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Personnel Management

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In Reply To: **Your reference:**

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DATE: November 26, 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 1110

FEDERAL LABOR RELATIONS AUTHORITY DECISION

62 FLRA No. 43;
62 FLRA 174
0-NG-2819
October 4, 2007

NATCA, AFL-CIO and U.S. Dep't of Transportation, FAA, Washington, D.C. The parties bargained over proposals surrounding the Agency's implementation of the Enhanced Back-Up Surveillance System (EBUS). Proposal 1 provided the Union may designate an EBUS Site Representative who shall have the same, timely access to all data as the Agency. The FLRA rejected the Agency's contrary to law claim and found the proposal within the duty to bargain because it is limited to requiring the disclosure of information the Agency has an obligation to disclose under § 7114(b)(4) of the Statute. Proposal 6 concerned training designed to restore proficiency in use of EBUS (proposal 7 also concerned training and the Union requested the proposals be considered together). The FLRA agreed with the Agency's contention the subject matter of Proposal 6 is "covered by" the parties' agreement and found proposals 6 and 7 outside the duty to bargain. Relying on case precedent, the FLRA determined the relevant contract provision granting the Agency general authority to determine training needs and methods encompassed the subject matter of a proposal designed to afford training opportunities for employees to attain a given level of proficiency. Proposal 8 granted immunity to employees for errors or deviations for a 2-month period after implementation of EBUS (proposal 9 provided that data derived from EBUS could not be the sole evidence to form the basis to establish an operational error and the Union requested the proposals be considered together). The FLRA found Proposal 8 was not an appropriate arrangement under § 7106(b)(3) because it excessively interfered with management's right to discipline by precluding any and all discipline based upon employees' use of EBUS, regardless of the nature of the error, deviation, or violation. Accordingly, the FLRA found proposals 8 and 9 outside the duty to bargain. Proposal 10 required local level bargaining over changes made to EBUS at the local level (proposal 11 provided that any change concerning EBUS not within the scope of the Union's proposed MOU must be implemented in accordance with the parties' national level agreement and the Union requested the proposals be considered together). Relying on case precedent, the FLRA found that because proposal 10 concerns local level bargaining, it concerns a permissive subject of bargaining. Accordingly, the FLRA dismissed proposals 10 and 11 and stated the proposals concern matters that are negotiable at the election of the Agency.

FEDERAL SERVICE IMPASSES PANEL DECISIONS

07 FSIP 76
October 11, 2007

Court Services and Offender Supervision Agency, Washington, D.C. and Local 727, AFGE, AFL-CIO. The parties bargained over an initial collective bargaining agreement and the impasse before the Panel concerned the Agency's decision to require each employee to work a late shift one day per pay period. The shift would end at 7 pm rather than the standard 5 pm. The Agency wanted to implement the new shift one pay period after the parties' agreement was signed and the Union wanted 60 days for employees to make adjustments in such matters as transportation and child care. The Panel found that employees had known for months of the Agency's decision, making an additional 60-day delay unnecessary and it noted the Agency proposal allowed for exceptions to immediate implementation on a case-by-case basis. In addition, the Panel found the process proposed by the Agency for requesting and granting exceptions, which involves supervisory approval, is clearer than the Union's and, therefore, is less likely to lead to disputes between the Agency and Union. Accordingly, the Panel ordered the parties to adopt the Agency's proposal.

07 FSIP 102
October 11, 2007

DOJ, Federal Bureau of Prisons, Federal Correctional Complex, Yazoo City, Miss. and Local 1013, AFGE, AFL-CIO. The impasse before the Panel concerned whether the Agency's decision to not implement the Union's proposed 4/10 compressed work schedule (CWS) for employees supervising inmates in two prison facilities is supported by evidence the schedule is likely to cause an adverse agency impact. In response to the Agency's claim that employees would spend an additional two hours each day not supervising inmates under the 4/10 schedule, the Union contended there was plenty of administrative and security work to perform. The Union also claimed that having the facilities open an extra two hours per day would result in an increase in production and a decrease in overtime costs. The Panel ordered the Union to withdraw its CWS proposal. The Panel was "not persuaded" that additional non-supervisory time is necessary to accomplish the Agency's mission. The Panel also concluded the Union's claim regarding an increase in productivity is not supported by the record because one of the facilities is experiencing a

reduction in work orders that has resulted in no overtime since at least 2006 and the fluctuating need for overtime at the other facility is insufficient to establish the benefits alleged by the Union.

