



United States  
Office of  
Personnel Management

Washington, DC 20415-2001

In Reply To:

Your reference:

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DATE: March 21, 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 1114

**FEDERAL LABOR RELATIONS AUTHORITY DECISIONS**

62 FLRA No. 60;  
62 FLRA 341  
0-AR-4078  
January 29, 2008

[\*General Services Administration and AFGE, Council 236\*](#). The Arbitrator sustained a grievance alleging the Agency violated the parties' agreement when it terminated employees' rotational assignments and failed to negotiate with the Union pursuant to the Statute. Prior to the termination, employees were allowed to enroll their children in a school run by DOD, because the school was available "to the families of non-military government personnel who are on a rotation in Puerto Rico." The Arbitrator determined that the Agency's decision to terminate rotational schedules concerned its right to assign work, but that it was obligated to bargain over the procedures used to implement the change and appropriate arrangements for those employees adversely affected by the change.

The Agency excepted to the award arguing that the award violated its 7106 rights with proposals that directly interfere with the agency's decision to exercise its right to assign work. The FLRA denied the Agency's exception concluding that where the agency proposes to change conditions of employment pursuant to a management right, the agency is obligated to bargain over procedures, under 7106(b)(2), and appropriate arrangements under 7106(b)(3).

The agency further excepted to the award by stating it had no duty to bargain over the impact and implementation of its decision because the termination of rotational assignments had no effect on employees' working conditions. The FLRA denied the Agency's exception stating that they look at not only the change itself, but the "effects" of the change. In this regard, the record shows that the employees' loss of the right to send their children to the school resulted from the decision to terminate rotational assignments. Thus, this was an "effect" of the decision that affected employees and had more than a de minimis impact on conditions of employment. Finally, the agency excepted by stating that the award fails to draw its essence from the agreement, in that the agreement itself contains certain management rights and the award violates those rights as well as the agreement. The FLRA denied the agency exception. The FLRA found that where an agency refuses to bargain, a Union is not required to establish that it has made negotiable proposals. The Agency never engaged in any bargaining with the Union, so it cannot avoid its obligation to bargain by objecting to "proposals and remedies" that the Union sought only after the Agency unlawfully refused to bargain.

62 FLRA No. 61;  
62 FLRA 344  
0-AR-4018

[\*U.S. Department of Transportation, Federal Aviation Administration and NATCA, AFL-CIO\*](#). The Arbitrator ruled he had jurisdiction over the merits of a national level grievance on overtime filed by the parties. The parties had previously agreed that the arbitrator could fashion a remedy for

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violations of the agreement and that such remedy could be applied prospectively in future cases where there was dispute that a violations had occurred. Subsequently, the Agency took the position that the Arbitrator had no jurisdiction to fashion a remedy for future violations by the Agency for allegedly “by-passing qualified bargaining unit members on a facility’s overtime list.” The Agency excepted based on its argument that the Arbitrator lacked jurisdiction because the issue to be resolved does not stem from “grievance arbitration,” but rather would create new contractual terms prior to the parties determining they are at impasse. The FLRA denied the Agency’s exception. It found that the Agency’s exception was interlocutory and the FLRA will not ordinarily consider interlocutory appeals. The FLRA will not resolve exceptions to an arbitration award unless the award constitutes a complete resolution of all of the issues submitted to arbitration. The award is an interim award, thus not a final award subject to review. The Agency further excepted to the award, arguing that the Arbitrator’s decision in this case would bind future arbitration disputes to the same remedy found by the Arbitrator. The Agency claims that the parties must first receive approval of the Federal Service Impasses Panel (FSIP) prior to engaging in binding interest arbitration to resolve a bargaining impasse. The FLRA denied the Agency’s exception finding that the parties were not engaged in collective bargaining and that the contract provisions in dispute had already been bargained. There is no indication that resolution of the matter would result in imposition of contract terms. Contrary to the Agency’s argument, the parties were not at impasse, but rather involved in grievance arbitration. There was no need to seek approval of the FSIP under 5 U.S.C. § 7119(b)(2). The Agency did not show that the Arbitrator lacked jurisdiction to resolve this matter and the FLRA found no plausible jurisdictional defect warranting interlocutory review.

