



United States
Office of
Personnel Management

Washington, DC 20415-2001

In Reply To:

Your reference:

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DATE: January 23, 2008

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 1112

FEDERAL LABOR RELATIONS AUTHORITY DECISIONS

* We note the FLRA cases are not hyperlinked because they are not yet posted on the FLRA's website.

62 FLRA No. 48
WA-CA-G3-0620
November 9, 2007

Pension Benefit Guaranty Corporation, Washington, D.C. and NAGE, SEIU, AFL-CIO, Local R3-77. A unit employee filed a formal complaint of discrimination with the Agency's EEO Office. The Agency appointed an independent contractor to investigate the complaint and he conducted interviews with employees to which the Union was not allowed to participate. The Administrative Law Judge (ALJ) concluded the contractor's interviews were formal discussions within the meaning of § 7114(a)(2)(A) of the Statute and the Agency violated § 7116(a)(1) and (8) by not providing the Union notice and an opportunity to be represented. The FLRA upheld the ALJ's conclusion. The FLRA found the ALJ properly applied the factors necessary to find the meetings were formal and rejected the Agency's argument the interviews were not discussions as that term is used in the Statute because they were held solely to obtain employees' knowledge of facts. Instead, the FLRA found the interviews involved detailed exchanges of information, and explained there need not be any debate between the participants in order for a discussion to be found. The FLRA also rejected the Agency's contention the contract investigators are neutral and should not be viewed as representatives of the Agency. The FLRA determined that a letter of authorization signed by the Agency's EEO director required all employees to cooperate with the contractor and the Agency's contract with the contractor placed him under the Agency's direction and control. Furthermore, the Agency had the obligation to investigate EEO complaints and the fact it chose to use a contractor rather than an Agency employee did not diminish the relationship between the contractor and the Agency. The FLRA also noted the Supreme Court has found an agency office of inspector general is a "representative of the agency" for the purpose of conducting investigative interviews under § 7114 (a)(2)(B). The FLRA concluded because the term "representatives of the agency" is also used in § 7114(a)(2)(A), applying to formal discussions, it must be given the same meaning in the absence of legislative history indicating otherwise. Finally, the FLRA found the Agency presented no reason for departure from a long line of precedent holding that an EEO complaint filed under EEOC regulations concerns a grievance within the meaning of § 7114(a)(2)(A).

62 FLRA No. 49
DA-CA-04-0576
DA-CA-04-0533
November 15, 2007

U.S. Department of Homeland Security, Border and Transportation Security Directorate, Customs and Border Protection, El Paso, Texas and AFGE, Local 1929. The FLRA joined two unfair labor practice (ULP) complaints alleging the Agency violated § 7116(a)(1) and (8) of the Statute by failing to allow the Union to be present at a formal discussion. In the first case, an Agency representative interviewed a bargaining unit employee who would be called as an Agency witness in

an arbitration hearing. The Agency notified the Union and invited it to attend, but would not allow the Union president to represent the Union because the president was designated as the Union's representative in the arbitration.

The Agency acknowledged the Union's right to designate its own representative, but claimed it is a presumptive right that can be overcome in special circumstances. In this regard, the Agency contended that interviewing the witness in the presence of the Union advocate would reveal its attorney work product and hearing strategy. The Administrative Law Judge (ALJ) held the Agency's refusal interfered with the Union's right to choose its own representative and that, under Authority precedent, the "attorney work product privilege" did not permit the Agency to exclude the Union President from the meeting. The FLRA upheld the ALJ's finding the Agency's action constituted a ULP because it has repeatedly rejected agencies' claims of attorney work product privilege as a defense to a failure to comply with § 7114(a)(2)(A) of the Statute. The FLRA also previously ruled the Union's statutory right to be present at a formal discussion includes the right to designate its representative and noted the Agency presented no other special circumstance that would allow it to deny the Union president the right to be present at the meeting.

In the second case, the Agency interviewed a bargaining unit employee who would be called as an arbitration witness. The Agency argued the meeting did not meet the definition of formal discussion because at the time of the circumstances leading to the arbitration, the employee was an acting supervisor. The ALJ found the Agency violated the Statute by refusing to provide the Union with notice and an opportunity to attend the meeting. The FLRA upheld the ALJ's finding because the plain language of the Statute dictates it is the employee's status at the time of the formal discussion (in this case a bargaining unit employee) that is the controlling factor in determining the union's right to be present. The FLRA further explained that even if the employee's previous status was relevant, there was no showing the employee performed any of the supervisory duties listed in the Statute that would warrant exclusion from the unit. The record showed the employee approved leave requests and that is not a criterion for being a supervisor.

