union. The Union claimed that access to reassignment files would allow it to ensure that management is administering the hardship reassignment process fairly and consistently throughout the Agency. The Agency asserted the Union's insistence that it be permitted to "audit" applicants' hardship reassignment request files would give the Union access to information "even for employees who have not designated the Union as their representative," and raises Privacy Act concerns. According to the Agency, it is also unnecessary because "the Union already has a statutory procedure available in order to obtain information from the Agency" under 5 U.S.C. 7114(b). The Panel ordered the parties to adopt the Agency's proposal because the Union's proposal would provide it with access to highly personal information without the applicant's prior consent and the Union's interests are adequately met through the existing statutory mechanisms.

7. Administrative Leave and Travel Reimbursement if Hardship Request is Approved. The Union claimed its proposal should be adopted because of a survey it conducted in 2002 that "shows the inconsistent amounts of administrative leave granted" by management in various geographical areas of the country when applicants' hardship reassignment requests have been approved. With respect to reimbursement of travel and relocation expenses, although the parties have generally followed the Federal Travel Regulations (FTR), the Union claimed the Agency has prohibited such payments on budgetary grounds. The Agency alleged the FTR does not "mandate reimbursement for voluntary reassignments," and its proposal makes it clear that if a hardship reassignment request is granted, "the employee will be responsible for his own travel and relocation expenses." With respect to administrative leave, the Agency asserted the Union's proposal would require it be granted in some circumstances where it is not currently required by contract or regulations, and in other situations "where local management should have discretion, as they currently do." The Panel ordered the parties to adopt the Agency's proposal because the Agency's position is reasonable. With respect to administrative leave, the Panel found the information the Union provided in its survey dated, and did not by itself demonstrate that employee treatment in different geographical areas was unfair or arbitrary.

8. Right of Return. The Union proposed that if a hardship ends unexpectedly or shortly after a move is effectuated, the employee will retain the right of return. The Agency requested the Union withdraw its proposal because reassignments are permanent. The Panel ordered the Union to withdraw its proposal because it has provided no justification for granting employees, whose hardships end shortly after a move occurs, the right to return to their original locations.

9. Requirement to Confer with Local Union Representatives. The Union proposed that management will, upon request, confer with the Local Union representative regarding issues not covered by this MOU or the General Agreement. The Agency requested the Union withdraw its proposal because it concerns a permissive subject of bargaining and the Agency elected not to agree to it. The Panel ordered the Union to withdraw its proposal because it provided no evidence or arguments for requiring management to confer with local representatives regarding issues not covered by the parties' MOU or NA.

07 FSIP 69  
July 6, 2007

[DOJ, Fed. Bureau of Prisons, Fed. Correctional Institution, Phoenix, AZ and Local 3954, AFGE, AFL-CIO.](#) The impasse before the Panel concerned whether the Agency's decision to terminate a 4/10 compressed work schedule (CWS) for correctional officers (COs) on the "bus crew" in the Correctional Services Department (CSD) is supported by evidence that the schedule is causing an adverse agency impact. As background, when the 4/10 CWS for the bus crew was implemented in 1999, the regularly scheduled round-trip went from Monday through Wednesday/Thursday. Since September 2005, however, the bus crew normally makes a 2-day round-trip, starting early on Monday morning and ending on Tuesday afternoon, picking up and dropping off inmates along the way. The Agency contended the schedule is causing an increase in the cost of agency operations. The Agency explained that to accommodate the regular days off (RDO) of the two employees on the 4/10 CWS, management has had to find other staff members on Fridays to cover posts in the CSD. The Agency also asserted that the unnecessary expenses accumulated under the CWS are taken

directly from the FCI's budget. The Union claimed the increase in costs alleged by the Agency is exaggerated because it does not take into account the savings management gains from not having to pay COs overtime on Mondays and Tuesdays. Finding that the CWS was causing an adverse agency impact by increasing the cost of agency operations, the Panel ordered it to be terminated. The Panel found that CO staffing levels have decreased and while the bus crew's RDOs could be accommodated when CO staffing levels were higher, the Agency has incurred costs to fill posts on Fridays to ensure the safety of the FCI that would have been unnecessary under a 5/8 schedule. In addition, according to the Panel, the increase in costs caused by the CWS has a direct impact on the FCI's budget.