62 FLRA No. 62;  
62 FLRA 348  
0-AR-4071  
January 30, 2008

[National Aeronautics and Space Administration, Goddard Space Flight Center, Greenbelt, Maryland and Goddard Engineers, Scientists and Technicians Association, IFPTE](#). The Arbitrator found that a grievance concerning an accretion-of-duties promotion was not procedurally or substantively arbitrable. The Grievant, a GS-13 employee, applied for an accretion-of-duties promotion. When the promotion was denied, the employee filed a Step 2 grievance in which he alleged discrimination was the reason for the denial. The agency denied the Step 2 grievance on timeliness grounds. The employee filed a Step 3 grievance which was also denied and the matter was submitted to arbitration. The Arbitrator interpreted the parties’ agreement and found that the Step 2 grievance was untimely filed. Regarding the discrimination claim, the Arbitrator found that the allegation was unsupported. Regarding whether the grievance was substantively arbitrable, she found that the grievance “concerned a classification matter” that could not be grieved under the parties’ agreement. While the Agency agreed with most of the Arbitrator’s factual assessments, they filed for exception arguing that the award was deficient in that it concludes that an arbitrator has jurisdiction over denial of an accretion-of-duties promotion due to discrimination. The Agency claimed the Arbitrator’s determination that the exclusions of 5 U.S.C. § 7121(c) do not apply when a grievant elects to file a grievance based on discrimination, is contrary to law, rule or regulation. The FLRA determined that the Agency does not challenge the Arbitrator’s resolution of the issue, but rather challenges a hypothetical future event. The Agency’s exception seeks an advisory opinion, which is precluded by 5 C.F.R § 2429. The Agency’s exception was dismissed.

62 FLRA No. 63;  
62 FLRA 350  
0-AR-4042  
January 30, 2008

[AFGE and U.S. Environmental Protection Agency, Chicago, Illinois](#). The Arbitrator denied a grievance and found the Agency did not violate the parties’ agreement or the Statute when it implemented a new performance evaluation system. The parties’ agreement included a two-tier performance evaluation system. The Agency proposed a five tier performance evaluation system and the Union countered with a two-tier system proposal. The Agency indicated to the Union that its two-tier system proposal was “in part” non-negotiable, and that it would proceed to impact and implementation bargaining on the five tier system. The Union did not respond with any new proposals and the Agency implemented the five-tier system. The Union filed a grievance on the proposed appraisal system as well as the implementation of the system. The Arbitrator found that the establishment of the five-tier system was within the management rights of the Agency in that it involved the assigning and directing of work. The Arbitrator found that the Agency, in implementing the system, afforded the union notice and opportunity to bargain, but the Union did not respond and that the Union waived its right to bargain. Next the Arbitrator examined the Union’s claim that the Agency committed an Unfair Labor Practice. The Arbitrator determined that the Agency was

exercising a management right, and that it afforded the Union notice and opportunity to bargain, but the Union did not do so. He also found the Union's one proposal was not consistent with law or government-wide regulation and therefore did not require the Agency to bargain in good faith. The Union filed an exception, claiming that a contract provision containing the number of tiers of a performance evaluation system is a "methods and means" of performing work, and is therefore an enforceable, permissive topic of bargaining. The FLRA denied the exception. It found that a contract term containing the number of tiers in a performance evaluation system affects an Agency's rights to assign work and direct employees. The FLRA addressed whether the number of tiers in a performance evaluation system is a "methods and means" of performing work and in [Council 236, FLRA at 452](#), determined it was not.

