



United States
Office of
Personnel Management

Washington, DC 20415-2001

In Reply To:

Your reference:

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DATE: February 22, 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 1113

FEDERAL LABOR RELATIONS AUTHORITY DECISIONS

62 FLRA No. 56;
62 FLRA 321
0-NG-2615
December 14, 2007

[*NTEU and U.S. Department of the Treasury, U.S. Customs Service*](#). The Union proposed the Agency provide lockers or other secure measures for the storage of weapons at all facilities where armed agents were assigned. Some Agency facilities had the capability for weapons storage while others did not. The FLRA found the proposal affected the Agency's right to determine its internal security practices because it would negate the Agency policy requiring trained and qualified employees to store weapons at home when the facility at which they worked did not have adequate storage capability. The FLRA determined the proposal was not an appropriate arrangement because although employees would benefit, the interference with management rights would be excessive. The Court of Appeals concluded the FLRA failed to properly apply the excessive interference test because it erred in concluding the Agency had an internal security policy requiring weapons storage at home. The record before the court and the FLRA established that many facilities had storage capability that allowed employees to store weapons at the facility and the proposal was merely to extend an existing internal security practice to all facilities. As a result, the proposal would not negate a policy already in existence. The court remanded the case to the FLRA to conduct a balanced excessive interference analysis based on the evidence in the record. On remand, the FLRA found the proposal constituted an appropriate arrangement because it does not excessively interfere with the Agency's right to determine its internal security practices and is within the duty to bargain. The FLRA rejected various Agency contentions that it would be significantly burdened by allowing storage of weapons at all facilities. The FLRA noted in particular that the proposal would not require the storage of weapons in unsuitable containers. The FLRA also noted several benefits accruing to employees, such as less exposure to the risk associated with carrying a weapon while off duty. In addition, the FLRA found the proposal did not interfere with the right to assign work, nor did it involve the methods, means and technology of performing work.

62 FLRA No. 57;
62 FLRA 328
0-AR-4005
December 20, 2007

[*U.S. Department of the Navy, Supervisor of Shipbuilding, Conversion and Repair, Gulf Coast, Pascagoula, Miss. and NAGE, Local R5-125*](#). The Arbitrator sustained a grievance alleging the Agency violated the parties' agreement by temporarily reassigning the grievant from one Agency division to another division. The provision in dispute required the Agency to reassign the most junior qualified employee when no one volunteered for a particular assignment. The Arbitrator interpreted the agreement as requiring the Agency consider the service dates on a department-wide basis affecting all qualified employees in the same job class and that if the Agency had done that it

would have found two employees with less seniority. The Agency contended the agreement provision, as interpreted by the Arbitrator, affected its right to assign employees because it would require it to take an employee who was performing needed work rather than simply reassign the least senior qualified employee in an already overstaffed division. The FLRA concluded the award did not affect the Agency's right to assign work because the Arbitrator's determination that the disputed provision constitutes a negotiable procedure under § 7106(b)(2) of the Statute is consistent with FLRA precedent holding that seniority-based assignments are within the duty to bargain and enforceable if the Agency retains the right to determine qualifications and seniority applies only to equally qualified employees. The FLRA found nothing in the award that would require the assignment of employees who were not equally qualified. The FLRA also rejected the Agency's contention the award failed to draw its essence from the agreement because the Arbitrator's finding the intention of the parties in negotiating over employee moves was to cover an entire department, not a single division, was a plausible interpretation of the agreement.

62 FLRA No. 58;
62 FLRA 332
DE-RP-07-0001
January 8, 2008

[*U.S. Department of the Air Force, Davis-Monthan Air Force Base, Ariz. and AFGC, Local 2924.*](#) The Union filed a petition seeking to clarify the unit status of six employees. The Regional Director (RD) determined the employees are engaged in security work that directly affects national security and that § 7112(b)(6) of the Statute bars their inclusion in a collective bargaining unit. The Union filed an application for review contending the RD failed to apply established law because he did not examine whether the work performed by the employees has a direct effect on national security. The FLRA denied the application for review. The FLRA found that although the RD did not explicitly analyze whether the employees' work directly affects national security, it was clear from the record the work has such an effect. The classified information accessed by the employees concerns troop movements and troop deployments, mission data and operational plans, and the travel of the President and high level military officials. The FLRA also found it apparent from the record the connection to national security is direct because there are no intervening steps between the employees' failure to prevent unauthorized disclosure of the classified information and the potential effect on national security.

