



United States  
Office of  
Personnel Management

Washington, DC 20415-2001

In Reply To:

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DATE: October 3, 2007

MEMORANDUM TO: MEMBERS  
NETWORK ON EMPLOYEE & LABOR RELATIONS

FROM: ANA A. MAZZI  
Deputy Associate Director  
Center for Workforce Relations & Accountability Policy

SUBJECT: Case Listing Number 1108

**FEDERAL LABOR RELATIONS AUTHORITY DECISIONS**

62 FLRA No. 36;  
62 FLRA 138  
0-AR-4004  
August 22, 2007

*AFGE, Local 376 and U.S. Dep't of the Interior, Bureau of Land Management.* The Arbitrator found the Agency did not create a hostile work environment in its investigation and discipline of the grievant, and the grievant's seven-day suspension and reassignment to a different position was proper. Citing § 2429.5 of its regulations, the FLRA dismissed the Union's claim the grievant was denied due process because that argument was not raised before the Arbitrator. The FLRA denied the Union's claim the award is contrary to Title VII of the Civil Rights Act because a party alleging hostile environment must establish the actions were based on the complainant's membership in a protected class and the Union made no such assertion. The FLRA also denied the Union's contention the Agency violated the grievant's fourth amendment rights when it sought a temporary restraining order against him. The FLRA found that although the Arbitrator did not address this constitutional claim, he was not required to because it was not part of the issue before him. Further, the FLRA denied the Union's argument the Agency violated MSPB precedent by considering reasons not set forth in the disciplinary proposal because arbitrators are bound by MSPB precedent only when considering actions governed by 5 USC 7512 or 4303, under which the seven-day suspension and reassignment do not fall. The FLRA denied the Union's nonfact claim the Arbitrator erred by crediting the testimony of certain management witnesses because it challenged the weight accorded witness testimony by an arbitrator. The FLRA also denied the Union's nonfact argument that the evidence did not establish the grievant committed the acts for which he was disciplined because it was a matter disputed before the Arbitrator. In addition, the FLRA denied the Union's contention the award fails to draw its essence from the parties' agreement because the Arbitrator gave a detailed explanation of his ruling as required by the agreement and he resolved the hostile work environment claim as presented to him. Finally, the FLRA determined the Union's claim that the Arbitrator did not address the testimony of a certain witness does not demonstrate the Arbitrator failed to provide a fair hearing.

62 FLRA No. 37;  
62 FLRA 143  
0-AR-4194  
August 22, 2007

*AFGE, Local 23 and U.S. Department of the Navy, Naval Air Warfare Center, Lakehurst, N.J.* The FLRA denied the Union's exceeded authority, fair hearing and essence exceptions to an arbitration award, not otherwise described.

62 FLRA No. 38;  
62 FLRA 144  
0-NG-2519  
August 22, 2007

*Association of Civilian Technicians, Puerto Rico Army Chapter and U.S. Dep't of Defense, Nat'l. Guard Bureau, Puerto Rico Nat'l Guard, San Juan, P.R.* The Union filed a motion for reconsideration of the FLRA's decision in *ACT, Puerto Rico Army Chapter*, 60 FLRA 1000, where, on remand from the D.C. Circuit, the FLRA relied on Supreme Court precedent in holding a provision requiring the Agency to reimburse employees for personal expenses incurred as a result of the Agency's decision to cancel pre-approved annual leave was not within the duty to bargain. 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 explained that attempts to relitigate its conclusions do not satisfy this burden and it found the Union's contentions the FLRA misstated Supreme Court precedent in concluding the provision is not an appropriate arrangement, restate arguments rejected by the FLRA in *ACT, Puerto Rico Army Chapter*. The FLRA also explained its initial ruling was consistent with Supreme Court precedent because the Court's reference to travel expenses being negotiable in the private sector did not conclude they were negotiable under the federal statute.