Next, the Union excepted by contending that the Arbitrator erred when he found the Agency did not violate the parties' agreement by proposing and then implementing the evaluation system. The parties' agreement was in full effect at the time and required a two-tier evaluation system. The FLRA denied the exception. The Union's exception was construed as a claim that the award fails to draw its essence from the parties' agreement. In reviewing an arbitrator's interpretation of an agreement, the FLRA applies the deferential standard that federal courts use in reviewing arbitration awards in the private sector: (1) it cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective bargaining agreement as to manifest an infidelity on the part of the arbitrator; (3) it does not represent a plausible interpretation of the agreement or (4) evidences a manifest disregard of the agreement. Based on that standard, the Union has not established that the award does not draw its essence from the agreement. Finally, the Union excepted by claiming the award is based on a non-fact because the Arbitrator did not acknowledge the agency had a continuing obligation to bargain after finding the proposals negotiable in part. The FLRA denied the exception noting the Arbitrator found the Agency notified the Union that its proposal was "in part non-negotiable." There is nothing in the award indicating that the Arbitrator made a factual finding different from the facts alleged by the Union in its exceptions. The Union did not establish that a fact underlying the award was clearly erroneous or based on a non-fact.

## FEDERAL SERVICE IMPASSES PANEL DECISIONS

08 FSIP 15  
February 12, 2008

[Health and Human Services, Center for Disease Control and Prevention, NIOHS, Morgantown, WV and Local 3430, AFGE](#). The impasse before the Panel concerned the use of tobacco products on the Employer's premises. The Agency proposed an absolute ban on smoking, tobacco use or sale of tobacco in any area controlled by CDC (Centers for Disease Control). The employer agreed to provide free smoking cessation programs. Executive Order 13058, issued by President Clinton in 1997, prohibits "the smoking of tobacco products in all interior space owned, rented, or leased by the executive branch of the Federal Government, or in any outdoor areas under executive branch control in front of air intake ducts." The employer's campus in this case is under the direct control of CDC/NIOSH. The employer claims it is not within its control to change an HHS/CDC directive and therefore the Morgantown NIOSH site should be tobacco free per existing CDC policy. The Union's proposal prohibits the sale of tobacco products on the premises, but allows two outdoor areas to be designated as smoking areas. The Union proposes that the employer maintain the smoking areas in accordance with Executive Order 13058 and that the employer provide free smoking cessation programs. The Union maintains that its proposals strike an appropriate "balance between the needs of smokers and nonsmokers" and is in keeping with previous Panel decisions. The Panel ordered the parties to adopt the Union's proposal. In the Panel's view, the Employer has failed to demonstrate the need to change the current smoking policy which fully protects the health of non-smokers while providing reasonable accommodations to smokers.

08 FSIP 7  
February 26, 2008

[Department of Housing and Urban Development, New Orleans HUD Office and Local 3475, AFGE](#). The Agency and Union were at impasse over scope of negotiations, union office space, equipment and parking, accommodations for disabled employees and temporary "swing space" while renovations were being completed. The Union's position included "status quo" on working conditions until changes were fully articulated by management according to contract provisions, and until the union has bargained through impasse. Management will bargain any and all changes to

working conditions implemented since 2006 which were not previously bargained. Management will provide a safe and sanitary work environment for HUD NOLA employees. Any and all space plans will comply with HUD Handbook, labor relations requirements and past practice. The Union office will be cleaned and upgraded per the “side bar” agreement and will be relocated to the 11<sup>th</sup> floor, Hale Boggs Building. Management will provide any and all documents verifying that space alterations are cost effective. Since the Union had no notice or opportunity to bargain, the Union will not concur with the relocation plans. The Union office will be provided a monitor, a laptop, new speaker phone, lockable file cabinets, upgraded printer, fax, copier and scanner. Management will comply with the ADA, the Rehabilitation Act of 1973, E.O. 13164, HUD’s AEP/AE/Diversity Policy, the HUD Agreement, past practice, etc. The Employer’s proposals, besides claiming tentative agreement with the Union on various issues, includes enhancing the work environment at the temporary “swing space” by leasing desks and privacy panels, installing telephone outlets in each area, installing security card reader systems, having the space painted and carpet cleaned prior to relocation, installing a copier and fax machine, and providing a “break area” in the swing space. Initially there were 26 Union proposals concerning the Employer’s decision to temporarily relocate and renovate the New Orleans HUD office. Mediation was held in October 2007, where the parties appear to have agreed on 14 of the issues addressed by the Union’s proposals. The Employer alleges, and the Union denies, that the parties reached a tentative agreement on separate union proposals. The Panel directed the parties to a mediation-arbitration proceeding and a proceeding was held. After considering the entire record, the Arbitrator concluded that the dispute should be resolved on the basis of the Employer’s final offer. The final offer addresses the Union’s concerns regarding the temporary relocation of unit employees and with respect to renovations at the Hale Boggs Federal Building. The Union’s proposals primarily involve the enforcement of its contractual agreements, a matter that is more appropriately raised in other forums.