MERIT SYSTEMS PROTECTION BOARD DECISIONS

DC-0752-06-0551-B-1
2007 MSPB 239
October 4, 2007

Gordon-Cureton v. United States Postal Service (USPS). Claiming preference eligibility, the appellant appealed her removal. The AJ dismissed her appeal without a hearing for lack of jurisdiction, finding that appellant's military service in the Army National Guard was for training purposes and did not qualify her for preference eligibility. On petition for review, the Board found the appellant's military service appeared to be for active duty rather than training and therefore could qualify her for preference eligibility if she met, or was exempt from, minimum service requirements. The Board vacated the initial decision and remanded for a determination on the minimum service requirement issue. On remand, the AJ again found appellant's military duty was for training purposes and dismissed the appeal for lack of jurisdiction. The appellant filed a second petition for review (PFR) 15 days late, in which she argued the AJ's decision was inconsistent with the Board's prior finding. She also claimed she had been unable to obtain her DD-214, Certificate of Release or Discharge from Active Duty, a copy of which the agency had but would not provide her. Although the PFR was untimely, the Board reopened the case on its own motion to "prevent manifest injustice" and held the AJ was bound by the Board's earlier findings under the law of the case doctrine. The Board vacated the second initial decision, reiterated its prior findings, ordered the agency to provide the appellant with her DD-214, and remanded for further adjudication. Vice Chairman Rose issued a dissenting opinion in which she concluded the circumstances did not warrant the Board reopening the case to cure the untimely PFR.

DA-0750-06-0393-I-1
2007 MSPB 240
October 4, 2007

Ryan v. Department of the Air Force. The appellant filed a petition for review of an initial decision that sustained his removal based on a charge of excessive absence. On appeal, the appellant argued the agency committed harmful error, discriminated against him based on his disability, and retaliated against him for whistleblowing activities. In an initial decision, the AJ found, although some of the appellant's absences during the period specified were approved and not generally actionable, the agency was permitted to bring the removal action pursuant to *Cook v. Department of the Army,* 18 M.S.P.R. 611, 612 (1984). The AJ further found the appellant failed to prove his affirmative defenses. On review, the Board reversed the initial decision, holding the AJ erred in relying on *Cook* because it only applies to situations in which the employee's absences were due to excessive use of LWOP. Here, the agency presented no evidence of the appellant excessively using unscheduled LWOP. Accordingly, the Board ordered the agency to cancel the removal action and restore the appellant to duty.

DE-3443-07-0158-I-1
2007 MSPB 238
October 4, 2007

Sedgwick v. The World Bank. The appellant, who claimed entitlement to veterans' preference, sought employment with the International Bank for Reconstruction and Development, also known as the World Bank, on a number of occasions over the past several years. His efforts proved unsuccessful and he filed a complaint with the Department of Labor (DoL). DoL determined there was no merit to the claim, finding the World Bank was "not a United States federal agency," and therefore not required to provide veterans' preference in hiring. The appellant next filed an appeal with the MSPB. The AJ found the MSPB lacked jurisdiction because the World Bank was not "an agency" covered by VEOA according to the definition of agency found § 5 U.S.C. 3330(a), *Government-wide list of vacant positions*. The appellant then filed a petition for review. On review the Board concurred it lacked jurisdiction, but found the AJ improperly relied on § 3330(a) because

that section does not pertain to veterans' preference. The applicable section § 3330a, *Preference eligibles; administrative redress,* however, contains no definition of agency. The Board relied on *Scarnati v. Department of Veterans Affairs*, 344 F.3d 1246, 1247 (Fed. Circ. 2003), in which the Federal Circuit stated § 5 U.S.C. § 3330a "pertain[ed] to employment in the federal government-wide civil service system." It also concluded the statute was "part of the civil service appointment process," and provided a means of redress for individuals who alleged violations of their "rights under any statute or regulation relating to veterans' preference for employment with the United States government." (Emphasis in the original.) The Board concluded neither World Bank employees nor recipients of its funding are employed "in the federal government-wide civil service system." Accordingly, the Board dismissed the appeal for lack of jurisdiction.