62 FLRA No. 39  
62 FLRA 147  
0-NG-2849  
September 7, 2007

*Antilles Consolidated Education Association and U.S. Dep't of Defense, Domestic Dependent Elementary and Secondary Schools, Puerto Rico District, Fort Buchanan, P.R.* The issue before the FLRA was whether the Agency head's disapproval of five provisions of the parties' collective bargaining agreement was timely served on the Union. As background, the Agency head had until August 12 to approve or disapprove the agreement. The Agency placed a certified copy of the disapproval in the U.S. Postal Service system on August 11 in an envelope addressed to the school superintendent's office at the address of the mail distribution service of the military installation upon which the school was located. It was forwarded to the superintendent's office then hand-carried to the union office, where it was received on August 18. The FLRA explained that proper service by mail begins with the date on which a document is delivered to the Postal Service with an address that allows for delivery to be perfected. It was undisputed the Agency delivered the disapproval August 11. According to the FLRA, the question was whether the disapproval was mailed to an address allowing "delivery to be perfected." The FLRA further explained it is service, not receipt that is the significant event in determining the timeliness of an agency head's disapproval. The Union provided copies of official correspondence, addressed to the Union's post office box during the previous two years, from agency officials including its office of General Counsel and its field advisory service, the same office that mailed the Agency head disapproval. The FLRA also noted the certificate of service contained the post office box address. The FLRA concluded the Union met its burden of establishing its correct mailing address. Finding the disapproval misaddressed, the FLRA concluded the disapproval was untimely served on the Union. Accordingly, the FLRA and found the parties' agreement had become effective.

62 FLRA No. 40;  
62 FLRA 153  
0-AR-4105  
September 13, 2007

*U.S. Dep't of Labor and AFGE, Local 12.* The Arbitrator found the Agency committed an unfair labor practice (ULP) by violating § 7116(a)(1) & (5) of the Statute when a supervisor refused to accept medical documentation concerning an employee from a union representative without a waiver from the employee, and by issuing a letter restricting the Union's right to provide medical documentation on behalf of employees. The FLRA denied the Agency's claim the Arbitrator exceeded her authority by failing to rule on whether a medical waiver was actually submitted to the Agency because that issue was not before the Arbitrator. The FLRA also found the Arbitrator did not exceed her authority by considering facts that pertained to a separate grievance before another arbitrator because the grievances arose from the same factual circumstances and the Arbitrator was within her authority to consider facts inextricably intertwined with her conclusion. However, the FLRA did find the Arbitrator exceeded her authority in concluding the Agency refused to meet and consult with the Union on the matter because that was the issue in the other grievance and not within the purview of the Arbitrator in this grievance. Accordingly, the FLRA set aside the portion of the award resolving the other grievance. In addition, the Agency contended the Arbitrator's ULP findings are contrary to law. The FLRA found that although the Arbitrator used the wrong legal standard in finding the Agency committed a § 7116(a)(1) violation, it was able to, based on the record, conclude the Agency did in fact interfere with, restrain and coerce the Union. However, the FLRA set aside the portion of the award finding the Agency refused to negotiate in good faith in violation of subsection (a)(5). The Arbitrator cited no authority for that conclusion and the FLRA

found nothing in the record to support it.

### FEDERAL SERVICE IMPASSES PANEL DECISION

07 FSIP 23  
August 24, 2007

Dep't of the Army, Army Medical Materiel Agency, Fort Detrick, MD and Local 1923, AFGE, AFL-CIO. The impasse before the Panel concerned the parties' successor collective-bargaining agreement and involved the following issues:

1. Administrative Leave to Participate in Physical Fitness Programs. The Union proposed to continue a 15-year practice under which employees received up to three hours per week to participate in fitness programs. The Agency proposed to apply an agency regulation under which employees would be granted administrative leave but only for the first six months. The FSIP ordered the parties to adopt the Agency's proposal because it found little in the record to conclude the practice that has previously existed resulted in tangible benefits that support the accomplishment of the Agency's mission.
2. Use of the Union Office as a Workstation. The Union proposed that a union official be allowed to spend half of her work hours in the union office, which would allow for greater privacy and more efficient utilization of the union office. The Agency proposed to maintain the *status quo* whereby union representatives performed agency duties at their desks and went to the union office or a conference room when it was necessary to confer with employees on representational matters. The FSIP ordered the Union to withdraw its proposal because the fact the Union office may be underutilized provides an insufficient basis for permitting a Union representative to spend half of his duty time at that location without a specific Union-related reason to be there.
3. Procedures for Filling Details and Temporary Promotions. The Union proposed a new article on details and temporary promotions. The Agency proposed maintaining the existing article, claiming it was effective and caused no grievances and that the Union's proposal would prevent the Agency from acting quickly in dealing with unforeseen events. The FSIP ordered the parties to adopt the Agency's proposal because the Union failed to provide evidence of unfairness in the current system necessary to balance the burdens its proposed procedures would place on the Agency.