08 FSIP 9  
February 29, 2008

[Environmental Protection Agency, Region 10, Oregon Operations Office, Portland, OR and Local 1110, AFGE.](#) The Union requested impasse assistance from the Panel arising out of bargaining over an office relocation. The parties disagree over: 1) whether employees should have private offices or cubicles; 2) the size of office areas; 3) whether natural light has been maximized in the new office; 4) the effect of pillars in the employee work space; and (5) modifying existing employee work areas.

The Employer’s position considers making adjustments to employees’ cubicle areas on a case-by-case basis. This would include systems furniture configurations, task lighting and storage options. The Employer maintains that current EPA policy concerning office space mandates cubicles for employees rather than private office space. If employees believe they need more privacy for work-related reasons, they can use the conference rooms or the team room for that purpose. The Employer additionally argues that all other working conditions in the new office should be status quo and the Union’s proposals rejected.

The Union’s final offer includes the proposal that the Director’s office be designed to maximize natural light; that seven private offices and one semi-private office be established for employees and the rest as cubicles; that private offices and cubicles be 135 sq. ft. in size, that private offices and cubicles be designed to maximize natural lighting; five cubicles with pillars be expanded and redesigned due to loss of space; vacant cubicle number 5 be allocated to two employees as additional space. The Union additionally maintains that there is a past practice for certain employees to have private offices because of the confidential nature of the employees’ work and should be continued. The new office space is larger than the old office, so there is ample room to implement the 135 sq. ft proposal for the offices. The impact of large pillars should be eliminated, since it is difficult to place large furniture in such a space.

The Panel referred the parties to mediation-arbitration and a hearing was held. After considering the entire record, the Arbitrator concluded the dispute should be settled in favor of the Employer’s final offer. Currently EPA is implementing floor plans that favor cubicles rather than private offices. Further, the office as contemplated would have to undergo major renovations if the 135 sq. ft. proposal was implemented and the space redesigned to minimize the effect of pillars. The Arbitrator

was reluctant to order such a costly resolution where employees appear to have sufficient space to perform their jobs. Further, the Employer has already taken steps to enhance natural lighting by placing a clerestory in the exterior wall of the Director's office and by ensuring that the majority of cubicles have windows.

### MERIT SYSTEMS PROTECTION BOARD DECISIONS

DA-0752-07-0331-  
I-1  
2008 MSPB 35  
February 20, 2008

*Tryon v USPS* The Board granted the appellant's petition for review of an initial decision sustaining his removal. The appellant was a letter carrier who was removed for "unacceptable conduct of touching a postal customer in an inappropriate manner and making inappropriate comments, some containing sexual innuendos." The AJ decided the customer lacked credibility in her testimony concerning the appellant kissing her and making inappropriate remarks. Nevertheless, the AJ held the agency proved its charge of unacceptable conduct because the appellant admitted hugging the customer. The AJ found hugging any customer is inappropriate behavior for a mail carrier. In concluding the agency's penalty was appropriate, the AJ relied on the fact the agency had proposed the appellant's removal in the past for similar misconduct. On review, the Board agreed with the AJ's finding on the charge but disagreed with her decision on the penalty because the more serious allegations of kissing the customer and making inappropriate comments were not sustained, and it was clear error for the AJ and the deciding official to consider the prior proposed removal. The Board determined any proposed actions which were either withdrawn or never finalized cannot be relied upon as they do not constitute prior discipline. The Board stated since the AJ only sustained one instance of hugging a customer, removal of an employee with 45 years of unblemished federal service exceeds the bounds of reasonableness. Accordingly, the Board determined a 60-day suspension was the maximum reasonable penalty for the sustained misconduct.