62 FLRA No. 59;
62 FLRA 337
0-NG-2886
January 25, 2008

[*NATCA and U.S. Department of Transportation, FAA.*](#) The Agency notified the Union it was changing the airspace configuration surrounding the Washington, D.C. area as well as the procedures air traffic controllers would use to direct aircraft into and out of Reagan National Airport. The Union offered a proposal concerning the training employees would receive. It also demanded the temporary assignment of a subject matter expert to a shift as well as an additional full time staff member for each shift. The Union further proposed a grace period during which employees would not be held accountable for errors and that the parties evaluate the changes after 90 days. The Agency declared each section of the proposal non-negotiable, asserting that several of them were already covered by the collective bargaining agreement and that each section interfered with a management right. Finding the Union explained why each section should be considered separately, the FLRA granted the Union's request to sever the various sections of the proposal. However, the FLRA noted that, in its petition, the Union made no argument for the negotiability of the sections and the Union did not file a response to the Agency's position. The FLRA concluded the Union did not contest either the Agency's covered-by assertions or its claim the sections interfered with management rights. The FLRA explained that when a union fails to present an argument or an authority disputing an agency's claim that a proposal interferes with a management right and does not contend it constitutes an exception to management rights, the proposal will be ruled outside the duty to bargain. Accordingly, the FLRA found the proposal outside the duty to bargain and dismissed the petition for review.

FEDERAL SERVICE IMPASSES PANEL DECISIONS

07 FSIP 111
January 15, 2008

[*Library of Congress, Washington, D.C. and Local 2910, AFSCME, AFL-CIO.*](#) The impasse before the Panel concerned the parties' disagreement over the level of specificity that should be provided by certain Union officials when reporting their official time use under the parties' agreement. The Agency proposed very specific reporting requirements, including recording the starting and ending times of meetings with management; the starting and ending times, or the cumulative hours for all

other activities along with the subject matter of the activity; protection of employee confidentially by reporting activities using unique numbers for each employee; and, in cases where bargaining strategy might be compromised, reporting activities directly to the Office of Inspector General (OIG). The Union proposed to use categories similar to those required by OPM in annual official time reports, which are meetings with management; term negotiations, mid-term negotiations; grievances and general labor-management relations. The Panel ordered the parties to adopt the Union's proposal because it was sufficient to meet the Agency's reporting needs. The Panel saw no need for the direct involvement of the OIG in administering the parties' agreement. The Panel made the following addition to the Union's proposal: under the category general labor-management relations, the Union will be required to indicate a subcategory, e.g. conferring with employees, and the number of hours used in that subcategory, regardless of the length of time involved.

07 FSIP 90
January 16, 2008

[National Labor Relations Board, Office of General Counsel, Washington, D.C. and National Labor Relations Board Union](#). The Agency decided to require its agents to display the American flag at sites where they conduct private sector union representational elections. The parties disagreed on a number of issues surrounding implementation of the decision including whether the Agency would purchase flags of various sizes and give the agents discretion as to which one to transport, excess baggage expenses to transport the flag, and whether the implementation of the decision would be delayed until weight and bulk standards are established by the safety and health committee. The Union explained its proposals were designed to ameliorate the extra burden of carrying a flag to the voting site along with the usual 40-50 pounds of election gear. Employees would have the option of displaying a lightweight flag or possibly a representation of the flag on their badges. They would also have the option to ship the flag to the site rather than carry it. The Union's proposals also addressed the use of taxis, purchase of luggage carts and payment for excess baggage. The Union proposed that employees not be disciplined for failing to fly the flag at half mast unless they were specifically instructed to do so. Among other matters, the Agency proposed to purchase luggage carts, to allow for excess baggage costs when necessary and to provide training on flag etiquette and assembly. The Panel ordered the parties to adopt a modified version of the Agency's final offer. The Panel explained the Union failed to demonstrate the impact on employees is so severe as to delay implementation of the decision pending the establishment of weight standards. The Panel modified the Agency's package to include language requiring employees' requests for taxis not be arbitrarily denied and permitting agents to incur reasonable excess baggage expenses. It also required the Agency to notify employees when flags should be flown at half mast.