62 FLRA No. 50
0-AR-4026
November 20, 2007

U.S. Department of Homeland Security, U.S. Customs and Border Protection and NTEU. The Arbitrator sustained the grievance alleging the Agency violated the parties' agreement when it implemented changes to its grooming standards policy prior to completing negotiations with the Union. The Arbitrator rejected the Agency's contention the Union waived its right to bargain because the Union promptly and actively exercised its right to bargain by requesting information and a briefing and submitting proposals. Also, according to the Arbitrator, three bargaining sessions occurred and any delays by the Union were legitimate. Further, the Arbitrator found that timely implementation of the grooming standards policy was not necessary for the functioning of the Agency because its claim that a delay would lead to decreases in efficiency, safety and security was unsupported by the record. As a remedy, the Arbitrator ordered a return to the *status quo*, but noting that negotiability issues were pending before the FLRA, stayed the remedy for a maximum 180 days pending the resolution of the negotiability disputes. The FLRA rejected the Agency's claim the award is contrary to law. Deferring to the Arbitrator's factual findings, the FLRA determined the Union did not waive its bargaining rights because it timely requested a briefing, timely submitted proposals and provided the Agency with negotiation dates and engaged the Agency in bargaining within a reasonable period of time after being notified of the proposed changes. The FLRA also found that an immediate change was not necessary for the Agency's functioning. The FLRA explained the Agency had to establish that its actions were consistent with its necessary functioning such that a delay would have impeded its ability to efficiently and effectively carry out its mission. Although the Agency made general assertions regarding safety and efficiency, the FLRA found it failed to identify any specific evidence in the record to establish the Arbitrator erred in his conclusion. In addition, the Agency did not establish how delaying implementation of the policy would impact its mission. Finally, the FLRA found the Arbitrator did not exceed his authority in ordering a return to the *status quo* and staying the remedy for 180 days because arbitrators have broad discretion when fashioning remedies.

NTEU and U.S. Department of Homeland Security, Bureau of Customs and Border Protection, Washington, D.C. This case involved several proposals over the Agency's proposed changes to its grooming standard policy.

Proposals 2, 3 and 4 - Proposal 2 means wearing of the official uniform alone is sufficient to identify a Customs and Border Protection (CBP) officer to the public. Proposal 3 means that, when officers are on duty, their attire and appearance must be neat, clean, and professional, as judged by a "reasonable person" standard. Proposal 4 permits on-duty officers to exhibit grooming styles that conform to contemporary standards. The FLRA found Proposals 2, 3 and 4 affect management's right to determine its internal security practices under § 7106(a)(1) of the Statute. Specifically, the Agency established a link between its grooming policy and its internal security objectives of having employees readily identifiable as law enforcement officers and increasing the officers' ability to effectively employ law enforcement techniques. In making this finding, the FLRA explained that only establishment of a link is necessary and that it will no longer follow earlier precedent holding that a proposal must conflict with or defeat the purpose of an agency's internal security measure in order to affect management's internal security right. The FLRA determined that Proposals 2 and 4 are not appropriate arrangements because they excessively interfere with management's internal security right. In this regard, Proposal 2 provides that grooming standards are not necessary in order for uniformed officers to be recognized by the public and would preclude the Agency from promulgating any standards. Proposal 4, by allowing officers to abide by contemporary grooming standards, would require the Agency to permit undefined and ambiguous grooming styles and defeat the Agency's goal of having well defined standards. The FLRA found Proposal 3 to be an appropriate arrangement because the Agency did not establish how requiring officers to be neat, clean, and professional excessively interferes with its internal security right, especially since there is no indication the Agency would ever desire a different policy. Accordingly, the FLRA found Proposals 2 and 4 outside the duty to bargain and Proposal 3 within the duty to bargain.

Proposal 6 – This proposal requires the Agency to grant exceptions to its grooming standards policy for legitimate religious and cultural reasons. The proposal also modified the personal appearance standards matrix with regard to length of hair and fingernails, facial hair (beards and mustaches allowed), rings, necklaces, bracelets, earrings and tattoos. The FLRA found the portion of Proposal 6 allowing deviations from the standards for religious or cultural reasons excessively interferes with the Agency's internal security right because it would require the Agency to grant exceptions to any and all grooming standards in any and all circumstances where an employee had a legitimate cultural or religious claim. The FLRA also found the portion of the proposal concerning facial hair excessively interferes with the Agency's internal security right because it failed to address emergency situations where officers would be required to use respirators. With regard to the other exceptions listed in Proposal 6, the FLRA found they did not excessively interfere because the Agency was unable to establish the safety related burdens it asserted. Accordingly, the FLRA found the portions of Proposal 6 concerning facial hair and exceptions to the Agency's grooming standards policy for religious and cultural reasons are outside the duty to bargain and the portions concerning hair, fingernails, rings, necklaces, bracelets, earrings, and tattoos are within the duty to bargain.

Proposal 7 – This proposal establishes a procedure to apply when an Agency official determines that an officer's attire or appearance is improper and that once the final decision has been made, the officer shall be instructed to take reasonable corrective action, if possible, for the remainder of the work day but the officer will not be sent home. The FLRA determined this proposal excessively interferes with the Agency's internal security right because it would preclude management from sending an offending officer home, regardless of the nature of the violation or whether the violation may be sufficiently corrected for the remainder of the workday. Accordingly, the FLRA found Proposal 7 outside the duty to bargain.

Proposal 9 – This proposal allows either party to reopen the negotiated Personal Appearance Standards memorandum of agreement in response to a proposed change in the standards by the Agency. Noting that it has long held that standard "reopener" proposals are within the duty to bargain, the FLRA found Proposal 9 within the duty to bargain.

