



United States
Office of
Personnel Management

Washington, DC 20415-2001

In Reply To:

Your reference:

1

1

DATE: December 20, 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 1111

FEDERAL LABOR RELATIONS AUTHORITY DECISIONS

62 FLRA No. 44;
62 FLRA 187
BN-CA-05-0123
October 26, 2007

[U.S. Dep't of Justice, Federal Bureau of Prisons, Federal Correctional Institution Fairton, N.J. and AFGE, Council of Prison Locals AFL-CIO, Local 3975](#). The Administrative Law Judge (ALJ) found the Agency violated § 7116(a)(1) and (5) of the Statute by implementing without completing bargaining a new policy of regularly assigning non-custodial employees to cover custodial posts on the same shift when needed. The ALJ rejected the Agency's "covered by" defense because Article 16 of the parties' agreement (requiring the Agency to comply with applicable laws and FLRA precedent) did not demonstrate the Union waived its bargaining rights and Article 18 (providing that "work assignments on the same shift may be changed without advance notice") was only intended to govern shift changes rather than changes of regular duties. Disagreeing with the ALJ, the FLRA found the subject matter of the new assignment policy "covered by" the parties' agreement and dismissed the complaint. The FLRA found by expressly permitting the Agency to change "work assignments on the same shift" without notice, Article 18 is not limited to shift changes and the ALJ's conclusion is inconsistent with the plain language of the agreement. The FLRA also determined Article 16 does not preserve the Union's bargaining rights because it expressly requires bargaining consistent with FLRA precedent, which includes the "covered by" doctrine that is applicable here.

62 FLRA No. 45;
62 FLRA 199
CH-CA-04-0345
October 26, 2007

[U.S. Dep't of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Elkton, Ohio and AFGE](#). As a result of a union grievance, the supervisor was told to discontinue his practice of scheduling overtime before 12:01 am on the first day of the administrative workweek. On the day before the beginning of the workweek, an employee requested overtime. The supervisor advised the employee he could not approve the request at that time and "made some reference to the Union." The Union filed a complaint alleging the supervisor's comment constituted an unfair labor practice (ULP) under § 7116(a)(1) of the Statute. Before the Administrative Law Judge (ALJ), the employee testified the supervisor spoke in an aggravated tone and used the phrase "your f---ing union." The supervisor testified when the employee asked why overtime could not be scheduled he told him to see the Union and he denied the use of profanity. The ALJ found it more likely than not the supervisor made the statement alleged by the employee and he concluded that although the supervisor's language and tone were intemperate, his comment could not reasonably be construed as coercive. Accordingly, the ALJ ruled the supervisor did not commit a ULP. The FLRA explained the standard for determining whether a management statement violates the Statute is whether it

tends to coerce or intimidate an employee or whether the employee could reasonably have drawn a coercive inference. Citing precedent, the FLRA stated that intemperate statements and profanity are not necessarily coercive. Unlike in other cases where it has found management statements to be coercive, the FLRA noted in this case the supervisor did not threaten retaliatory action or deny the overtime, but explained it could not be scheduled before the next day. The FLRA concluded there was no demonstration the supervisor's comment tended to coerce or restrain any employee. Accordingly, the FLRA upheld the ALJ's ruling and dismissed the complaint. Member Pope dissented, claiming the comment disparaged the Union for the Agency's decision to discontinue the practice of assigning overtime in a certain manner and that a reasonable employee could certainly have been discouraged by the supervisor's comment from supporting the Union.

62 FLRA No. 46;
62 FLRA 207
WA-RP-06-0026
October 26, 2007

[*U.S. Dep't of Transportation, FAA, Washington, D.C. and AFSCME Council 26, AFL-CIO and NATCA, AFL-CIO and PASS, AFL-CIO.*](#) The Agency filed a petition seeking the consolidation of two AFSCME bargaining units and the accretion of certain employees in the PASS and NATCA units into the newly consolidated unit. The Regional Director (RD) found consolidation was appropriate but ruled that PASS and NATCA remained the exclusive representatives of the disputed employees. AFSCME petitioned for review claiming the RD made a clear and prejudicial error concerning a substantial factual matter. AFSCME claimed the RD's description of the PASS and NATCA bargaining units conflicted with his description of the AFSCME unit by encompassing some employees in those units that were included in the AFSCME consolidated unit. The FLRA granted the application for review. The FLRA found the bargaining unit descriptions clearly conflict because by including all professional employees in the AFSCME unit the RD included some engineers also included in the NATCA unit. The FLRA found a similar error occurred regarding the PASS unit. The FLRA concluded the unit descriptions would result in dual representation. Finding the record insufficient to allow it to correctly amend the unit descriptions, the FLRA remanded the case to the RD.