AT-0752-07-0157-I-1
2007 MSPB 253
October 26, 2007

Slocum v. United States Postal Service. The agency placed the appellant in a non-duty status based on a medical assessment contained in an FMLA certification. Although in his MSPB appeal appellant described the agency's action as "removal and negative suitability determination," the AJ determined that it in fact was an enforced leave issue. The agency filed a response to the appeal stating that it had taken steps to reverse the enforced leave period by granting appellant administrative leave for the period of absence that exceeded 14 days. The AJ dismissed the appeal for lack of jurisdiction and determined absent an otherwise appealable action, the Board lacked jurisdiction to consider the appellant's discrimination claim. On review, the Board granted jurisdiction because at the time of the appeal the agency had not yet granted administrative leave. The Board reiterated jurisdiction is determined by the nature of an agency's action, *Hagan v. Department of Army*, 99 M.S.P.R 313 (2005). Further, the Board determined appellant had not been granted full relief because if the Board had decided in appellant's favor it would have ordered the agency to pay him beginning with the date it initially placed him off duty. The Board added the agency also would have been required to delete all references to the enforced leave action in personnel records. Finally, the Board noted the AJ did not inform appellant of what he needed to show in order to establish Board jurisdiction or his defenses of discrimination and retaliation. The Board remanded the case for adjudication in accordance with its determinations.

DE-3443-05-0248-I-3
2007 MSPB 259
October 30, 2007

Weed v. Social Security Administration. Both the appellant and the agency petitioned for review of an initial decision granting the appellant's request for relief under VEOA. The appellant also filed a petition for enforcement challenging the sufficiency of the agency's reconstruction of the hiring process. The appellant, a 10-point compensable preference-eligible veteran, alleged the agency violated his veteran's preference rights when it did not make a selection from a competitive service vacancy announcement for two positions in Montana for which he had applied and instead non-competitively selected two non-preference eligible applicants for the positions under the Outstanding Scholar Program. The AJ determined, in accordance with *Dean v. Department of Agriculture*, 99 M.S.P.R. 533 (2005), the appellant's rights under statute were violated by the agency's non-competitive appointments from the Outstanding Scholar list. The AJ further found the appellant had shown by preponderant evidence the agency's violation was willful because the selections were made with reckless disregard for his rights. She ordered the agency to reconstruct the selections for the two positions under the competitive examination process. On review, the Board held the "reckless disregard" standard used in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 (1985), should be applied to determinations of whether violations of VEOA are "willful" under 5 U.S.C. § 3330c(a). Applying this standard, the Board found the agency's violation of veteran's preference rules was not "willful." Accordingly, the Board reversed the initial decision in this regard and remanded the case for a decision on the appellant's challenge to the sufficiency of the agency's reconstruction of the hiring process.

AT-3443-04-0915-B-1
October 31, 2007

Russell v. Equal Employment Opportunity Commission. The case began as a USERRA appeal in which the appellant argued the agency assigned her to a different duty location upon her return from Army active duty. The initial decision denied her request for relief on the merits. On petition for review, the Board determined there was indeed jurisdiction even though appellant had first grieved the matter under the negotiated grievance procedure, because language in 5 U.S.C. § 7121(a)(1), which makes negotiated grievance procedures exclusive in certain situations, did not apply to claims of USERRA violations. Also finding the AJ failed to explain burdens of proof in USERRA appeals,

the Board remanded the case instructing the AJ to inform appellant of her burdens, allow her to respond, and conduct any further adjudication in light of her responses. On remand, the AJ adopted his findings from the initial decision and the appellant challenged the remand finding with another petition for review which resulted in this decision. Here, the Board in a split decision reversed its earlier decision on jurisdiction, citing the recently issued Federal Circuit decision in *Pittman v. Department of Justice,* 486 F.3d 1275 (Fed. Cir. 2007). In *Pittman*, the Court determined the Board lacks jurisdiction in a USERRA appeal when an appellant previously elected to file a grievance because 5 U.S.C. § 7121(e) does not allow election in more than one process. The Board opined although the case here did not involve an election, nevertheless, *Pittman* was applicable because the same statute in another section, § 7121(a), made the negotiated grievance procedure the applicable and exclusive procedure for resolving claims that fall within its coverage. The Board determined *Pittman* amounted to one of the exceptions in applying the law of the case doctrine, a "contrary decision of law by a controlling authority." Accordingly, the Board found it need not determine the issues raised on review because it lacked jurisdiction. Chairman McPhie issued a dissent, arguing *Pittman* does not amount to a contrary decision of law by a controlling authority, because its finding pertained to § 7121(e) and not § 7121(a). Therefore, according to the Chairman, since the facts in this case pertained to § 7121(a), the majority erred in applying *Pittman* to reverse its previous finding on jurisdiction.