## MERIT SYSTEMS PROTECTION BOARD DECISIONS

SF-0752-06-0635-  
I-1  
2007 MSPB 151  
June 12, 2007

*Stempihar v. United States Postal Service* The AJ dismissed as moot the appellant's appeal of his removal because the agency indicated that it was rescinding the removal subject to reissuance. The appellant objected on the basis, among other things, that the agency had not clearly stated that the appellant would receive all back pay and benefits that he would have received but for the canceled removal action. The initial decision stated the deadline for filing a petition for review as August 23, 2006, but did not set forth any deadlines for "compliance" or filing a petition for enforcement. On October 25, 2006, the appellant filed a pleading with the regional office in which he complained that the agency had not provided him with all of his "lost overtime" pay after it canceled his removal. The appellant's representative asserted in an affidavit that in the 2 months following the initial decision, the agency disputed the appellant's claim for lost overtime and delayed reinstating him to his position. The representative further averred that negotiations over the amount of back pay ultimately broke down after the initial decision became final, the agency then "unilaterally" awarded the appellant about one-third of the lost overtime pay he requested, and his arguments did not relate to the initial decision itself but to the agency's actions after the initial decision became final. The Board determined that the appellant plainly intended his filing as a petition for enforcement within 30 days after the date he considered the parties to be at an impasse in negotiations over back pay, 2 months following the initial decision. The Board held that the appellant's late filing of his petition for review should be excused because he acted reasonably in the face of a confusing initial decision, which specified that the appellant could file a petition for enforcement at some unspecified future time if he believed the agency did not provide him with all of his entitlements following cancellation of the removal. The Board stated the initial decision failed to include the Board's customary notice of the procedures and deadline for obtaining compliance. Moreover, the initial decision was misleading; a decision dismissing an appeal as moot is not enforceable by the appellant because it is not a decision on the merits in the appellant's favor. The Board remanded the appeal for a determination as to whether the agency has completely rescinded the appellant's removal and afforded him all the relief he would have received if the appeal had been adjudicated and he had prevailed.

AT-0752-05-0775-  
B-1  
2007 MSPB  
June 13, 2007

*Hay v. United States Postal Service* The appellant filed his initial appeal 2 months after his removal. The administrative judge (AJ) dismissed for lack of jurisdiction because the appellant failed to show he was a preference eligible with appeal rights to the Board. Two months later, the appellant filed a second appeal of his removal and provided evidence that he was a preference eligible. The AJ dismissed the appeal, holding that the appellant was collaterally estopped from relitigating the issue of whether he was a preference eligible. On petition for review, the Board reversed the AJ and remanded for a determination on the timeliness of the appeal. On remand, the AJ ordered the appellant to file evidence and argument on the timeliness of his appeal. The appellant responded to the order 6 days late, asserting that he had filed an EEO complaint prior to his removal, the complaint encompassed his removal, and the agency's final decision in his discrimination complaint (FAD) was issued on June 21, 2005. Because he filed his second appeal 29 days after the FAD, he contended his appeal was timely filed. The AJ declined to consider the argument, finding the appellant failed to exercise due diligence in responding to the timeliness order, and dismissed the appeal as untimely based on the date of his first appeal. The appellant petitioned for review, arguing his appeal was timely filed but mistakenly directed to the Equal Employment Opportunity Commission (EEOC). In the alternative, the appellant argued that the AJ erred in failing to apply

mixed-case procedures where he had filed an EEO complaint prior to the effective date of his removal. The Board concluded the AJ's sanction was too severe for a mere 6 day delay and decided it would consider the merits of appellant's late submission. The Board found, based upon the totality of the circumstances, that the appellant's EEO complaint encompassed his removal, concluded the second appeal was timely filed and remanded to the AJ for further adjudication consistent with its decision.