DA-0752-07-0263-  
I-1  
2008 MSPB 37  
February 28, 2008

*McCoy v. United States Postal Service* The Board granted the appellant's petition for review of an initial decision dismissing his appeal as untimely filed. The employee was removed and filed an MSPB appeal, but he withdrew his appeal prior to a hearing, and the AJ dismissed the case as withdrawn. Over a year later the appellant filed an MSPB appeal again challenging his removal, asserting disparate treatment. The AJ dismissed the new appeal as untimely. On review, the Board noted the appellant had filed a formal complaint of discrimination several months after his removal, the agency did not dismiss the complaint as untimely, and the appellant had not received a final agency decision on his complaint. The Board found his new appeal was timely because § 5 C.F.R. 1201.154(b)(2) provides "If the agency has not resolved the matter or issued a final decision on the formal complaint within 120 days, the appellant may appeal the matter directly to the Board at any time after the expiration of 120 calendar days." The Board further decided the appellant could not have made an informed election of either a mixed-case complaint or mixed-case appeal at the time he filed his initial MSPB appeal because the removal decision letter did not provide notice of a choice, and the facts underlying the basis of his discrimination claim had not yet come into existence. (Note: The Board addressed several factors in the decision unique to the Postal Service: 1-The election between a grievance and Board appeal set out in § 5 U.S.C. 7121(d) do not apply to the Postal Service; 2-The Board lacks jurisdiction to review arbitration awards pertaining to preference-eligible Postal Service employees; and 3-The Board has long applied the collateral estoppel doctrine to Postal Service arbitration awards and directed the AJ to address the application of collateral estoppel on remand.)

AT-0351-07-0401-  
I-1  
2008 MSPB 38  
February 29, 2008

*Garofalo v. Department of Homeland Security* The Board granted the appellant's petition for review and remanded the appeal in a reduction in force (RIF) case. The appellant was an excepted employee who was separated by the Transportation Security Administration (TSA) resulting from the agency's workforce reduction procedures. The appellant's late appeal was accepted as timely because the agency failed to notify him of his Board appeal rights. The AJ denied the appellant an opportunity to present evidence concerning the observations, reasoning, and conclusions reached during in-person interviews conducted as part of the workforce reduction process. The AJ also

denied a request for an interlocutory appeal on the argument. After holding a hearing, the AJ issued a decision affirming the appellant's separation. On review, the Board noted the agency had the statutory authority to modify RIF procedures applicable to its excepted service employees. The majority found the AJ abused his discretion by denying the appellant's request to call the interview panel members as witnesses whose testimony allegedly would have cast doubt upon the agency's proffered reason for its action. The majority stated if the appellant could show the scoring of the structured interviews was arbitrary or irrational, he could establish the agency committed a clear abuse of discretion. The case was therefore remanded for the appellant to have the opportunity to question the panel members. The decision further ordered if the panel members are unable to articulate a rational basis for its interview scores, the AJ should determine whether that fact alters his analysis of the appellant's affirmative defenses of discrimination and retaliation. Chairman McPhie issued a dissenting opinion agreeing with the AJ that allowing the appellant to delve into the thought processes of the panel members and requiring them to explain their reasoning, goes beyond the scope of the Board's review.

SF-0752-04-0058-  
X-1  
2008 MSPB 42  
March 4, 2008

*Caston v. Department of Interior* The Board denied the appellant's petition for enforcement. The appellant had been removed by the agency, filed an MSPB appeal, and the parties resolved the case through settlement. The appellant later filed a petition for enforcement alleging the agency disclosed documents it agreed through settlement to destroy. The agency argued the appellant breached the agreement first by initiating EEO proceedings in violation of his promise not to bring further actions concerning the subject matter of his removal appeal. The AJ determined the agency's failure to file its own petition for enforcement precluded consideration of the appellant's breach. The AJ then found the agency committed a material breach and recommended rescinding the settlement and reinstating the appellant's initial MSPB appeal. On review, the Board found the AJ was in error in not considering the agency's argument the appellant first breached the settlement. The Board cited *Thomas v. Department of Housing & Urban Development*, 124 F.3d 1439 (Fed. Cir. 1997), in which the Court held a material breach by one party discharges the other party from a contractual duty to perform what was exchanged for the promise. The Board decided the appellant's breach of the agreement was a material one that discharged the agency from its obligation to perform.