Proposal 11 – This proposal provides that if the Agency and the Union agree to modify the Agency's proposed grooming standards, then the Agency must sign, upon request, the agreement and the agreed-upon standards will control over the proposed ones. The FLRA found that because there is no indication the Agency is obligated to sign such an agreement until there is a mutual agreement, the Agency did not establish the proposal is inconsistent with § 7114(b)(5) of the Statute, which provides that if an agreement is reached, the parties are obligated, on the request of any party to the negotiations, to execute a written document embodying the agreed terms. Accordingly, the FLRA found Proposal 11 within the duty to bargain.

62 FLRA No. 52
WA-RP-05-0077
November 27, 2007

U.S. Department of Justice, Washington, D.C. and AFSCME, Local 3097. The Union filed a petition seeking to clarify the unit status of four employees (project manager, analyst and 2 specialists) who are responsible for overseeing information technology aspects of a database of information concerning federal offenders. The Regional Director (RD) determined the employees are not engaged in security work that directly affects national security and, therefore, are not barred from inclusion in a collective bargaining unit under § 7112(b)(6) of the Statute. Specifically, the RD found the employees' duties do not include the designing, analyzing, or monitoring of security systems or procedures. The FLRA denied the Agency's request that it reconsider its precedent requiring review of cases involving the national security exclusion from bargaining units on a case-by-case basis. In this regard, the FLRA rejected the Agency's argument that sensitive positions and those requiring a security clearance should be automatically excluded because these factors are significant in making a unit determination. However, the FLRA concluded the RD failed to apply established law in finding the two specialists and project manager positions did not perform security work directly connected to national security. The FLRA found one specialist is responsible for monitoring the security of the system and that his work has a direct connection to national security as there are no intervening steps if he fails to perform his duties. The other specialist is personally and directly responsible to monitor the work of contractors and is the only person with the authority to direct contractors to make security changes in the system. Again, the FLRA found no intervening steps between this work and the potential effects on national security if this specialist fails to perform his duties. The FLRA also found the project manager is responsible for monitoring the security of the system by monitoring contractor security work and this is a direct connection to national security. The FLRA found the RD ruled correctly on the analyst position because there is no responsibility for or access to the system. Accordingly, the FLRA found the two specialists and project manager are excluded from the bargaining unit and denied the application for review in all other respects.

62 FLRA No. 53
WA-RP-G6-0G59
November 27, 2007

U.S. Department of the Treasury, IRS and NTEU. The Union filed a petition seeking to clarify the unit status of all employees encumbering the Physical Security Specialist position. The Regional Director (RD) concluded the employees are engaged in security work that directly affects national security and, therefore, are barred from inclusion in the collective bargaining unit under § 7112(b)(6) of the Statute. As relevant here, the Union contests the RD's finding the work of the employees is directly connected to national security because there is sufficient evidence of a straight bearing or unbroken connection between the security work performed by the employees and national security. The FLRA concluded the RD did not fail to apply established law. The FLRA found the RD properly identified an unbroken connection between the work of the specialists and national security because the specialists are personally and directly responsible for designing security systems and there are no intervening steps between the specialists' duties and the potential effects on national security if they fail to perform. The FLRA also rejected the Union's request for it to reconsider the precedent relied upon by the RD. The FLRA explained that by only relying on the dissenting opinion issued in that precedent case, the Union's argument amounts only to disagreement with the precedent and does not present a basis for reconsideration. The FLRA also rejected the Union's claim there is an absence of precedent regarding whether employees who do not have access to sensitive or classified information should be excluded from a bargaining unit. The FLRA noted it has explicitly ruled that employees may perform security work concerning national security irrespective of whether they hold a security clearance.

62 FLRA No. 54
DA-CA-80834
December 14, 2007

U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Forrest City, Ark. and AFGF, Local 922. This case was before the FLRA on remand from the United States Court of Appeals for the Eighth Circuit. In the underlying ruling, the FLRA determined the Union was entitled to a special investigative supervisor's manual in order to judge whether the Agency followed proper procedures when it investigated an employee suspected of absence without leave. When the Agency turned over only a part of the manual the FLRA filed an enforcement action with the court. The court found the Agency was required to furnish the Union with those portions of the manual that could assist the Union in representing the disciplined employee, but not information bearing no relationship to the Union's representational duties. The court noted language in the Administrative Law Judge's and the FLRA's decisions that suggested a narrower order was intended, but found the order itself required disclosure of the entire manual. As a result, the court set aside the FLRA's order. Explaining the record was not sufficient to allow the court to determine what portions of the manual should be released, the court remanded the case to the FLRA. The FLRA's in camera review of the manual disclosed it addresses more than misconduct investigations and that it also included procedures for conducting criminal investigations and investigation of inmates. The FLRA confined the release of information only to those aspects dealing with employee misconduct. Accordingly, the FLRA listed the relevant chapters and sections and ordered the Agency to provide them to the Union.