MERIT SYSTEMS PROTECTION BOARD DECISIONS

DA-0752-07-0143-
I-1
2007 MSPB 313
December 21, 2007

[Valenzuela v. Department of the Army](#) The Board denied the appellant's petition for review but reopened the case on its own motion and affirmed the initial decision as modified. The appellant was removed for charges of AWOL and failure to follow leave procedures, and providing false or misleading information. The initial decision sustained the agency's charges and removal action. In sustaining the second charge, the AJ split the charge, finding the appellant provided "misleading and most certainly inconsistent" information but did not provide false information. The Board found the AJ improperly split the charge. According to the Board, the agency was required to prove falsification with the intent to deceive or mislead in order for the charge to be sustained. The Board reversed the charge but affirmed the penalty of removal, noting the AWOL by the appellant amounted to 137.5 hours (approximately 17 days) in a period of just over two months.

PH-0752-06-0495-
I-1
2008 MSPB 1
January 4, 2008

[Balouris v. Unites States Postal Service](#) The Board issued a split decision in a removal case, reversing the AJ's decision to mitigate the penalty. The appellant was removed following an altercation in which he struck another employee. The AJ found the agency proved its charge but determined the appellant did not intentionally strike the other employee, and mitigated the penalty to a 60-day suspension. On review the Board agreed with the AJ's determination the blow was unintentional. However, the Board found the agency's deciding official weighed the relevant penalty factors, including the appellant's past disciplinary record, and the fact the altercation took place while the appellant was in uniform on a public street where it could be observed by the public. The majority reversed the AJ's mitigation of the penalty and affirmed the removal. Member Sapin

issued a separate opinion agreeing the blow was unintentional but dissenting on the penalty. She argued the comparison of the appellant's removal with the letter of warning issued to the other employee indicated a great disparity, especially since the other employee verbally provoked and spit on the appellant. Member Sapin argued the most important factor in determining a penalty is the nature and seriousness of the offense, and a single incident consisting of an instantaneous and accidental physical striking of the other employee was, in her view, hardly sufficient to warrant the penalty of removal.

AT-0752-07-0092-
I-1
2008 MSPB 2
January 8, 2008

[Christopher v. Department of the Army](#) The Board reversed the initial decision and affirmed the agency's removal action. The appellant was charged with making inappropriate comments in the workplace and falsifying an official form (OF) 306, "Declaration for Federal Employment." When the employee answered the questions on the OF 306 pertaining to criminal convictions, imprisonment, etc., he reported a conviction for a misdemeanor, stating, "My wife and I had a domestic squabble between 96 and 97. I was placed on probation but all that has been taken care of." The initial decision reduced the penalty to a 14-day suspension after finding the agency proved the inappropriate comments charge but failed to prove the "intent to deceive" element necessary to prove falsification. The Board concluded the appellant's explanation for not reporting his four assault convictions between 1994 and 1999 for which he served periods of imprisonment, and a 2001 contempt of court conviction was implausible and the AJ erred in not sustaining the falsification charge. It also determined the agency properly considered appropriate penalty factors and the penalty was within the bounds of reasonableness. The Board therefore reversed the initial decision and affirmed the agency action.