AT-0330-06-0198-  
R-1  
2007 MSPB 157  
June 13, 2007

[Hayes v. Department of the Army](#) The appellant alleged the agency violated his veterans' preference rights when it combined referral lists for two different advertised positions. Without holding a hearing, the AJ dismissed the appeal for lack of jurisdiction because the appellant failed to exhaust his remedy before the Department of Labor (DOL). After considering the appellant's arguments under the then-applicable law, the Board denied the appellant's petition. After that Board decision, the Federal Circuit issued a decision in *Kirkendall v. Department of the Army*, 479 F.3d 830 (Fed. Cir. 2007) (en banc). The Court held in *Kirkendall* that the Board has the authority to review, and should apply the doctrine of equitable tolling to, claims brought under VEOA that have been dismissed by DOL as untimely under 5 U.S.C. § 3330a(a)(2)(A). Nine days after the Federal Circuit's decision in *Kirkendall* was issued, the appellant filed a request for reconsideration with the Board based on the Federal Circuit's ruling in *Kirkendall*. The Board stated that although the appellant's request for reconsideration, having been filed eight months after the Board's decision in this appeal, stretched the bounds of a reasonable time period, the appellant displayed great diligence in prosecuting his appeal by promptly requesting reconsideration within days after the *Kirkendall* decision. Finding the desirability for finality was outweighed by the public's interest in reaching what appears to be the right result, the Board reopened the appeal, reversed its earlier finding, and remanded the appeal. On remand, the AJ must provide the appropriate notice to the appellant of his burden under *Kirkendall*, and then decide whether the time limit should be equitably tolled. Chairman McPhie issued a dissenting opinion.

DE-0351-05-0293-  
M-I  
2007 MSPB 162  
June 20, 2007

[Parrish v. Department of Interior](#) The agency abolished the appellant's Dean of Administration position with the Southwestern Indian Polytechnic Institute (SIPI), a component of the Department of Interior. As a result, the appellant was separated by reduction in force (RIF) on April 30, 2005. The appellant appealed to the MSPB and the agency filed a motion to dismiss for lack of jurisdiction. The agency argued that Congress enacted legislation in 1998 authorizing the agency to establish a demonstration project covering employees of SIPI which allowed for RIF procedures different from those provided under 5 CFR part 351 and that the demonstration project was in effect at the time of the appellant's separation. The AJ found that the Board had jurisdiction over the appeal but stayed the proceedings and certified his ruling for interlocutory review by the Board. The Board reversed the AJ's ruling, concluding that the Board lacked jurisdiction. The appellant filed a petition for judicial review with the U.S. Court of Appeals for the Federal Circuit. The Court of Appeals vacated the Board's decision, holding the Board had "the authority indeed the obligation, to determine its own jurisdiction over a particular appeal." The Court remanded the appeal to the Board for a determination as to whether the agency had satisfied the statutory requirements for eliminating Board jurisdiction over RIF appeals. On remand, the Board found the agency did not satisfy the statutory requirements specified in Public Law No. 105-337 for eliminating Board jurisdiction over RIF appeals. Specifically, SIPI did not include any citation to 5 C.F.R. 351 and appeal rights to the Board in its personnel manual or refer to any Board appeal right that the agency might have intended to supersede, nor did the agency publish the personnel manual or any detailed description of its contents in the Federal Register. Therefore, the Board concluded it had jurisdiction over the appellant's RIF appeal. The appeal was remanded to the field office for further proceedings.