62 FLRA No. 55
CH-RP-07-0002
December 14, 2007

U.S. Dep't of the Army, Army Materiel Command Headquarters, Joint Munitions Command and Army Sustainment Command, Rock Island, Ill. and AFGF, Local 15, AFL-CIO. When a command became equal to a command to which it had previously been subordinate through reorganization, the Agency petitioned for separate bargaining units. The Regional Director (RD) determined the existing unit was no longer appropriate. The RD concluded separate units would promote a community of interest, effective dealings and the efficiency of agency operations. In this regard, the RD considered the fact the commands had successfully conducted labor-management dealings and negotiations as individual entities and he explained the separate units exist at the level where personnel and labor relations policies are established. However, the FLRA found the RD's decision did not support the conclusion the existing unit was rendered inappropriate through the reorganization. The FLRA summarized the criteria for determining community of interest, effective dealings and efficiency of agency operations and concluded the RD did not give the proper weight to the various factors in all three areas. The RD also failed to consider FLRA precedent indicating a preference for preserving longstanding bargaining relationships and avoiding unit fragmentation. Finding a stipulation made by the parties did not contain sufficient information to allow it to rule on the matter, the FLRA remanded the case to the RD.

The FLRA rejected the Agency's contention the parties had agreed, through a phone call, to waive their respective right to contest the RD's decision because the Agency offered no record evidence.

FEDERAL SERVICE IMPASSES PANEL DECISIONS

07 FSIP 105
November 19, 2007

GSA, Northwest/Arctic Regional Office (Region 10) Auburn, Wash. and Council 236, AFGF, AFL-CIO. The impasse before the Panel concerned the Agency's proposal to end the practice of granting administrative leave three times per week for employees to engage in on-site fitness activities. The Agency claimed the practice conflicted with an Agency directive that allowed supervisors to grant time off without charge to leave only in non-routine situations, emergencies, or when it is deemed in the interest of the Agency. The Union argued the Agency failed to show a compelling need to change a longstanding practice and the practice was in line with the directive because it was authorized by a previous director who found it was in the interests of the Agency. Recognizing the Agency's concern that a large number of employees might begin to engage in the practice thereby affecting productivity, the Union proposed a formula by which the total number of hours used by employees would be capped. The Panel ordered the parties to adopt the Agency's proposal. The Panel found that regardless of the circumstances under which the practice originated or whether it is inconsistent with Agency regulations, it is clear that management no longer believes that its continuation would be beneficial to the accomplishment of the Agency's mission. The Panel also

determined there was insufficient evidence in the record concerning the benefits of the practice and the Union's proposed alternative is too administratively burdensome.

07 FSIP 107
November 21, 2007

SSA, Office of Disability, Adjudication and Review, Falls Church, Va. and Council 215, AFGE, AFL-CIO. The impasse before the Panel concerned the Agency's decision, after a pilot period, to require employees to use a new tool called Findings Integrated Templates (FIT) as an aide in writing decisions. The Union recognized the Agency's right to make FIT mandatory and agreed it was a user-friendly program that generated few complaints during the pilot period. However, the Union's proposed memorandum of understanding addressed issues such as notice to employees about FIT, handling and documentation of employee concerns, training, case assignments, performance assessment, an adjustment period, the impact on the flexiplace program, and a joint assessment of the program six months after its implementation. The Agency proposed that employees would be advised of how FIT will be used and under what circumstances and allowed for concerns about the program to be submitted to employees' supervisors for consideration. The Agency asserted that other concerns such as training, performance and flexiplace were already addressed in existing agreements and would be handled in accordance with those provisions. The Panel ordered the parties to adopt the Agency's final offer. In the Panel's view, the Union's concerns regarding the potential adverse impact of the mandatory use of FIT are speculative, particularly in view of the fact that FIT has been used voluntarily since 2005 without any documented problems. Additionally, the training and performance articles of the parties' agreement appear to adequately address employees' legitimate interests concerning the mandatory implementation of FIT.

07 FSIP 114
November 21, 2007

Department of the Army, Army Dental Activity, Fort Carson, Colo. and Local 1345, AFGE, AFL-CIO. The impasse before the Panel concerned whether the Agency's decision to terminate the 5/4-9 compressed work schedule (CWS) for employees providing dental care is supported by evidence the schedule is likely to cause an adverse agency impact. The Agency contended the CWS should be terminated because it has caused a diminished level of service to external customers (soldiers), a reduction in productivity and, consequently, an increase in the cost of dental operations. Specifically, military personnel and contractors who work closely with the unit employees are on standard work schedules and therefore, when unit employees are off on Fridays, there is a diminished level of service because fewer patients are seen. The Agency also claimed its workload was going to increase and that it is already suffering a financial loss to augment the shortage of employees. It contended it suffers an additional loss when employees working nine hour days are not engaged in their primary duties for one hour each day when the facility is not open to patients. The Union contended the Agency's data regarding patients seen on Friday is faulty because it fails to account for military members, including military dentists, who are offsite on Fridays due to mandatory training. The Union also pointed to the Agency's own data showing a productivity increase over the past year and claimed the employees are performing important duties such as sterilizing instruments when the facility is closed to patients. The Panel ordered the Agency to rescind its determination to terminate the 5-4/9 CWS because the Agency has not demonstrated it is causing a diminished level of service to its customers, a reduction in productivity or an increase in cost. The Panel found that a more "persuasive" explanation for fewer patients being seen on Fridays is that fewer military dentists are available to see patients on that day for reasons that appear to be unrelated to CWS. The Panel also noted the facility was meeting or exceeding dental readiness standards and its productivity had increased by 14 percent over a six month period. Given this record, the Panel was not convinced that employees are unproductive for one hour each day when the facility is not open to patients.