PH-0353-07-0280-
I-1
2008 MSPB 4
January 11, 2008

[Nevins v USPS](#) The Board reversed and remanded a restoration appeal case dismissed by the AJ for lack of jurisdiction. The appellant, who had sustained a work related injury in 1991, refused a limited duty job offer and resigned from the agency in 1997. In 2004 her OWCP compensation was terminated. The appellant claimed she began asking for restoration in 2004, but officials were non-responsive and no one informed her of her Board appeal rights. The appellant filed an MSPB appeal in 2007 after she learned of her right to appeal from her Congressman. The initial decision dismissed the appeal for lack of jurisdiction but did not address the issue of timeliness. The AJ found the appellant failed to show she had been separated because of a compensable injury or that she had requested restoration within 30 days of termination of OWCP compensation. The Board held the jurisdictional test in a restoration case includes whether the appellant (1) was separated because of a compensable injury, (2) has been fully recovered for more than one year after the date you become eligible for OWCP benefits, (3) requested restoration within 30 days after the cessation of OWCP compensation, and (4) believes the agency violated reemployment priority rights. According to the Board, the facts showed compensation benefits were terminated in 2004 and the agency subsequently did not place the appellant on its reemployment priority list, thereby satisfying the second and fourth elements. Regarding the first element, although the appellant resigned, she alleged she resigned under protest in 1997 because the agency offered her a limited duty position she could not perform and the agency informed her if she did not accept the position she could resign. When an employee is removed solely for refusal to return to work, a sufficient nexus exists between the injury and the removal to entitle the employee to priority consideration for restoration upon full recovery. Regarding the third element, the Board found the appellant raised a sufficient factual dispute as to require a hearing on whether she timely requested restoration with the agency. In remanding the case for a hearing on the issue of jurisdiction, the Board declared it will be unnecessary for the AJ to resolve the timeliness of the appeal, since the Federal Circuit has held the critical fact in a restoration case is not the alleged diligence of the appellant but the failure of the agency to give notice of appeal rights at the time it denied the appellant restoration.

SF-9752-07-0581-
I-1
2008 MSPB 9
January 22, 2008

[Antonio v Department of the Air Force](#) The Board denied the appellant's PFR but reopened the case on its own motion. During the processing of the initial appeal, the agency notified the AJ it had canceled the removal action, changed the personnel record to reflect the appellant was not removed, and it would calculate and disburse appropriate back pay and allowances. The AJ ordered the agency to submit evidence when it paid all back pay. The AJ then apprised the appellant of his burden of proof on the issue of jurisdiction and directed him to file evidence and

argument. The appellant did not respond to the order, but the agency produced documentation showing the appellant had received back pay, and it moved to dismiss the appeal as moot. The AJ dismissed the appeal as moot and instructed the appellant he could file a petition for enforcement if he believed the agency failed to follow through with rescission of the action. The Board found the AJ erred in determining “placement as nearly as possible in the same situation as if the action had never occurred” is the test of mootness. The Board repeated its standard for mootness recently declared in *Fernandez v. Department of Justice*, 105 M.S.P.R. 443 (2007), “the correct focus is on whether there is any relief that the appellant could receive if the Board ruled in his favor.” The Board noted the appellant had raised discrimination claims in his appeal and would be entitled to compensatory damages if he prevailed in his argument. The Board further noted although the AJ had indicated he could not dismiss an appeal as moot if the agency’s action was based on prohibited discrimination, and although the AJ directed the appellant to file supporting evidence and arguments, there was no indication the AJ had ever apprised the appellant specifically of the elements and burden of proof with respect to his discrimination claims. The Board also found the AJ relied on outdated case law in stating the appellant could later file a petition for enforcement. In *Haskins v. Department of the Navy*, 106 M.S.P.R. 616 (2007), the Board determined it lacks authority to adjudicate a petition for enforcement when an appeal is dismissed as moot. Accordingly, the Board vacated the initial decision and remanded the appeal for further adjudication consistent with its decision.