CH-1221-06-0480-  
W-1  
2007 MSPB 164  
June 22, 2007

[Horton v. Department Veterans Affairs](#) The Board reversed the dismissal of the appellant's individual right of action (IRA) appeal for lack of jurisdiction with respect to five of his seven disclosures concerning the agency giving patients home oxygen without meeting the requisite standards for receiving it and providing false information on Medicare and/or Medicaid payment documentation, and remanded the appeal. The Board concluded that the appellant, a Registered Respiratory Therapist at an agency Medical Center, showed he exhausted his administrative remedies with the Office of Special Counsel (OSC) with respect to all of his disclosures, contrary to

the AJ's findings that he'd only done so with respect to two of his disclosures. Specifically, the Board determined that three disclosures were raised in the narrative the appellant attached to his OSC complaint and the other two were substantially the same on the appeal as they were in the OSC complaint. The Board found the appellant made nonfrivolous allegations that: a person in his position with knowledge of the essential facts known to and readily ascertainable by the appellant could reasonably conclude that the law was violated; he made at least one protected disclosure which was a contributing factor in the agency's decision to take at least one personnel action against him (i.e., a letter of reprimand regarding his use of sick leave); and as the respiratory therapist for the home care program at his facility, he was in a position to form a reasonable belief on the matters at issue. The official taking the action was necessarily aware of the appellant's alleged protected disclosures because the appellant made many of them directly to that official. The Board found that the appellant's primary duties were clinical in nature and thus did not include an investigatory or oversight function so his reports could qualify as protected disclosures.

CH-315H-07-0102-  
I-1  
DE-315H-07-0077-  
I-1  
2007 MSPB 163  
June 22, 2007

*Smith v. Department of Defense* The appellant explained that he mistakenly filed his first appeal of the agency's decision to terminate him during his probationary period to the Board's Denver Field Office on November 13, 2006. In an effort to correct his error, he filed an identical appeal with the Central Regional Office on November 14, 2006. The Board joined the appellant's two petitions for review, the initial decision of the Denver Field Office dismissing his appeal for lack of jurisdiction and the initial decision of the Central Regional Office dismissing his appeal on application of collateral estoppel. The appellant complained that his case did not receive a full and fair consideration by the Board because neither AJ considered all of the relevant pleadings in both appeals. The Board agreed and reopened the joined appeal to fully consider the parties' jurisdictional pleadings. The Board affirmed the first initial decision as modified by the Board's opinion and order, still dismissing the appeal for lack of jurisdiction. The appellant did not show that he had a right of appeal under 5 C.F.R. part 315 because he did not allege his termination was based on partisan political reasons, marital status, or for a reason arising before his appointment. Although the appellant asserted that he should not have been hired as a probationary employee because of his previous work experience and thus should have been entitled to adverse-action appeal rights, the Board found he failed to meet either of the statutory requirements under 5 U.S.C. § 7511(a)(1)(A). Finally, the Board rejected the appellant's constitutional claims on appeal because they were not coupled with an independently appealable action.

SF-1221-06-0855-  
W-1  
2007 MSPB 167  
June 28, 2007

*Greenup v. Department of Agriculture* The appellant resigned from her County Office Program Technician position with the USDA, Farm Service Agency on May 15, 2004. On January 17, 2003, the appellant filed a complaint under the Whistleblower Protection Act with the Office of Special Counsel alleging that her county office supervisor and the USDA retaliated against her for making disclosures protected under 5 U.S.C. §2302(b)(8). After OSC's termination of the investigation, the appellant filed an appeal with the MSPB alleging her resignation was involuntary and that the agency retaliated against her by not selecting her for a secretarial position with the agency's General Counsel's office. The AJ dismissed the appeal for lack of jurisdiction and the Board affirmed, concluding the appellant was not supervised by a Federal employee but rather by a person hired by the County Committee and, thus, did not meet the definition of "employee" at 5 U.S.C. § 2105(a). However, the Board found that it had jurisdiction in regard to the appellant's allegation that the agency retaliated against her when it failed to select her for a secretarial position. The appellant was an applicant, made nonfrivolous allegations that she made a protected disclosure, and made sufficient allegations that her alleged disclosures were a determining factor in the decision not to select her for the position (due to the reference she received from her County Committee employer). Addressing the appellant's No FEAR claim, the Board held that statute provides no right of appeal.