62 FLRA No. 47;
62 FLRA 214
0-AR-3984
October 31, 2007

[*U.S. Department of the Air Force, Luke Air Force Base, Phoenix and AFGE, Local 1547.*](#) The Arbitrator found the Agency violated the parties' agreement when managers failed to provide the human resources office written reasons for not making a selection from an internal list of candidates. He ordered the Agency to do so in the future and to provide the Union with a copy of the letters. Finding the Agency's violation open, continuing and deliberate, the Arbitrator ordered the Agency to pay the full cost of arbitration despite an agreement provision requiring the costs be split equally between the parties. The FLRA found the Arbitrator did not exceed his authority by requiring the Agency to provide the Union a copy of the written reasons because there is no specific limitation in the parties' agreement that would preclude the Agency from providing this information to the Union or preclude an arbitrator from ordering the Agency to take this action. Explaining the award's requirement to provide the Union written reasons could be construed to apply to all vacancies, not just vacancies for bargaining unit positions, the FLRA found it exceeds the Arbitrator's authority. Accordingly, the FLRA modified the award to pertain only to bargaining unit positions. Chairman Cabaniss dissented, contending the agreement was specific as to when and to whom written reasons would be provided and the parties could have, but did not, negotiate a provision requiring the reasons be provided to the Union. The FLRA also found the Arbitrator's order the Agency pay the full cost of arbitration due to its deliberate violation fails to draw its essence from the agreement because the agreement provides for equal sharing of arbitral fees with no exceptions permitting the Arbitrator to exercise discretion in the apportionment of fees. The FLRA modified the award to provide for the equal sharing of costs. Member Pope dissented, contending that FLRA precedent supports the Arbitrator's right to apportion fees in the manner he considered appropriate.

FEDERAL SERVICE IMPASSES PANEL DECISION

07 FSIP 62
October 25, 2007

[*Department of Defense, Department of Defense Education Activity, Domestic Dependent Elementary and Secondary Schools, Peachtree City, Ga. and Federal Education Association-Stateside Region, NEA.*](#) The impasse before the Panel concerned the parties' first collective bargaining agreement for a consolidated unit and involved the following issues:

1. Tobacco-free school campuses. The Agency proposed making the campuses tobacco-free because, among other reasons, it would promote both the overall health of the workforce and the anti-smoking message that schools, parents and boards of education favor. The Union proposed continuation of the current practice of permitting employees to smoke in designated outdoor areas. The Panel ordered the Agency to withdraw its proposal because the current practice of restricting employee smoking to designated outdoor areas away from the view of students conveys to minors that smoking is not promoted or freely permitted while accommodating the legitimate interests of smokers. Furthermore, by relegating smoking to designated outdoor areas, it appears the Agency already has taken steps to protect non-smokers from the adverse effects of secondhand smoke.
2. Payment of certification/licensure expenses. The Agency proposed it continue to pay for licenses and certifications required by a position for a four-year period. The Union's proposal expanded the *status quo* by also requiring the Agency to pay the costs for employees "who seek or request placement" into a position which has certification/licensure requirements. The Panel ordered the parties to adopt the Agency's proposal. The Panel explained that limiting the Agency's financial obligations to a defined period is more reasonable than the Union's approach that goes well beyond maintenance of the *status quo* and could create unknown expenses.
3. Use of performance appraisals in determining retention standing during a RIF. The Agency proposed using performance appraisals when determining an employee's retention standing during a RIF. The Union disagreed, arguing the performance measurements currently used by the Agency lack objectivity by not including critical elements. The Panel ordered the parties to adopt the Agency's proposal. While the Union's proposal would neutralize the effects of performance appraisal ratings it believes lack objectivity, it also essentially would eliminate employee performance as a factor when employees are competing for higher retention standing in a RIF. In the Panel's view, employee performance should be a consideration in determining RIF-retention standing and there are administrative procedures available to employees for challenging performance appraisal ratings they consider inaccurate or unfair.
4. Exceptions to the practice of progressive discipline. The Panel ordered the parties to adopt the Agency's wording because it appropriately addresses situations where employees should not expect progressive discipline or to receive the usual 30-day notice period for the effectuation of discipline. In the Panel's view, some offenses are so serious they warrant deviation from customary practices and the Agency's approach would place employees on notice this is the case.
5. Contacting Union representatives prior to the questioning of an employee during an investigation. The FSIP rejected a Union proposal that the Agency "make reasonable efforts" to contact the Union and the Union's attorney before questioning an employee because it could inadvertently cause a delay in the questioning of an employee where expedience is crucial.
6. Union's ability to file institutional grievances and the grievance form. The Union proposed it have the right to determine whether grievances are filed by individuals at the local level or by the Union, which would bypass the local level grievance step process. The Panel ordered the parties to adopt the Agency's proposal that would have a three-step local grievance procedure because it "favor[s]" the implementation of a procedure that requires the parties to attempt to resolve their disputes at the lowest levels. The Panel also ordered adoption of the Agency's proposal to require the Union to provide details when filing a grievance, including the names of grievants, because disclosure of information better serves the process.
7. Duration of the parties' agreement. The Agency proposed the agreement remain in effect for 4 years and the Union proposed 3 years. The Panel ordered the parties to adopt the Agency's proposal, explaining a longer duration is clearly warranted given the length of time the parties have been negotiating over their initial agreement.