DE-0752-05-0291-  
I-3  
2008 MSPB 40  
March 4, 2008

*Neuman v USPS* The Board granted the agency's petition for review of an initial decision mitigating a postal manager's removal to a demotion. The appellant had been fired with four charges. The AJ deemed one of the charges, appearance of impropriety, as not proved. The charge pertained to the appellant's reassignment of a female employee as his direct report. According to the proposing official, witnesses stated there was an appearance of favoritism and the two had been involved in a relationship for several years. The AJ referred to the deciding official's admission the appellant had not violated any rule or policy in effecting the reporting change, the credible denial of any past affair, and no allegation or evidence of a current affair. The AJ mitigated the removal penalty to a reduction in grade for the single charge he affirmed, failure to follow procedures. On review, the majority found the AJ in essence required the agency to prove a charge it did not bring. The majority stated the agency was not required to prove the appellant engaged in improper conduct to support the charge, and it agreed with the agency the actual charge of appearance of impropriety had been proved. In support of its finding, the majority referred to the appellant's admission he changed the reporting relationship without seeking approval from anyone, despite his awareness of the rumor he and the person had an affair or relationship. Regarding the AJ's penalty determination, the majority found the AJ, in essence, simply weighed the relevant *Douglas* factors differently than did the agency. The majority concluded the deciding official reasonably exercised management discretion, and it held the penalty of removal was within the tolerable limits of reasonableness for the sustained charges. Member Sapin dissented, agreeing with the AJ's reliance on the denial of a past affair and the absence of evidence of a current affair, in finding that rumors alone, without any basis in fact, are not sufficient to establish an appearance of impropriety. Member Sapin also agreed with the AJ's mitigation of the penalty to a reduction in grade, particularly since the infraction was directly linked to the appellant's duties in his current position, and the appellant had a blameless and excellent record for many years before promotion to his current position.

AT-0752-07-0473-  
I-1  
2008 MSPB 46  
March 5, 2008

*Adams v. United States Postal Service* The Board granted the agency's petition for review of an initial decision holding the appellant's resignation was involuntary. The appellant, a postal carrier, was observed throwing away mail by postal inspectors and subsequently resigned for personal reasons. Shortly thereafter he was diagnosed with a brain tumor and had surgery to remove it. He asked to rescind his resignation, and his doctor wrote letters stating the tumor caused the appellant's bizarre behavior and throwing out mail was a behavior typical for people with tumors in the same location. In the initial decision, the AJ found the appellant had proved his brain tumor seriously impaired his capacity to make a rational decision to resign. On review, the majority concluded a postal doctor's opinion was entitled to greater weight than the conclusions of the appellant's doctor. The postal doctor reasoned: 1) The appellant's act of discarding only advertising mail, as opposed to first class or other mail, was an indication of rational thinking because the absence of advertising mail would be less likely to be reported by customers; 2) There was no indication the appellant's thinking was impaired during an investigative interview; 3) With respect to the resignation, the appellant came to the post office voluntarily and without assistance, engaged in a lucid conversation with his supervisor and listed a reason for his resignation that would not provoke suspicion from potential future employers; 4) The appellant was permitted to sign a surgical consent form before undergoing surgery, without his doctor or anyone else questioning his mental capacity. The majority stated the opinion of the appellant's doctor, on the other hand, was conclusory and lacked any explanation for why he believed the appellant was mentally incompetent at the time of his resignation. The majority therefore held the appellant failed to prove his resignation was involuntary and dismissed the appeal for lack of jurisdiction. Member Sapin dissented, arguing the AJ properly gave more weight to the opinion of the appellant's doctor because the postal doctor did not examine the appellant, was not a neurosurgeon with expertise in the effects of a brain tumor, and was not fully familiar with the appellant's treatment from diagnosis to cure.