07 FSIP 82
December 13, 2007

Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, Washington, D.C. and NTEU. When the parties reached impasse over the participation of certain classes of employees in an already agreed upon telework program, the Panel gave one of its members the authority to mediate and, if agreement were not reached, to issue a binding arbitration ruling. Agreement was reached on one employee group but not on employees known as legal instrument examiners (LIEs). The parties disagreed over the category in which LIEs would be placed under the telework agreement. The Union wanted category B, where an employee teleworks regularly for one or more days a week, every two weeks or several days each month. The Agency wanted category C, which allowed for telework on a situational basis for reasons such as a medical problem, reasonable accommodation, or a special project. The Agency claimed LIEs could not remove the documents they normally worked with from the premises to telework sites because the information in those documents, if lost, would put the public at risk and potentially allow criminals and terrorists to obtain weapons. The Agency also claimed statutory deadlines would be missed. The Arbitrator ordered the parties to adopt the Union's proposal. She found that hundreds of other employees are already transporting similar documents from their homes to the sites of firearms and explosives dealers and that allowing LIEs to do the same would not raise the risk level any higher than what the Agency considers acceptable. With regard to missed deadlines, the Arbitrator noted the telework agreement allows supervisors to remove an employee from the program for a decline in productivity. The Arbitrator did, however, limit the Union's proposal to a 6-month telework pilot, after which the Agency can reopen negotiations. The Arbitrator believed the Agency's interests, and those of the general public, are further protected by its ability to terminate Category B status for LIEs if it can demonstrate after the 6-month pilot has run its course that there is actual evidence to support its concerns.

MERIT SYSTEMS PROTECTION BOARD DECISIONS

DE-0752-07-0445-
I-1
2007 MSPB 275
November 28, 2007

Jarosz v. Department of the Air Force The Board reopened a removal case dismissed by the AJ as withdrawn. The appellant was removed, filed an MSPB appeal and, during the processing of the appeal, entered into a settlement agreement with the agency providing for withdrawal of his appeal. The agency filed a copy of the signed settlement agreement with the AJ who dismissed the appeal as withdrawn. However, the settlement agreement contained a term allowing the appellant to revoke the agreement within 7 days, and he did so. He filed a petition for review citing his revocation of the agreement, requesting reinstatement of his appeal, and adding a claim of USERRA violation. The Board cited a previous case, *Ikossi v. Navy*, 98 M.S.P.R. 14 (2004), indicating it is appropriate to reopen and reinstate an appeal for cancellation of a settlement agreement through proper procedures contained in a cancellation clause. The Board reopened and reinstated the appeal, remanded it for adjudication, and instructed the USERRA violation claim be docketed and adjudicated as a new appeal.

PH-1221-06-0055-
W-2
2007 MSPB 280
November 30, 2007

Armstrong v. Department of Justice The Board in a split decision modified an initial decision in a whistleblower reprisal appeal. The appellant filed an MSPB appeal asserting he was denied compensatory time and a promotion as a result of disclosures he made in an Office of Inspector General investigation of a supervisor. At the initial stage, the AJ determined the agency failed to comply with a discovery order and issued a sanction barring it from providing evidence it would not have promoted the appellant nor granted him compensatory time absent any protected disclosure. The initial decision determined the appellant made protected disclosures which were a contributing factor in the agency's decision not to promote him. The AJ ordered the agency to promote the appellant retroactively to GS-13, but he declined to refer the retaliation to the Office of Special Counsel for further action. The appellant had resigned his position with the agency prior to the initial hearing and accepted a position with another agency. The AJ ordered interim relief but suggested "the appellant may nevertheless wish to consider declining interim relief, as it is not clear to me that, once he relinquishes his current position, his employer has any obligation to restore him to that position at a later date." The agency filed a petition contesting the decision the appellant's disclosures were protected or were a contributing factor in not granting him a promotion. The agency also argued the AJ's sanctions were unwarranted and draconian. The agency further insisted the AJ had no authority to order the appellant's reinstatement to a position from which he resigned.

The Board supported the AJ's determinations the appellant made protected disclosures and the disclosures were a contributing factor to not being promoted. The Board determined, since there was reason to believe a current employee of the agency committed a prohibited personnel practice, it is required to refer the matter to the OSC (§ 5 U.S.C. 1221, § 5 CFR 1209.13, and *Walton v. Agriculture*, 78 M.S.P.R. 403 (1998)). The decision also determined the AJ erred in ordering interim relief because the appellant was not entitled to reinstatement since he left the agency voluntarily. The Board ordered retroactive promotion up to the date the appellant left the agency, back pay, interest, and other benefits consistent with OPM's regulations. The majority supported the AJ's chosen sanction. However, Chairman McPhie issued a dissenting opinion arguing the sanction was too severe and disproportionate to the party's offense. The Chairman would have barred the agency from introducing evidence relating to promotions of comparison employees, but he would have permitted evidence pertaining to the motives and state of mind of the alleged retaliator and evidence regarding the agency's decision not to promote the appellant during the two-year period prior to his disclosures.