DC-0752-06-0828-  
I-1  
2007 MSPB 171  
June 29, 2007

*Graves v. United States Postal Service* The agency removed the appellant from his position as a Mail Processing Clerk for unsatisfactory attendance/absence without permission. The appellant filed a Board appeal challenging his removal and alleged he was removed in retaliation for his prior equal employment opportunity (EEO) and grievance activity. The prehearing conference took place on November 7, 2006, and the hearing was scheduled for seven days later. In a November 13<sup>th</sup> teleconference the appellant sought to withdraw his hearing request, and on that date he filed a handwritten statement indicating that he did not wish to proceed with the hearing. The AJ therefore

gave both parties an opportunity to submit additional evidence and argument and issued an initial decision affirming the appellant's removal. The appellant appealed to the Board and argued that he was denied the opportunity to call witnesses. He also asserted that a statement from an Equal Employment Opportunity Commission (EEOC) AJ who was attempting to settle an EEO claim involving the appellant would have been helpful and challenged several of the MSPB AJ's findings in the initial decision. The Board found that the appellant's statement in his handwritten note that "the [appeal] trail is still active" raised doubts as to whether the appellant fully understood that he was completely waiving his right to have a hearing in this matter or whether the appellant thought he was merely requesting a postponement of the hearing. The Board found there was nothing in the record establishing the appellant was apprised of any alternatives to withdrawing his hearing request. Given the strong policy in favor of granting an appellant a hearing on the merits of his appeal, and the lack of any memorialization in the record of what occurred during the November 13<sup>th</sup> teleconference, the Board remanded the appeal in order to provide the appellant the hearing he initially requested.

DC-0752-06-0136-  
B-1  
2007 MSPB 180  
July 20, 2007

*Romero v. Department of Defense* The agency indefinitely suspended the appellant from his Auditor position based on a preliminary decision to deny the appellant access to Sensitive Compartmented Information (SCI). The appellant filed a Board appeal challenging his indefinite suspension. After the AJ dismissed the appeal for lack of jurisdiction, the appellant filed a PFR. On PFR, the Board found that it lacked jurisdiction to review the appellant's indefinite suspension because the appellant had waived his Board appeal rights in a settlement agreement. The Board noted, however, that the appellant remained on indefinite suspension for at least four months after December 7, 2005, the date the agency made its final determination denying his access to SCI. The Board found that the appellant's waiver of appeal rights did not apply to the potentially improper continuation of his indefinite suspension beyond a reasonable time after DIA made its final determination. The Board therefore remanded the appeal to the AJ for the limited purpose of determining whether the agency had improperly continued the appellant's indefinite suspension. On remand, the AJ found that the agency had initiated the appellant's removal within a reasonable time after DIA's final determination. The appellant challenged the merits of both the indefinite suspension and his subsequent removal. In response to this petition for review, the Board observed that it remanded the appeal only for consideration of whether the indefinite suspension was improperly continued and, further, the appellant had not yet been removed. The Board therefore held that neither the original indefinite suspension nor the appellant's removal were properly before the Board in this appeal. However, the Board held that the agency failed to submit any evidence to establish that the continuation of the appellant's indefinite suspension beyond December 7, 2005, was reasonable, ordered the agency to cancel the indefinite suspension and restore the appellant to duty effective December 7, 2005.

NY-0752-06-0267-  
I-1  
NY-0752-06-0266-  
I-1  
2007 MSPB 185  
August 10, 2007

*Isabella v. Department of State* In June 2004, the appellant applied for a Diplomatic Security Service Special Agent position at the Department of State 5 months before his 37<sup>th</sup> birthday. Under 22 U.S.C. § 4823, the Secretary of State has statutory authority to set a maximum entry age for Diplomatic Security Service Special Agents, and under that authority the Secretary set a maximum entry age of less than 37 years of age for Special Agent positions. The agency terminated consideration of his application because he was only months away from his 37<sup>th</sup> birthday and no candidate considered for the position could have been appointed before the appellant's 37<sup>th</sup> birthday. The appellant appealed pursuant to the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) and the Veterans Employment Opportunities Act of 1998 (VEOA). The AJ concluded that it was undisputed the requirements for the position required candidates to be appointed before their 37<sup>th</sup> birthday and the appellant would have turned 37 before the agency could have appointed Special Agent candidates who applied under the vacancy announcement in question. The AJ dismissed the appellant's USERRA and VEOA appeals for lack of jurisdiction. The appellant appealed that decision to the Board. The Board held that, because the maximum entry age for the position of Special Agent was not essential to the performance of the duties of the position, the agency's failure to waive this age requirement violated the appellant's veterans preference rights under 5 U.S.C. §§ 3312(a)(1) and 3320. Consequently, the Board ordered the agency to waive the maximum entry age requirement on the appellant's behalf and to reconstruct the selection process,