### MERIT SYSTEMS PROTECTION BOARD DECISIONS

NY-0752-06-0016-  
I-1  
2007 MSPB 193  
August 24, 2007

Milligan v. U.S. Postal Service. The appellant, a preference-eligible Mail Processing Clerk, was removed for Improper Conduct. The arbitrator sustained the charge but mitigated the penalty to a time-served suspension, and the appellant appealed to the Board. After the hearing, the AJ issued an initial decision in which she affirmed the agency's action, accorded collateral estoppel effect to the arbitrator's finding on the charge, and sustained the mitigated penalty after finding the arbitrator's imposed penalty was reasonable. On petition for review, the Board held that, as an initial matter, the AJ should not have relied on case law concerning the standard of Board review of arbitrators' decisions under 5 U.S.C. § 7121(d), which does not apply to Postal Service cases. A preference-eligible Postal employee can file a grievance pursuant to a collective bargaining agreement and a Board appeal under 5 U.S.C. § 7513 from the same adverse action. Normally when a Postal grievance goes to arbitration and the criteria for collateral estoppel are met, as they were here, the parties may not relitigate the propriety of the penalty in a subsequent Board appeal. The Board however concluded that to do so in this case would be contrary to Board precedent that collateral estoppel effect cannot be given to an award mitigating the agency's action to a time-served suspension without pay. *Fulks v. Department of Defense*, 100 M.S.P.R. 228 (2005); *Montalvo v. U.S. Postal Service*, 50 M.S.P.R. 48 (1991). Moreover, because the appellant did not receive a de novo review from the AJ, the Board remanded the case for the parties to litigate the propriety of the agency's removal penalty. Chairman McPhie issued a dissenting opinion in which he would hold that the appeal was barred by res judicata.

AT-315H-07-0463-  
I-1  
2007 MSPB 195  
August 27, 2007

*Coleman v. Department of the Army*. Thirteen days shy of one year of service, the appellant, a preference eligible in the excepted service, was notified that he was being removed during his probationary period. On appeal, the AJ informed the appellant that he would be granted a hearing only if he made a nonfrivolous claim that his termination was based on partisan political reasons or marital status and ordered the appellant to file evidence and argument establishing the Board's jurisdiction. In response, the appellant asserted, among other things, that he had been left in a leave without pay status after the notice of termination was issued and the standard form 50 effecting his termination was not approved until 3 weeks after his probationary period ended. The AJ dismissed the appeal finding the appellant's submission of "perfunctory" personnel actions issued after his termination did not establish evidence that the appellant was actually employed by the agency when the personnel documents were produced. The appellant appealed to the Board, which found the appellant supported his allegation with leave and earning statements and that the AJ's reliance on the SF-50s submitted by the agency constituted a mere factual contradiction of the appellant's otherwise adequate prima facie showing of jurisdiction. The Board remanded the case for a jurisdictional hearing.

NY-3443-06-0245-  
I-1  
2007 MSPB 198  
August 27, 2007

*Williamson v. Unites Sates Postal Service*. The appellant alleged the agency violated his veterans' preference rights when it failed to select him for several higher-graded positions. The appellant filed a VEOA complaint with the Department of Labor but DOL notified the appellant that it could not assist him in resolving his complaint because VEOA did not provide for veteran's preference in internal agency actions such as promotions, transfers, reassignments and reinstatements. The appellant then filed a complaint with the Board 18 days after DOL issued its notification. The AJ advised the appellant that VEOA appeals must be filed no later than 15 days from receipt of DOL's written notification that it was unable to resolve the complaint. The AJ ordered the appellant, among other things, to state the dates on which he received written notification from DOL. The appellant did not specify the date he received DOL's notification, asserting only that he timely filed his board appeal within the 15 day window. The AJ dismissed the appeal as untimely filed and held that, even if timely, the appellant failed to state a claim upon which relief could be granted because veteran's preference rules do not apply to promotions and intra-agency transfers. In his petition for review, the appellant stated for the first time that he did not receives DOL's May 25, 2006, notification until June 7, 2006, and that he filed his Board appeal within 15 days after receiving the notification. The Board found the appeal timely filed but denied the appellant's request for corrective action because veteran's preference does not apply when an employee seeks a promotion under an announcement limited to internal candidates. Chairman McPhie issued a concurring opinion with a different reasoning from the majority on timeliness.