MERIT SYSTEMS PROTECTION BOARD DECISIONS

DE-3443-06-0256-
M-1
2007 MSPB 267
November 13, 2007

Lynch v. Department of the Army. The Board ordered the agency to reinstate a tentative job offer to the appellant, complete a hiring process in accordance with § 5 U.S.C. 3312(b), and notify the appellant of the results. The appellant had applied for a position requiring him to be “medically fit to be a resident” on a military base and the agency made him a tentative job offer contingent on him passing a medical examination. The agency subsequently withdrew the offer after deeming him not medically suitable. In an earlier Board decision in this case the Board supported the AJ’s determination the appellant failed to prove a violation of veterans’ preference law or regulation. But the Court of Appeals for the Federal Circuit Court reversed the Board, finding the agency violated 3312(b) which required the agency to notify OPM of its conclusion the applicant was not medically suitable and to get a final determination of suitability from OPM. The Board issued this decision as a result of the Court’s remand.

DC-0752-07-0192-
I-1
2007 MSPB 268
November 14, 2007

Dones v. United States Postal Service. The Board granted the appellant’s petition for review of a constructive suspension claim. The appellant argued the agency denied him light duty and limited duty when he attempted to return to work following a job injury. The Board agreed with the initial decision finding the agency did not improperly deny light duty because the appellant failed to provide medical documentation required by the collective bargaining agreement for light duty requests. But the Board disagreed with the AJ’s finding the appellant lacked entitlement to OWCP limited duty benefits because the OWCP had terminated his claim before he requested limited duty. The Board determined the record showed although the OWCP had threatened to close out the appellant’s claim, in fact it kept his case open well past the time of his limited duty request. However, the record did not show to what extent the appellant’s approved OWCP claim may have entitled him to limited duty work or whether limited duty work was in fact available during the relevant period. The Board also noted the AJ did not advise the parties of the proper burden of proof framework for constructive suspensions. It remanded the case for further development and adjudication.

AT-3443-06-0811-
B-1
2007 MSPB 269
November 14, 2007

Marshall v. Department of Health and Human Services. The Board granted the agency’s petition for review and modified the initial decision in a VEOA case of nonselection. The appellant applied for a GS-13 position in 2004 and subsequently accepted a GS-12 position with another agency. When HHS learned he had accepted another position, it erroneously removed him from consideration for the GS-13 position. An audit revealed the error approximately two years later, and the agency then offered the appellant the position, but he declined. The agency argued the AJ erred in ordering the agency to reinstate the appellant retroactively from when the initial selection to the position was made in 2004 up to the date the appellant declined the position. The Board agreed with the agency, finding the appropriate remedy is not automatic and retroactive appointment to the position. Instead, the Board held the agency is required to reconstruct the 2004 hiring process in accordance with veterans’ preference hiring statutes. The Board ordered the agency to do so within 30 days of the date of the decision and to notify the appellant of its compliance. The appellant was informed he may file a petition for enforcement if he believes the agency does not carry out the order fully.