CB-7121-07-0025-
V-I
2008 MSPB 11
January 23, 2008

[Taylor v Department of the Army](#) The Board granted the appellant’s petition for review of an arbitration decision sustaining his removal. The appellant was removed for sexual harassment, conduct unbecoming, and falsification of statements. The agency argued the Board lacked jurisdiction over the appellant’s claim of gender discrimination because the collective bargaining agreement prohibited an issue from being raised in the grievance process if it was allowed to be raised through the Equal Employment Opportunity law or regulation. The Board held it has jurisdiction to review an arbitration decision if it has jurisdiction over the subject matter of the grievance (in this case, removal), the employee alleges the action constitutes discrimination, and the arbitrator has issued a final decision. Further, the Board declared it has jurisdiction even if the appellant failed to raise discrimination before the arbitrator. The Board stated it has a limited scope of review over an arbitrator’s award; it will modify or set aside an arbitration decision only where the arbitrator has erred as a matter of law in interpreting civil service law, rule, or regulation. The Board found the appellant failed to show the agency discriminated against him, failed to show the arbitrator erred as a matter of law in sustaining the sexual harassment charge, and failed to show the arbitrator erred in sustaining the penalty. For those reasons, the Board sustained the arbitrator’s award.

DA-3443-06-0597-
I-1
2008 MSPB 13
January 28, 2008

[Hope v. Department of the Army](#) The Board granted the agency’s petition for review of the initial decision reversing its termination action. The agency removed the appellant during his probationary period from his Optometrist position for pre-employment reasons; that he failed to possess a Doctor of Optometry degree and he did not possess a current state license to practice optometry. The appellant argued the agency failed to provide him requisite procedural rights when it terminated him (an advance notice, chance to respond, and decision letter). The AJ concluded the Board had jurisdiction over the appeal and further found the agency’s procedural deficiencies constituted harmful error. According to the AJ, had the agency provided the appellant with a chance to respond, he likely would have convinced the agency he was sufficiently qualified for an Optometrist position. The AJ relied on evidence from the appellant consisting of a license to practice medicine in Oklahoma and the Oklahoma “statutory scheme for licensure of Optometrists.” The agency argued in its petition for review the Board lacked jurisdiction because the appellant’s appointment was illegal and, therefore, he never was an employee. The Board rejected the agency’s argument on jurisdiction. It noted the appellant had been appointed, had entered duty as a probationer, and the regulations the agency offered to support an illegal appointment actually addressed qualification standards; the appointment was not contrary to an absolute statutory prohibition. The Board found, however, the AJ was presumptive in declaring harmful error because the agency was given no opportunity to refute the evidence on which the AJ relied. The Board noted the Department of Defense’s Directive 6025.13, section 5.2.2.2., requires all healthcare

practitioners must “maintain a current, valid, and unrestricted license or other authorizing document, in accordance with the issuing authority, before practicing with the defined scope of practice for like specialties.” The Board determined the record lacked any evidence of whether the agency would consider the appellant’s medical degree, license, and certification to practice ophthalmology to be a license to practice in a “like specialty.” Accordingly, it remanded the case for further evidence and adjudication on the question of harmful error.

CB-7121-07-0014-
V-1
2008 MSPB 17
January 29, 2008

FitzGerald v. Department of Homeland Security In a split decision the Board reversed the removal of the appellant for falsification. The appellant had listed a bachelor’s degree on several Optional Forms (OF) 612, Application for Federal Employment. She received her degree from an unaccredited school after receiving credits for “life and work experience” and paying \$2,500. The agency removed her with a charge of falsification of her applications. She filed a grievance which proceeded to a hearing, and the arbitrator held the removal was for just cause and rejected her claim of retaliation for prior EEO activity. On Board review, the majority reversed the arbitrator’s decision, concluding the arbitrator erred in finding the appellant’s application responses were false, citing, *Guerrero v. Department of Veterans Affairs*, 105 M.S.P.R. 617 (2007), in which the Board rejected a falsification charge because the OF 612 does not require the individual to only report education from accredited institutions. The majority also held the arbitrator failed to cite any legal standard in analyzing reprisal evidence, and he erred in rejecting the appellant’s discrimination claim. Chairman McPhie issued a dissenting opinion, arguing the majority failed to defer to the arbitrator’s fact-finding on the falsification claim and misread the arbitrator’s analysis on the retaliation claim. The Chairman stated the arbitrator issued a finding of fact when he found the appellant knew she did not have a valid degree from an accredited college when she answered “yes” on the OF 612 as to whether she had a college degree. On the discrimination issue, the Chairman argued the arbitrator was not required to use the traditional burden-shifting discrimination analysis, according to *Simien v. United States Postal Service*, 99 M.S.P.R. 237 (2005), but met his obligation to weigh the evidence and make a finding on the ultimate issue of whether the appellant met her overall burden of proving retaliation. Therefore, according to the Chairman, the majority simply reweighed the evidence to come to a contrary conclusion without establishing any clear legal error.