PH-0752-06-0639-  
I-1  
2007 MSPB 205  
August 31, 2007

*Brehmer v. United States Postal Service*. The appellant, a preference eligible veteran, alleged that because the agency terminated his limited duty assignment and failed to honor his request for light duty, the agency denied his restoration rights, placed him on enforced leave and ultimately forced him to retire. He further alleged that the agency discriminated against him by failing to accommodate his disability. The appellant was a Letter Carrier who suffered an injury to his left knee on May 20, 1986. On September 22, 2000, he filed a claim with the Office of Workers' Compensation Program (OWCP), asserting that his injury was causally related to his Federal employment. The appellant's OWCP claim was denied on June 19, 2003. While the case was on appeal, the agency assigned the appellant to a limited duty carrier position effective September 24, 2003. The agency advised the appellant on December 23, 2005, that because his OWCP claim was denied he was no longer eligible for limited duty and no light duty work was available. On February 2, 2006 the appellant filed a grievance with the agency and retired effective the following day. In an initial decision, the AJ found that the appellant's retirement was voluntary and dismissed the appeal for lack of jurisdiction without addressing the appellant's remaining claims. The Board found that the AJ failed to adjudicate the appellant's constructive suspension claim (his placement on enforced leave) as required by *Spirthaler v. Office of Personnel Management*, 1 M.S.P.R. 587 (1980), and that the AJ and the agency failed to inform the appellant of the elements required to establish Board jurisdiction over an alleged constructive suspension. The Board further found that rescission of restoration rights that were previously granted may constitute a denial of restoration within the meaning of 5 CFR § 353.304(c). The Board found the record insufficient to determine whether it had jurisdiction over the

appellant's restoration claim. Accordingly, the Board remanded the appeal for adjudication of the appellant's constructive suspension and denial of restoration rights claims. On remand, the AJ also was required to revisit the appellant's constructive removal claim. Chairman McPhie concurred in part and dissented in part.

AT-0752-05-0990-  
A-1  
2007 MSPB 211  
September 7, 2007

*Miller v. Department of the Army*. The appellant petitioned for review of an addendum initial decision denying the appellant's motion for attorney fees. While the AJ mitigated the penalty of removal to a 60-day suspension because he sustained only one of two charges, the AJ concluded that the agency neither knew nor should have known that it would not prevail on the merits of the case. On petition for review, the Board found that the agency knew or should have known that it would not prevail in its selection of the penalty because all of the evidence relied on by the AJ to mitigate the penalty was known by the agency before it took the action. The Board remanded the case for a determination of the hours spent on the penalty issue and the merits of the charge not sustained by the AJ. The fees attributed to the appellant's unsuccessful challenge to the merits of the sustained charge are not compensable.