CH-0752-07-0091-
I-1
2007 MSPB 271
November 27, 2007

Desai v. Environmental Protection Agency. The Board vacated an initial decision and dismissed for lack of jurisdiction the appellant’s appeal of her reduction in pay. The appellant received a promotion on May 15, 2005, but the agency placed her at too high a step in her new grade because it failed to apply the Federal Workforce Flexibility Act of 2004 (FWFA), implemented through OPM regulations effective May 1, 2005. Subsequently the agency realized and corrected its error, placing the appellant at a lower pay rate, although it waived past overpayment. The AJ determined the appellant made a prima facie showing of Board jurisdiction but concluded the agency’s pay recalculation was proper. The appellant both petitioned for review of the initial decision and requested a review of OPM’s regulations implementing the FWFA. The Board cited the general rule a reduction in an employee’s rate of basic pay is appealable, but it noted an exception in § 5 C.F.R. 752.401, “when an agency reduces an employee’s basic pay ‘from a rate that is contrary to law or regulation.’” The Board found the agency’s action met the exception, and it vacated the initial decision by holding the appeal lacked jurisdiction. Additionally, the Board declined to review OPM’s implementation regulations because the agency’s reduction of the appellant’s pay

was required by the language of the FWFA; therefore, the purported invalidity of OPM's regulations was not material and would not entitle the appellant to any relief.

AT-0752-07-0528-
I-1
2007 MSPB 273
November 28, 2007

Cano v. United States Postal Service. The Board vacated and remanded an involuntary retirement appeal the AJ had dismissed for lack of jurisdiction. It found the AJ failed to address whether any of the appellant's allegations constituted a nonfrivolous claim of involuntariness that would entitle him to a jurisdictional hearing. It also decided the appellant indeed had raised a nonfrivolous claim the agency discriminated against him by incorrectly regarding him as disabled and subsequent working conditions were so difficult a reasonable person would have felt compelled to retire. It noted this case may implicate the EEOC's regulations pertaining to whether the appellant posed a "direct threat to the health or safety of the individual or others in the workplace" (§ 29 C.F.R. 1630.15(b)(2)). The Board also found the AJ erred by suggesting the EEOC AJ was incorrect in assessing the case as a mixed case because the appellant had not made an argument of involuntary retirement when he initiated his EEO complaint but waited to raise it in a prehearing conference. The Board noted the EEOC AJ properly designated the EEO complaint as a mixed case after allowing the complainant to amend his complaint in accordance with § 29 C.F.R. 1614.106(d) to include the involuntary retirement issue. The Board remanded the case for further adjudication to include a jurisdictional hearing and in the event involuntary retirement was upheld to assess discrimination claims.

PH-0752-00-0011-
I-1
2007 MSPB 277
November 28, 2007

Russo v. United States Postal Service. The Board issued a compliance Order in accordance with its previous decision modifying a removal penalty to "a demotion to the next lower-graded nonsupervisory position for which the appellant was qualified with the least reduction in grade and pay" and to adjust benefits and provide back pay including overtime and interest. Here the Board determined there were two non-compliance issues in question: 1) whether the appellant received the correct amount of back pay to include overtime pay, and 2) whether he was properly demoted to a qualifying position with the least amount of reduction in grade and pay. The Board cited *Lucas v. DOD*, 64 M.S.P.R. 172, 179 (1994), to determine the agency improperly restricted the positions for placement to the maintenance craft instead of considering all positions "for which the appellant could become qualified without undue interruption of the agency's mission." (*Lucas*, in turn, cites *Jackson v. VA*, 31 M.S.P.R. 135, 136 (1986), noting a training period of up to 90 days was not an undue interruption. Both *Lucas* and *Jackson* pertain specifically to downgrades in disciplinary situations.) Although the agency maintained it did not have vacancy records for longer than a year, the Board required the agency to produce documentation showing it evaluated all available vacancies for the relevant period in terms of the appellant's abilities and experience. The Board also rejected the agency's argument the appellant was responsible for not receiving back pay covering several months because he disagreed with the agency's calculations and had refused to sign back pay forms. According to the Board, refusal to sign was not sufficient justification for the agency's failure to process and pay undisputed amounts of back pay. The Board held if the agency does not provide proof of compliance it must show cause why sanctions should not be imposed against the responsible agency official.