PH-072-07-0184-I-1
2007 MSPB 286
December 4, 2007

Heath v. USPS The Board reopened and remanded a case dismissed by the AJ as settled. The appellant filed an appeal asserting he received a constructive suspension when the agency discriminated against him in ordering him to leave work and failed to accommodate his disability to the extent he remained out of work. During the processing of the appeal, the parties reached a settlement indicating, "for settlement purposes, the Postal Service and the Appellant stipulate that the M.S.P.B. has jurisdiction over this appeal." The AJ described the case as a suspension of more than 14 days, decided the Board had jurisdiction, entered the settlement into the record and dismissed the case as settled. Subsequently the appellant filed a petition for review alleging there was "mutual mistake" in the settlement. The Board determined the petition did not meet the criteria for review because the appellant did not identify any mistakes, and the essence of his petition was he believed he made a bad bargain. However, the Board reopened the case on its own motion because there was insufficient evidence in the record to support the AJ's conclusion of jurisdiction. The Board reiterated jurisdiction is a prerequisite to entering a settlement into the record for enforcement purposes, and the ultimate question of jurisdiction is a legal conclusion not subject to stipulation. The Board reviewed the two situations which may constitute a constructive suspension: 1) when an agency places an employee on enforced leave in order to inquire into ability to perform, and 2) when an employee absent for medical reasons requests to return to work with altered duties and the agency denies the request. The facts here allege the employee was ordered to leave work, he had previously requested accommodation through limitations on his work duties, and his supervisors refused to adhere to those limitations. Those facts, without more, are insufficient to establish whether the appellant's absence from work was a constructive suspension. The Board also found the settlement agreement may be invalid because the parties settled under the mistaken belief the agreement would be enforceable by the Board, a material and mutual mistake of law. The Board decision instructs the parties if they wish to resuscitate the settlement they must either forego a finding on jurisdiction and agree the settlement is not enforceable by the Board, or they can make factual stipulations sufficient to establish Board jurisdiction over the appeal. The Board reversed the initial decision and remanded the case for further proceedings consistent with its findings.

SF-0752-07-0383-
I-1
2007 MSPB 283
December 4, 2007

Zendejas v. Department of Homeland Security The Board remanded the appeal of a removal case dismissed at the initial stage as withdrawn. The appellant, *pro se*, filed an MSPB appeal over his removal but subsequently informed the AJ he wanted to withdraw his case to pursue the matter in another forum. The AJ cautioned him he could not refile his case if he withdrew it and gave him 7 days to consider his decision. The appellant did not reply, and the AJ dismissed the case as withdrawn. More than two months after the finality date of the initial decision, the appellant submitted a new appeal form containing the same merits arguments as before and a supplemental document requesting the Board to review his appeal. He indicated his attempts were unsuccessful to have his removal issue heard through the grievance-arbitration process or informal mediation. The Board treated his new appeal as a request to reopen and reinstate a prior appeal. It noted that, although withdrawals ordinarily are considered final, a previous ruling, *Carter v. Navy*, 87 M.S.P.R. 373 (2000), allowed a withdrawn case to be refiled because the appellant failed to understand his withdrawal to challenge in another forum could never be refiled. Although the AJ advised the

appellant his case could not be refiled, the Board noted there is nothing in the record to suggest any attempt was made to “correct the appellant’s misunderstanding about the availability of the other means of redress he had mentioned in his withdrawal request.” Because the record included little specific evidence about why the appellant was unable to pursue his removal in another forum, the Board vacated the initial decision and remanded the case specifying if the AJ determined the case should be deemed a dismissal without prejudice, he should also consider whether the appellant exercised due diligence in seeking reopening of his appeal.