including affording the appellant any other advantage to which his status as a preference eligible might entitle him.

NY-0752-06-0267-  
I-1  
NY-0752-06-0266-  
I-1  
2007 MSPB 185  
August 10, 2007

*Lamour v. Department of Justice* This case involves two appeals that arose from the same incident, and since the agency's documentation and the appellants' responses were virtually identical, the Board consolidated the cases. The appellants were Senior Officer Specialists with the Bureau of Prisons. The agency indefinitely suspended them pending the results of an OIG investigation into the appellants' alleged use of unnecessary force and criminal assault against an inmate. On appeal, the AJ reversed the appellants' indefinite suspensions, finding the agency failed to establish reasonable cause to believe that either of the appellants committed a crime for which a sentence of imprisonment may be imposed. On petition for review, the agency argued that the AJ erred in imposing the reasonable cause standard because the agency did not shorten the notice period. Citing the U.S. Court of Appeals for the Federal Circuit decision in *Perez v. Department of Justice*, 480 F. 3d 1309, 1311 (Fed. Cir. 2007), the Board agreed with the agency and vacated the initial decision. However, the Board determined that while an agency may choose to investigate incidents in which its correctional officers exert force against inmates, an agency cannot meet its burden of establishing that indefinitely suspending a correctional officer during an investigation promotes the efficiency of the service where the agency failed to establish any basis to believe that the employee's actions were contrary to the normal and proper execution of his duties. The Board reversed the indefinite suspensions, finding that the agency failed to: 1) provide the appellants a meaningful opportunity to respond because it did not provide enough detailed information concerning the allegations in the proposal notices; and 2) prove the indefinite suspensions promoted the efficiency of the service. Chairman McPhie issued a dissenting opinion.

#### NOTEWORTHY COURT DECISION

Fed. Cir. No.  
2006-3050  
July 3, 2007

*Lary, Sr., v. U.S. Postal Service* On petition for rehearing, Robert H. Lary, Sr., the appellant's father and representative, moved to have himself substituted as the petitioner because the appellant passed away after the Court issued its original opinion. The government moved to vacate the original opinion and dismiss the appeal as moot. In a separate order issued July 3, 2007, the Court granted the motion to substitute and denied the government's motion. The Court clarified its original opinion which held that the United States Postal Service (USPS) materially breached its settlement agreement with Mr. Lary by failing to provide required documents in a timely fashion. In that opinion, the Court vacated the decision of the Board and remanded for entry of a decree of specific performance and an order of back pay and other relief if the Office of Personnel Management determined that Mr. Lary was entitled to such. In its earlier opinion, the Court rejected the government's argument that Mr. Lary could have filed a timely application for retirement benefits without the documents from the government. The Court stated that either of two alternative grounds was sufficient for this conclusion: the government's argument only went to whether Mr. Lary could have mitigated damages, not to the materiality of the breach; and Mr. Lary was harmed by the government's breach because disability benefits do not begin to accrue until all application requirements have been met and the application is complete. The government also argued that the Board did not have jurisdiction to order specific performance. The Court disagreed and stated the Board's power to enforce a settlement agreement comes from its authority to enforce its own orders, set forth by statute, citing to 5 U.S.C. § 1204(a)(2). Further the Court stated the Back Pay Act is not inapplicable to this situation if Mr. Lary would have been entitled to disability retirement benefits. The Court, in clarifying its original opinion, expressed no view as to the ultimate outcome of the proceeding on remand.