NOTEWORTHY COURT DECISIONS

Fed. Cir. No.
2008-3013
February 11, 2008

Iyer v. Department of the Treasury The Court affirmed the Board’s dismissal of an MSPB appeal for lack of jurisdiction. The appellant had applied for a position with the Internal Revenue Service and the agency tentatively offered him the position pending completion of preliminary inquiries. Shortly before a scheduled orientation, the agency placed the offer on hold due to issues arising during a background investigation, and requested the Office of Personnel Management (OPM) make a suitability determination regarding the appellant. OPM concluded the inconsistencies in the application resulted from typographical errors and any misconduct during earlier employment occurred too long ago to warrant adjudication. The agency’s business unit indicated it did not want to hire the appellant, and the human resources department notified him the agency was no longer filling its vacancy. The appellant filed an MSPB appeal in which he argued the Board had jurisdiction because the agency had in fact based its action on suitability factors. The AJ dismissed the appeal for lack of jurisdiction, relying on the agency’s stated reason it decided not to fill the position. The Board denied the appellant’s petition for review and he subsequently filed a petition for review with the Court. The Court accepted the AJ’s conclusion the agency was prepared to go forward with a negative suitability determination but did not do so when the selecting official decided not to fill the position. The Court determined the Board does not have jurisdiction based on the agency’s nonselection. The Court also referred to the appellant’s jurisdiction argument as alleging a “constructive suitability determination” and held under that theory he must demonstrate the agency acted under delegated authority from OPM to make the suitability determination. The Court referred to OPM’s regulations that it does not delegate authority for determinations in cases involving “material, intentional false statement or deception or fraud in examination or appointment.” The Court determined, accordingly, the appellant failed to establish jurisdiction under a constructive suitability theory. Therefore, the Court affirmed the Board’s decision to dismiss the appeal for lack of jurisdiction.

Fed. Cir. No. 2007-
3050
February 14, 2008

Chambers v. Department of the Interior The Court affirmed in part, vacated in part, and remanded in part a Board removal decision. The appellant, Chief of the United States Park Police, expressed dissatisfaction with the Park Police budget to a Washington Post reporter and a House of Representative staffer. She was removed for making public disclosures about safety on parkways, leaking budget information, and failing to follow instructions and the chain of command. The Board in a split decision upheld her removal, finding she was trying to build support for a particular position in a policy debate, and not revealing waste, fraud, abuse or similar wrongdoing by government officials. On review, the Court found the Board erred in the standard it used to determine whether the appellant disclosed a risk to public health or safety. The Board improperly considered the appellant's disclosures under the standard in *White v. Department of the Air Force*, 391 F.3d 1377 (Federal Circuit 2004). The Court's decision in *White*, however only concerned gross mismanagement whereas the Board should have determined whether the disclosed danger is sufficiently substantial and specific to warrant protection under the WPA. The Court, therefore, vacated and remanded the case for application of the correct standard. However, the Court affirmed the findings of the AJ and the Board on the specifications, charges, and penalty. Chief Judge Mayer issued a dissent in part, agreeing with the findings on the charges and penalty. However, he argued the Board did consider adequately whether the appellant's comments evidenced a substantial and specific danger to public health or safety, and it concluded they did not. He added even on remand, if the Board found the appellant's safety disclosures to be protected, the agency nevertheless would have taken the same personnel action due to the appellant's repeated violation of trust as the head of a law enforcement agency. According to the Chief Judge, under those circumstances, remanding the case to the Board is merely an academic exercise.