AT-3443-06-0635-  
I-1  
2007 MSPB 214  
September 11, 2007

*Garcia v. Department of State*. The agency petitioned for review of the initial decision in which the AJ found that it had violated the appellant's rights under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). In August 2005, the appellant submitted a bid list, i.e., a list of positions for which he wished to be considered, and requested that his current assignment be extended for an additional year. In March 2006, while the appellant was on active duty, the agency denied his request for extension of his assignment. During subsequent correspondence concerning the appellant's return to the agency, the appellant became aware that his 2005 bidlist was no longer active, and that other bidders had been selected for the positions he had requested. While the agency's petition for review was pending before the Board, the Federal Circuit issued a decision addressing an arguably similar claim in *Tully v. Department of Justice*, 481 F.3d 1367 (Fed. Cir. 2007). In that case, the Court held that USERRA's prohibition against the denial of a benefit of employment on the basis of an employee's military service did not entitle an employee who was absent for military duty to preferential treatment. The absent employee was entitled instead to the benefits that were comparable to "the benefits associated with absences similar to the service member's." Factors such as the length of an absence were proper grounds for assessing similarity," and the difference between the expected duration of an employee's military leave and the expected duration of another kind of leave could be relevant in determining whether an employee absent for military duty was entitled to a certain benefit of employment. The Board found *Tully* suggests that the appellant in this case was entitled, under 38 U.S.C. § 4311, to the same treatment with respect to bid assignments that the agency affords other employees on extended leaves of absence. In sum, if the agency considers the assignment bids of employees on absences comparable to the appellant's absence for military duty, then the agency may have denied the appellant a benefit of employment in violation of 38 U.S.C. § 4311. The Board remanded the appeal for the principles set forth in *Tully*.

#### NOTEWORTHY COURT DECISION

Fed. Cir. No.  
2006-3375  
August 27, 2007

*Hernandez v. Department of the Air Force*. The appellant filed a claim with the Board citing that he had been erroneously charged military leave from 1980 to 2001, and that as a result he was improperly forced to use annual leave, sick leave, and leave without pay. Based on the records obtained in discovery, the agency unilaterally corrected its records as to the 12 days from 1997 to 2000 the appellant identified and requested correction of his pay records and payment for the improperly charged leave. The AJ granted the government's motion to dismiss, based on the finding that the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §§ 4301-433 only allowed relieve for violations occurring after its enactment. The appellant appealed to the Board, and before his appeal was heard, the Board determined in *Garcia v. Department of State*, 101 MSPR 172 (2006), that it was authorized to adjudicate USERRA claims arising from prohibited pre-enactment conduct. The Board nevertheless concluded that, although the AJ had improperly limited his inquiry to post-enactment conduct, the appellant had not been substantively prejudiced. The Court reversed-in-part and remanded the case. Citing *Fernandez v. Department of the Army*, 234 F.3d 553 (Fed. Cir. 2000), the Court held as a threshold matter that where a governmental action violated a veterans'

protection statute in effect at the time the conduct occurred, the Board has jurisdiction under USERRA to adjudicate claims arising from that past violation, regardless of whether it occurred before, on, or after the date of USERRA's enactment, October 13, 1994. The Court found in this case the agency violated USERRA under *Butterbaugh v. Department of Justice*, 336 F.3d 1332 (Fed. Cir. 2003), and USERRA's predecessor statute, the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), Pub. L. No. 93-508, 88 Stat. 1578. The Court determined the Board has the authority to order relief covering the entire period of the alleged *Butterbaugh* violations. As to the merits of the appellant's pre-USERRA claims, the Court stated the Board erred by failing to remand them for further proceedings. Because it was not until after the appellant had filed his appeal with the Board, i.e., after *Garcia* was decided, that he had the first opportunity to have his case decided under the correct law, the appellant could not be faulted for having failed to acquire the necessary documents. With respect to the appellant's post-USERRA claims, the Court agreed with the Board that they are moot because the appellant had already received complete relief when the agency restored the improperly charged annual leave and issued a time and attendance remedy ticket to the Department of Defense Finance and Accounting Service.