DC-1221-07-0491-
W-1
2007 MSPB 293
December 10, 2007

Kinsey v. Department of the Navy The Board reversed and remanded an individual right of appeal case which had been dismissed at the initial stage for lack of jurisdiction. The appellant, while on temporary duty in Kuwait, alleged he was assaulted by a coworker and heard of a scheme by his supervisor and coworkers to claim more per diem for housing than they were actually spending. He was returned to the United States and lodged his accusations with agency management and two other investigative groups. Several months later he requested another assignment to Kuwait, but it was denied because the new supervisor of the unit indicated his return would be bad for morale. He filed a complaint with the Office of Special Counsel (OSC) over the denial and subsequently an MSPB appeal after OSC informed him in a letter it was terminating its investigation. The AJ issued a show cause order requiring him to provide correspondence with OSC showing the issues raised in his appeal were the same as those raised in his OSC complaint. At the time he was on another temporary assignment in Guam, and his personal files were at home in Virginia. He did not respond to the show cause order. Although he had provided the letter from OSC, the letter did not refer specifically to the issues he raised. The AJ dismissed his appeal for lack of jurisdiction, finding he did not raise a non-frivolous allegation of a protected disclosure, did not provide evidence showing what issues he raised in his OSC complaint, did not show he exhausted his remedies before the OSC, and did not prove his disclosures were a contributing factor to the denial of more duty in Kuwait. The AJ noted the official denying his request to return to Kuwait lacked knowledge of his disclosures. Upon review of the appellant’s petition for review, the Board determined although the appellant did not initially provide evidence of the issues he raised in his OSC complaint, he did provide with his petition for review a final letter from OSC, unavailable earlier, confirming the disclosures raised with OSC were the same as those in the MSPB appeal. Additionally, the Board determined the appellant made a non-frivolous allegation his protected disclosure was a contributing factor in the agency’s decision. It found the AJ erred in determining the official denying the appellant’s return to Kuwait lacked knowledge of the disclosures. The AJ had referred to the official’s affidavit indicating the official was aware only that the appellant had been involved in a conflict with coworkers. The Board found the official’s affidavit indicated the official *initially* was aware only of a conflict between the appellant and coworkers, but upon returning to Kuwait he learned more details, including the appellant’s accusations against his supervisor and some of his peers. Accordingly, the Board vacated the initial decision and remanded the appeal for further adjudication consistent with its decision.

CH-0752-07-0231-
I-1
2007 MSPB 294
December 10, 2007

Rose v. United States Postal Service The Board denied the appellant’s PFR but reopened the case and affirmed the initial decision as modified. The appellant had shouted at two coworkers, “Give me my [time] card before I blow your brains out.” Ten minutes later he returned and acted as if he were holding a machine gun and made machine gun sounds while pointing at the two coworkers. He was removed with a charge of “Unacceptable Conduct/Violent and Threatening Behavior Towards Coworkers.” The initial decision found the agency supported its charge and penalty of removal. The appellant filed a petition for review determined by the Board to lack a basis for review, but the Board reopened the case on its own motion, finding the AJ wrongly analyzed the charge. The AJ had identified the charge as “making statements that caused anxiety and disruption in the workplace” and stated “because intent is not an element of the charge, the appellant’s intent is irrelevant to determine whether he engaged in the charged misconduct.” According to the Board, since the charge label contained the term “threat,” the agency was required to meet the requirements set forth in *Metz v. Treasury*, 780 F.2d 1001 (Fed. Cir. 1986). The Board cited a previous case, *Roseberry v. Department of Veterans Affairs*, 51 M.S.P.R. 172 (1991) in which it did not sustain a charge of “insolent, insubordinate and threatening behavior” because the element of threat was not proved. It also distinguished another case, *Otero v. U.S. Postal Service*, 73 M.S.P.R. 198 (1997), in

which the agency was not required to prove threat when the term was used in the accompanying narrative description but not in the charge label. The Board then analyzed the evidence of record to determine the agency proved its charge under *Metz* and it upheld the removal penalty.

DC-1221-07-0032-
W-1
2007 MSPB 296
December 10, 2007

Swinford v. Dept. of Transportation The Board denied the appellant's petition for review. However, the Board reopened the appeal to address the individual right of action (IRA) jurisdictional analysis and the appellant's allegation that his retirement was involuntary. The Board remanded the appeal for a hearing regarding both whether the Board has jurisdiction over the appellant's involuntary retirement claim and the merits of his IRA appeal. The appellant filed a complaint with the Office of Special Counsel (OSC) alleging, in part, that he was placed on a performance improvement plan (PIP), denied use of sick leave, and ultimately forced to retire in reprisal for his whistleblowing disclosures. After affording the parties an opportunity to respond to the jurisdictional issues, the AJ dismissed the appeal for lack of jurisdiction without holding the requested hearing and further found the appellant's retirement was not an adverse action that was directly appealable to the Board because he failed to make any nonfrivolous allegations that his retirement was involuntary. On review, the Board first found, accepting the appellant's allegations as true, he reasonably believed his disclosures evidenced a violation of law, rule, or regulation. The Board stated the appellant complained to the Office of the Inspector General (OIG) regarding his concerns and OIG considered the allegations to be sufficiently viable so as to require conducting an investigation and, ultimately, corrective action. (In determining reasonable belief, the existence of an actual violation may be debatable.) Second, the Board analyzed whether his supervisor knew of the disclosure and if the personnel action occurred within a period of time such that a reasonable person could conclude the disclosure was a contributing factor in the personnel action. The Board found the appellant's supervisor, Ms. Weisman, would likely be aware of the basis of the ongoing OIG/FBI investigation into the appellant's allegations and concerns that the Deputy Administrator referred to the Office of General Counsel, given her duties as Director, Office of Budget and Finance. Additionally, Ms. Weisman would reasonably be cognizant of information regarding which her predecessors were aware. Third, the Board held the appellant made a nonfrivolous allegation that his retirement was involuntary. The Board reviewed the totality of the circumstances asserted by the appellant, including that Ms. Weisman allegedly threatened to abolish his job and "make things difficult" for him if he did not choose to retire and that he averred the agency denied his request for sick leave unless he immediately retired. The Board found the appellant made a nonfrivolous allegation that his protected disclosures were a contributing factor in the agency's decision to take several personnel actions.