DC-0353-07-0608-
I-1
DC-0752-07-0319-
I-1
2007 MSPB 276
November 28, 2007

Taylor v. Department of Homeland Security. The Board vacated an initial decision and remanded for further adjudication consistent with its findings. The case began as an appeal of a removal action for physical inability to perform duties. The appellant recovered partially from an earlier on-the-job-injury but the agency concluded it could not restore her to duty because it had no positions for which she was qualified and capable of performing. Before removing the appellant, the agency announced three positions for which the appellant was qualified, all three of which could be filled at either the GS-5, GS-6, or GS-7 grades, and it filled two of the positions with GS-7 selectees and one with a GS-6 selectee. In the initial decision, the AJ sustained the removal action and dismissed the restoration claim for lack of jurisdiction. The AJ concluded although the appellant was a person with a disability, the agency's failure to assign her to another position either before or after her removal did not violate her rights. In reaching this conclusion the AJ determined the agency did not have to promote the appellant to GS-7 to satisfy restoration requirements and the appellant did not meet the physical requirements of the position filled by a GS-6 selectee. The Board noted the AJ heard testimony, however, indicating the physical demands of the vacant positions varied based on

location, and the appellant could have met the physical requirements of one of the positions filled at the GS-7 grade. According to § 5 CFR 353.301(d) an agency “must make every effort to restore in the local commuting area, according to the circumstances in each case, an individual who has partially recovered from a compensable injury and who is able to return to duty.” Therefore, according to the Board, under the provisions of § 353.301 the agency was obligated to determine whether the appellant was qualified and able to perform any of the three announced vacancies since they could have been filled at the grade 6 level and, if not, to determine in accordance with the Rehabilitation Act whether any of the positions could have been modified or adjusted to accommodate the appellant. The Board vacated the initial decision and remanded the case for further adjudication consistent with its findings.

SF-0432-06-0735-
I-2
2007 MSPB 278
November 30, 2007

McGowan-Butler v. Department of Justice. The Board in a split decision denied the agency’s petition for review of an AJ’s reversal of the performance-based removal of an employee. The majority opinion merely cited the failure of the PFR to establish either significant new evidence formerly unavailable or error in interpreting a law or regulation. Chairman McPhie, however, issued a dissent disagreeing with the AJ’s conclusion that the agency failed to define the minimally successful level of performance for the appellant as required by § 5 U.S.C. 4302(b). The Chairman explained the agency does not have a five-level performance system and in its system there is no level of performance between “fully successful” and “unacceptable.” For example, declared the Chairman, missing [certain] deadlines more than 10% of the time is unacceptable, while missing them up to 10% of the time is fully successful. He accepted the agency’s argument the minimally successful performance level can be determined from its definition of the fully successful and unsatisfactory levels. The Chairman characterized the initial decision as elevating form over substance and opined the appellant could not have reasonably believed she would be safe from a performance-based action if she failed to meet the fully successful level. The majority opinion is the Board’s final decision. (§ 5 C.F.R. 1201.115(d))

CH-0752-04-0620-
B-1
2007 MSPB 282
December 4, 2007

Doe v. Department of Justice. In this second Board decision on the same case, the Board granted the agency’s petition for review of an AJ’s decision mitigating a removal penalty to a suspension. The case facts began with the removal of an FBI Special Agent for videotaping his sexual encounters with women without their consent, two of whom worked in his division. The initial decision reversed the agency for failing to establish nexus with agency efficiency or the appellant’s duties. The first Board decision accepted the agency’s petition for review, held the agency indeed had established nexus, reversed and remanded the case for further adjudication. In the remand initial decision the AJ determined removal was too severe and modified the penalty to a 120-day time served suspension. The agency again filed a petition for review, arguing 1) the AJ improperly substituted his own judgment for the agency’s in deciding the penalty; and 2) the AJ erred in not allowing the agency either to open the record for a supplemental hearing or to file an interlocutory appeal on the issue of the effect of the Board’s nexus finding to the appellant’s ability to testify or act as an affiant in criminal cases under *Giglio v. U.S.*, 405 U.S. 150 (1972). (*Giglio* requires the agency to disclose to prosecutors any potential impeachment evidence regarding the agents involved in a case, hence the concern about the appellant’s credibility as a witness in future criminal cases.) The appellant also filed a cross petition asking the Board to reconsider its earlier ruling agreeing the agency established nexus. The present Board decision determined the law of the case doctrine precluded it from reconsidering the appellant’s argument since he did not offer evidence to support any of the exceptions to the doctrine. The Board also determined the agency was not harmed by the AJ’s denial of a supplemental hearing or interlocutory appeal. The Board then determined the AJ was in error in modifying the removal penalty because the agency gave appropriate consideration to mitigating factors and, given the nature of the misconduct and the agency’s penalty rationale, the agency’s decision “was not so harsh and unconscionably disproportionate to the misconduct that it amounts to an abuse of discretion.” Accordingly, the appellant’s removal was sustained.