DE-3443-07-0165-  
I-1  
DE-3443-06-0300-  
R-1  
2008 MSPB 55  
March 7, 2008

*Grandberry v. Department of Homeland Security* In a split decision the Board reversed the initial decision in part, vacated in part, and remanded in part. The appellant was on active military duty when the agency issued a competitive vacancy announcement. When the appellant was not included on the agency certificates listing those eligible, he filed a complaint with the Department of Labor and subsequently filed an MSPB appeal. The AJ construed the appeal as raising both VEOA and USERRA claims and determined the agency had not violated USERRA but had violated appellant's rights as a preference eligible under 5 C.F.R. § 332.312 by not permitting the appellant to file a late application for the position. The majority reversed the VEOA claim, finding § 5 C.F.R. 332.312 grants rights based on military service rather than preference eligibility. The majority remanded the case for further adjudication under USERRA because the AJ did not address the appellant's rights as a returning veteran under § 38 USC 4313. Chairman McPhie issued a dissenting opinion, arguing the majority extended the statute to an affirmative agency duty to consider employees absent on military duty for competitive promotions and reassignments irrespective of whether the employee is qualified or has taken an examination for the position. The Chairman argued the majority finding was not only "incorrect as a matter of law, the burden it places on the federal employer is unworkable."

#### NOTEWORTHY COURT DECISIONS

Fed. Cir. No.  
2007-3046  
February 26, 2008

*Baird v. Department of the Army* The Court vacated the Board's final decision sustaining the appellant's removal from her psychiatric nursing assistant position. The appellant had been removed for failing a random drug test. She asserted the proposing and deciding officials were "mere puppets" of the Commander, who had given direction to draft a proposed removal letter. On the day before the MSPB hearing, the appellant's counsel interviewed the agency's Deputy Commander, showing him an email message stating the Commander had made a decision on

what action to take against the appellant. The Deputy Commander volunteered he regularly archived such messages in his computer. At the hearing, the appellant's counsel asked for access to the archived email messages, the agency objected to "discovery in the middle of the trial," and the AJ sustained the agency's objection. The AJ affirmed the removal, the initial decision became final when the appellant did not petition the Board, and the appellant then appealed to the Federal Circuit Court. On review, the Court stated the record demonstrated clearly the agency did not comply with discovery requests to deliver all pertinent email messages. The Court found the AJ abused his discretion in refusing to compel discovery of the Deputy Commander's email messages. The Court therefore remanded the case, ordering the Board to enforce full compliance with the discovery request. The Court instructed the Board is free to affirm the removal if no further support for the appellant's theory of the case is found after compliance by the agency, but if the discovery request produces additional support for the appellant's theory the Commander made the decision to remove her, thereby depriving the deciding official her role and rendering unnecessary any meaningful review of the *Douglas* factors, the appellant shall be entitled to a further hearing. Judge Rader issued a dissent, arguing the AJ had good reason to refuse to revisit his rulings on discovery in the midst of a hearing that already featured the Deputy Commander's testimony and availability for examination and cross-examination and, by labeling this routine evidentiary call as an abuse of discretion, the Court will only force the appellant and the government to expend further resources on remand to reach the same result.

Fed. Cir. No.  
2007-3167  
March 3, 2008

*Johnston v. Merit Systems Protection Board* The Court reversed and remanded the Board's dismissal of an MSPB appeal for lack of jurisdiction in a whistle-blower reprisal case. The appellant filed an appeal alleging reprisal for disclosures protected under the Whistleblower Protection Act of 1989 (WPA). The AJ dismissed the appeal for lack of jurisdiction, finding her disclosures did not identify a substantial and specific threat to public safety and therefore were not protected by the WPA. The Board denied the appellant's petition for review and she subsequently appealed to the Court. The Court concluded the Board erroneously conflated the requirements for establishing jurisdiction with those required to prevail on the merits of a WPA claim. The Court stated there is a fundamental distinction between the requirements necessary to prevail on the merits of a WPA claim and those sufficient to establish board jurisdiction. To prevail on the merits, an employee must establish a protected disclosure was a contributing factor in an adverse personnel action by a preponderance of the evidence. But to establish MSPB jurisdiction, the employee's burden is significantly lower; an employee need only establish by nonfrivolous allegations a protected disclosure that was a contributing factor to the personnel action taken or proposed. The Court found appellant's detailed and facially well-supported disclosures to her supervisors and the agency's Office of Inspector General, and her claim of retaliation by changing her work duties and issuing a counseling memorandum, were sufficient to support Board jurisdiction.