AT-072-05-0844-I-1
2007 MSPB 297
December 11, 2007

Evans v. Department of Homeland Security The Board in a split decision reversed the removal of a Federal Air Marshal for giving an intentional and material false statement. When the appellant applied for a Federal Air Marshall position at the Transportation Safety Administration he listed his current medication on a pre-employment form. He omitted listing Adderall, a drug prescribed for attention deficit disorder. The drug contains amphetamines and agency regulations prohibit flying while taking amphetamines. Two years later, the appellant was notified of a random drug test and informed his supervisor of his concern he might fail the test because he was taking Adderall. The agency deemed his omission of Adderall on the pre-employment form to be an intentional and material false statement and removed him. The AJ decided the appellant's nonuse was only temporary and, therefore, his omission of the drug was a false statement. The AJ also decided that although EEOC guidance proscribes asking applicants about their medicines prior to making an offer of employment, the agency did not violate discrimination law because EEOC guidance is "just a notice, not a law, rule or regulation." The Board, however, disagreed with the AJ and found the agency committed a violation of § 42 U.S.C. and § 29 C.F.R. when it asked the appellant to disclose the medication he was taking prior to extending a job offer to him. The Board stated the law does not mention inquiring about medication; it prohibits making inquiries to determine whether an applicant is a person with a disability. However, the EEOC guidance on the law does specify the impropriety of asking about medication. The Board determined the AJ dismissal of the EEOC guidance was inappropriate because the Board defers to the EEOC in issues of substantive discrimination law. The majority referenced First and Ninth Circuit cases as persuasive in finding a false response to an improper inquiry should not be used as the basis for action against the

employee. Chairman McPhie dissented, arguing the appellant should be held accountable for his false response even if the inquiry was improper. The Chairman cited two cases in support of his position: *Lachance v. Erickson*, 522 U.S. 262 (1998), which does not include lying in a section of carefully delineated rights; and *Bryson v. U.S.*, 396 U.S. 64 (1969), upholding a perjury conviction in which the petitioner responded falsely to an unconstitutional inquiry.

PH-0752-06-0028-
I-3
2007 MSPB 299
December 11, 2007

[*McFarland v. Department of Transportation*](#) The Board issued a modified decision by reversing the initial back pay order for a reduced suspension. The appellant was suspended by the Federal Aviation Administration (FAA) for unauthorized storage of his motorcycle in a government-leased storage facility and failing to remove it promptly after his supervisor ordered him to do so. The AJ determined the 90-day suspension was beyond the tolerable bounds of reasonableness, reduced it to 30 days, and ordered the agency to provide back pay for the difference. The agency filed a petition for review arguing the AJ erred in ordering back pay because the Back Pay Act does not apply to the FAA. According to the agency, the Act was a “waiver of sovereign immunity” and in the absence of such a waiver by the FAA the Board may not order the sovereign to expend funds. The Board noted it was a possible oversight by Congress to restore Board appeal rights to FAA employees without restoring the right to be awarded back pay. Nevertheless, according to the Board, the doctrine of sovereign immunity will not allow the Board to assume such authority in the absence of the required explicit waiver of immunity. The Board added the FAA’s personnel management system permits back pay in certain situations, but not in decisions or settlements under the Board’s appeal procedure. It therefore supported the reduction of the suspension from 90 days to 30 days but vacated the initial decision’s order of back pay.

AT-0752-07-0266-
I-1
2007 MSPB 302
December 13, 2007

[*Parbs v. U.S. Postal Service*](#) The Board reversed the initial decision and upheld the removal of the appellant. The appellant was charged by the agency with improper conduct for failing to activate a piece of equipment in spite of a supervisor’s attempt to have him do so. The AJ reversed the agency’s removal action, finding the agency charged the appellant with insubordination and failed to prove its charge. The agency filed a petition for review arguing the AJ erred in requiring proof of insubordination for a charge of improper conduct. The Board determined the AJ had informed the agency in a prehearing order of the requirement to prove insubordination but the agency did not assert, nor did the record reflect, any objection to the AJ’s order. The Board added, however, even if it considered the agency’s argument it reaches the same conclusion, the AJ properly interpreted the charge as requiring the agency to prove insubordination. In support of its conclusion the Board pointed to part of the specification narrative in which the supervisor gave the appellant a “direct order” and told him if he disobeyed he would be “put off the clock.” The narrative also referred to the appellant’s unwillingness to follow instructions and his little regard for authority evidenced by his repeated failure to follow the instructions of his supervisors and managers. All of this language, declared the Board, indicates the agency charged the appellant with insubordination, a willful and intentional refusal, not with simply failing to follow instructions. The Board nevertheless decided the AJ erred in finding the agency failed to prove the charge of insubordination, and it specified the evidence of record supporting a charge of insubordination. The Board also determined the penalty was warranted, and it sustained the agency’s removal action. _