CB-7121-07-0020-
V-1
December 4, 2007

Morales v. SSA. The Board accepted the appellant’s request to review an arbitration decision, and remanded and reversed the decision. The arbitrator had accepted the agency’s argument the appellant’s grievances were not arbitrable. He referred to language in the parties’ collective bargaining agreement indicating “the grievant shall have ten (10) workdays to make an oral and/or

written presentation.” The employee had submitted written grievances and asked for an additional written and oral presentation, but neither she nor the union arranged for the presentation within the required ten day time period, so the agency denied the grievances on procedural grounds. The appellant argued her written grievances were enough to require the agency to render decisions on the merits of her grievances. The Board determined the arbitrator erred as a matter of law in construing the parties’ agreement as requiring or permitting termination of grievances when the grievant fails to schedule oral or written presentations. It found although the language permits oral or written presentations it does not require any presentation other than the written statements in the grievance itself. The Board noted when an appellant requests an MSPB hearing and fails to take action to enable such a hearing to be held, the appellant forfeits only the right to a hearing, not the right to a decision on the merits. The Board saw no basis not to apply the same principle here. The case was remanded for further proceedings consistent with the Board’s analysis.

NOTEWORTHY COURT DECISIONS

Fed. Cir. No. 2007
3056
November 19, 2007

Reid v. DOT and MSPB. The U.S. Court of Appeals for the Federal Circuit reversed a previous MSPB Board decision denying an IRA claim of whistleblower reprisal. The appellant had been instructed to prepare a “statement of work and procurement” to justify a sole source contract and she had informed more than one supervisor of her belief the sole source contract would be a violation of federal acquisition regulations. Her MSPB appeal alleged she was subjected to adverse personnel actions of losing telecommuting privileges and being denied reasonable accommodation. The reasoning by the AJ (supported by the Board in its denial of her petition) were 1) the agency action she complained of (sole source contract) was never taken; 2) she made her disclosure to her supervisors rather than to anyone who could remedy the potential violation; and 3) she failed to show the alleged harmful acts were covered personnel actions. The Court rejected the Board’s conclusion the disclosure could not be deemed protected because the event she complained of never transpired. In reaching its determination, the Court declared it would be a “cramped reading of the statute to exclude potential violations not carried out.” It also cited and agreed with a previous Board decision, *Ward. V. Army*, 67 M.S.P.R., 482, 488-89 (1995), in which the Board reasoned, “requiring a violation of law, rule, or regulation to occur before the employee could make a protected disclosure would force the employee either to act without protection or to risk being partly responsible for the violation.” The Court also found, although an employee’s complaint to a supervisor about the supervisor’s own conduct is not protected, disclosure to any supervisor other than the wrongdoer is a protected disclosure, since such a person is in a position to correct the abuse by bringing the matter to the attention of a higher authority. Finally, although the Court declined to address the appellant’s failure to show denial of reasonable accommodation should be considered a personnel action within the meaning of the Whistleblower Protection Act, it determined the AJ arbitrarily dismissed loss of telecommuting as a personnel action because he failed to explain why it could not constitute benefits or a significant change in working conditions (§ 5 U.S.C. 2302(a)(2)(a)). The Court remanded the case for further proceedings in accord with its findings.

Fed. Cir. No.
2006-3260
November 26, 2007

Vanieken-Ryals v. Office of Personnel Management. The U.S. Court of Appeals for the Federal Circuit issued a decision reversing OPM’s and MSPB’s denial of a disability retirement application. The plaintiff argued both OPM and MSPB erred in denying her application solely for lack of “objective” medical evidence. The Court first addressed a question of jurisdiction, referring to § 5 U.S.C. 8347 and *Lindahl v. OPM*, 470 U.S. 768 (1985), as restricting its review to issues of law and not factual determinations on questions of disability and dependency. It then concluded the issue of law was the MSPB’s rejection of any probative weight to medical testimony due to lack of objective evidence such as formal cognitive testing, emergency room reports confirming panic attacks, or relevant psychiatric studies. The Court determined OPM’s and MSPB’s adherence to such a rule was unsupported in law, arbitrary and capricious, and contrary to law. In support of this conclusion it cited and agreed with a previous Board decision, *Chavez v. OPM*, 6 M.S.P.R. 404, 418-23, in which the Board reversed the AJ who “erred in assuming the appellant’s claim for disability retirement benefits could not be granted if it was not proven by objective medical evidence.” The Court remanded the case for proper consideration of medical and other evidence.