NOTEWORTHY COURT DECISIONS

Fed. Cir. No. 2006 3307
October 5, 2007

Augustine v. Department of Veterans Affairs. The appellant, a disabled veteran, applied for and was denied employment with the agency. The Board determined the agency violated the appellant's veterans' preference rights. As the prevailing party, the appellant moved for attorney fees and expenses under 5 U.S.C. § 3330c(b). The AJ denied the motion because appellant's attorney was not a member of the State bar where the proceedings before the AJ occurred. On appeal, the Court vacated and remanded with instructions to the Board to consider the motion without regard to the State of the attorney's bar membership. On remand, the AJ again denied the motion for attorney fees and expenses because, in the AJ's opinion, 1) the attorney's services did not contribute to the appellant's success on appeal, and 2) the attorney failed to enter his appearance with the MSPB until five months after he began providing legal services. This decision became the Board's final decision and appellant again appealed to the Court. The Court reversed, vacated and remanded to the Board to determine the appropriate amount of attorney fees with indicating the most useful starting point in determining the amount of a reasonable fee is the number of hours reasonably expended on the case multiplied by a reasonable hourly rate. The Court rejected the AJ's reasons for denying the motion for attorney's fees, and declared that fees were mandatory, not discretionary, to the prevailing party under the statute and that the only question on remand is the amount of the fees. (Note: This case is distinct from an earlier Federal Circuit decision, *Craig J. Jacobsen v. DOJ*, No. 2007-3006 (09/20/2007), a USERRA case in which fees were denied under a separate provision of law.

Fed. Cir. No. 2007-3002
October 23, 2007

David L. Gutkowski v. U.S. Postal Service. The appellant petitioned for review of the Board's final decision dismissing his petition for enforcement of a prior order. In 2001 the agency removed the petitioner from his supervisory position. The administrative judge mitigated the removal to a 90-day suspension and demotion to the next-highest non-supervisory position, and awarded back pay and related retroactive benefits. Following the initial decision, the agency ordered the appellant to report to a lower-grade non-supervisory position. The appellant filed a petition for enforcement and later supplemented his petition with a motion to accept and consider new evidence that the agency failed to provide him notice of higher-level employment opportunities pursuant to the final board order. He submitted with his motion a declaration from a union officer referring to an accompanying printout of 76 positions he argued should have been offered to him. The agency argued it could not have offered those positions because to do so would have violated the applicable collective bargaining agreement. The AJ found the agency in compliance, concluding the agency was not required to violate its collective bargaining agreement. The employee's sole argument in his Court appeal was the AJ erred as a matter of law in holding the agency was not obligated to assign him to a higher-level position if such assignment breached

the collective bargaining agreement. The Court rejected his argument, reiterating its well-established precedent that provisions of a collective bargaining agreement have the weight of regulations and agencies must comply with them.

Fed. Cir. No. 2007-3073
November 5, 2007

Joseph v. Federal Trade Commission (FTC). The appellant, a disabled veteran and unsuccessful applicant for a paralegal position, claimed the FTC selection procedures denied him veterans' preference rights. The vacancy announcement for the position stated the FTC could consider applicants under both merit promotion and open competitive procedures and the appellant was evaluated and rated under both procedures. The appellant was among four applicants who received the highest numerical ratings on the merit promotion list. Under the competitive process, the appellant received ten-points for veteran's preference and ranked first on the list of the three top rated applicants. The FTC elected to make the appointment from the merit promotion list, interviewed all four candidates, and selected a non-veteran FTC employee. Having unsuccessfully challenged his non-appointment to the Department of Labor, the appellant appealed to the Board under the Veterans Employment Opportunities Act (VEOA). The Board, reversing the initial decision, determined the appellant's veterans' preference rights were not violated because applicants are not entitled to veteran's preference under merit promotion procedures. The Court agreed, concluding 1) the appellant was provided veteran's preference under the competitive examination process, 2) the appellant was not entitled to preference under merit promotion procedures, and 3) the FTC could fill a vacancy by any authorized method and was not limited to the competitive examination process in making its final selection.