Fed. Cir. No.  
2006-3388  
August 29, 2007

[\*Pucilowski v. Department of Justice\*](#). The Court found that the Board erred by declining to order the government to correct the appellant's records for the days he was improperly charged military leave in violation of *Butterbaugh v. Department of Justice*, 336 F.3d 1332 (Fed. Cir. 2003), and reversed-in-part and remanded. The appellant filed a *Butterbaugh* claim with the Board and established that he had been improperly charged 22 days of military leave from 1991 to 1998, including two days in 1991 and three days in 1993. However, the only resulting leave that these improper charges forced the appellant to take was leave without pay (LWOP) in 1993. He took a total of 34 days of LWOP that year, but because he had been improperly denied only five days of military leave from 1991 to 1993, the AJ limited his award of back pay to five days. Given the absence of any other improper deprivation of annual leave, sick leave, or LWOP from 1994 to 1998, the AJ denied further monetary relief. He also declined to order correction of the appellant's civilian and military leave records, because he reasoned that under *Dombrowski v. Department of Veterans Affairs*, 102 M.S.P.R. 160 (2006), the Board was without authority to do so. The appellant appealed and argued the Board erred by failing to order the relevant agencies to correct their records to reflect a proper accounting of his military leave. The Court agreed, stating the Board plainly has the authority under 38 U.S.C. § 4324 to remedy denial of military leave benefits. The Court rejected the appellant's suggestion that he was entitled to monetary compensation based solely on the 22 days of improperly charged military leave. It stated that a veteran is legally entitled to monetary compensation or its equivalent only where he demonstrates actual harm. The Court made clear that, while not legally obligated to do so, agencies may resolve claims by providing more compensation than an individual has been able to prove. This practice, as illustrated by several relevant decisions the Court cited, is appropriate as a matter of administrative convenience, especially if the records before agencies are deficient or incomplete, and helps to ensure that veterans are appropriately given the benefit of the doubt and fully enjoy the presumption that veterans' benefits statutes are to be resolved in their favor. The Court affirmed the Board's compensation decisions.

Fed. Cir. No.  
2006-3123  
August 30, 2007

[\*Robinson, Sr., v. Department of Homeland Security\*](#). The appellant was removed from his Criminal Investigator (Special Agent) position after the agency revoked his Top Secret security clearance, which was a condition of his employment. He appealed his removal to the MSPB, arguing that his minimum due process rights had been denied because the agency's decision to revoke his security clearance had been "predetermined." The Board affirmed the agency's removal action. In his appeal to the Court, the appellant challenged the ruling by the AJ to exclude testimony from a witness who, if permitted, would have testified regarding the agency's alleged "predetermination." The Court affirmed the Board's decision and found that, contrary to the appellant's argument and what appeared to be the Board's view, security clearance decisions are not reviewable for "minimum due process protection." In its analysis, the Court relied on its prior holdings in other cases that a federal employee does not have a liberty or property interest in access to classified information and therefore the revocation of a security clearance does not implicate constitutional procedural due process concerns. The Court found that in the appellant's case, the revocation of his

security clearance was a completed matter in which he fully participated (replying in writing to the proposal notice and appealing to the agency's internal Appeal Board), so that its absence became a matter of record on which the Board could rely. The Court noted that even if the issue of whether the appellant's revocation was predetermined were properly before the Court, the record does not demonstrate that the testimony at issue would show the alleged bias, or that any particular agency decision maker was incapable of judging fairly on the merits whether to revoke the appellant's security clearance, and the exclusion of the testimony was not an abuse of discretion. A concurring opinion was issued.

Fed. Cir. No.  
2007-3006  
September 20, 2007

*Jacobson v. Department of Justice*. The appellant appealed from the Board's final opinion and order affirming the denial of his motion for attorney fees pursuant to 38 U.S.C. § 4324(c)(4), the fee-shifting provision of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). The Court affirmed the Board's decision. The Board held that attorney fees were properly denied in this case based on the appellant's "limited" degree of overall success on the merits of his claim because (1) his claim for relief was very broad and mostly unsupported by specific evidence and (2) the appellant failed to utilize the agency's administrative process for making retroactive military leave adjustments, where he would have obtained the same result without filing an appeal to the Board. The Court found that, unlike other attorney fees provisions administered by the Board, these provisions leave the decision whether to award reasonable attorney fees to the Board's discretion, and the Court accords broad deference to the Board's decision to deny fees. The Court held that because the record is devoid of any specific dates the appellant actually engaged in military service, his claim was reasonably construed as alleging that the agency improperly charged him military leave for each of the seven years he was obligated to serve. The record showed that in all seven years of the appellant's military service, the agency only once improperly charged him with military leave in violation of USERRA. The Court found the Board erred in relying on the fact the appellant could have achieved the same result through the administrative process as he did before the Board in error because USERRA contains no requirement that a petitioner pursue, much less exhaust, his or her remedies before bringing an appeal to the Board. However, since it affirmed the Board's finding that the appellant claimed much more than he was awarded and therefore obtained limited success on his claim, the Court concluded the Board's reliance on this factor was harmless error.