United States
Office of
Personnel Management

Washington, DC 20415-2001

In Reply To: **Your reference:**

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DATE: June 17, 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 1115

FEDERAL LABOR RELATIONS AUTHORITY DECISIONS

62 FLRA No. 64;
62 FLRA 354
0-AR-4032
February 15, 2008

AFGE Local 1917 and United States Department of Homeland Security, CIS, New York District. The Arbitrator declared not arbitrable a grievance alleging the agency had terminated the grievant's term appointment, which had been extended by a Section Chief of the agency prior to its expiration. The agency had the authority to extend the appointment to September 2006, and in January 2005 the grievant's Section Chief e-mailed the grievant that her term appointment was extended through September 2006. The Arbitrator determined, however, that only the District Director had authority to extend the grievant's term appointment and therefore the grievant's term of employment ended in March 2005. In determining whether the agency was equitably estopped from enforcing the March 2005 expiration of the term appointment, the Arbitrator concluded the government cannot be bound by the representation of an agent who does not have actual authority. The Union argued the Arbitrator's award is not in accordance with law, in that the precedent relied on by the Arbitrator was in error and relying on case law, argued that the government can be held liable for the actions of an agent with implied authority. After reviewing the relevant precedent, the Authority rejected the union's argument and held equitable estoppel is not available to employees who rely on erroneous information from government officials. The Authority noted the Union pointed to nothing in the award or the record supporting a conclusion that the Section Chief had *any* authority to extend the grievant's term appointment. The Authority denied the Union's exception.

62 FLRA No. 65;
62 FLRA 356
0-AR-4054
March 5, 2008

FDIC and NTEU, CHAPTER 273. The Arbitrator determined that the grievant was entitled to a Corporate Success Award (CSA). The parties had agreed the agency would award CSAs to "top contributors" and that such awards would be distributed in "a fair and equitable manner." In deciding the issue, the Arbitrator noted that when making nominations for a CSA, supervisors are required to prepare the CSA and "prioritize and assign a numerical ranking." Those rankings are forwarded to higher level officials (e.g.,regional supervisors) in the Agency. The grievant's immediate supervisor met with four regional supervisors when making initial determinations as to what rankings to give the grievant. The Arbitrator determined that the supervisors engaged in determination of employee rankings although they had not completed the CSA nomination forms. The Arbitrator found the Agency failed to follow the CSA process. She also found the grievant was entitled to a CSA because she had greater accomplishments than another employee who received a CSA. She directed the Agency to award the grievant a 2003 CSA and a 3 percent retroactive salary increase from that date. The Agency filed an exception, claiming the award was deficient for failure

to draw its essence from the parties' agreements and because the Arbitrator exceeded her authority. With regard to the first exception, the Agency claims the Arbitrator improperly relied upon the internal management memo in finding the Agency failed to properly apply the CSA process and argued the Arbitrator's remedy itself violates the terms of the parties' Compensation Agreement. The Authority denied the exception because the term "fair and equitable" is not defined in the parties' agreements and the Agency provided no basis to show the Arbitrator's conclusion was deficient. The Agency's argument that the cap as stipulated in the Compensation Agreement cannot be breached also failed because the Compensation Agreement provided a minimum percentage; not a maximum, as argued by the Agency.

62 FLRA No. 66;
62 FLRA 360
0-AR-4063
March 18, 2008

Department of Homeland Security, CBP Queens, New York, and AFGE Local 1917. The Arbitrator found the Agency violated the parties' collective bargaining agreement by failing to notify the union of an increase in parking rates at its JFK Airport facility. In 2004, the Port Authority increased rates for CBP officers at the JFK Airport. After the fees were raised, the Union filed a grievance claiming the CBP violated Article 9(A) of the 2000 collective bargaining agreement. Further, the union claimed the "rate increase was a mandatory subject of bargaining." The Agency argued it was not bound by the 2000 agreement because it was not a party to the agreement, and also asserted the Union did not meet its burden of proving the Agency failed to give notice pursuant to Article 9(A). In this regard, the collective bargaining agreement predated the formation of the Department of Homeland Security in which the formation of CBP occurred. The Arbitrator found the 2000 Agreement did govern the matter because in a previous but unrelated arbitration hearing he heard evidence and testimony that a management memorandum showed all existing collective bargaining agreements and related documents executed before 2003 were still considered active. The Agency argued before the Authority that the Arbitrator denied it a fair hearing by relying on testimony outside the record in finding the Agency was bound by the 2000 Agreement. The Authority agreed. An award will be found deficient when it is demonstrated that the arbitrator refused to hear or consider pertinent and material evidence, or that other actions in conducting the proceeding so prejudiced a party as to affect the fairness of the proceeding as a whole. There was no dispute that the evidence the Arbitrator relied on was not presented at the hearing in this case. It also was undisputed that the Agency had no opportunity to contest the evidence before the Arbitrator rendered his award. The Arbitrator thus prejudiced the Agency in a manner that affected the fairness of the proceeding. The Authority vacated the award and remanded to the parties for resubmission to the Arbitrator to address those issues.

62 FLRA No. 67;
62 FLRA 364
0-AR-4095
March 27, 2008

USDA and AFGE, National Joint Council of Food Inspection Locals. The Arbitrator held the Agency violated the parties' agreement and § 7116(a)(5) of the Statute. The Agency unilaterally terminated a past practice that permitted Union officials to perform representation duties on official time at their home offices. The Arbitrator ordered the Agency to restore the past practice and compensate any Union officials who used annual leave or leave without pay as a result of the Agency's actions. The instant case arose as a result of the Authority's decision in *AFGE National Council of HUD Locals 222*, AFL-CIO, 60 FLRA 311 (2004) (*HUD)*. There the Authority held that the law authorizing agencies to establish telecommuting policies for employees applies only to "officially assigned duties" and does not apply to representation duties performed on official time. Based on the *HUD* decision, the Agency concluded that its practice of permitting union officials to perform representational duties at home on official time was illegal. The Arbitrator concluded the *HUD* decision had no "relevance or applicability to the instant matter." The employees in this case were not performing officially assigned duties but were acting pursuant to an established past practice that predated the telecommuting law by many years. On exception, the Agency argued the Arbitrator erred in this conclusion as the decision in *HUD* provided no statutory basis for allowing employees to use official time in this manner. The Authority denied the Agency's exception, holding the location at which official time is to be exercised is a mandatory subject of bargaining. Further, the telework law does not prohibit union representatives from performing representation duties on official time. As 5 USC 7131(d) authorizes bargaining over all aspects of official time, and the Agency pointed to no law prohibiting union officials from performing representation duties at home, the Authority concluded the Agency's past practice was not contrary to law.

62 FLRA No. 68
62 FLRA 369
0-NG-2887
March 27, 2008

American Federation of Government Employees, Local 1836 and U.S. Department of the Air Force, Eielson Air Force Base, Alaska. In a negotiability case the Authority found a proposal was outside the duty to bargain. The Agency notified the Union that it was revising its policy regarding the use of cell phones because the Code of Federal Regulations had been modified to restrict cell phone usage while operating motor vehicles on federal installations. Specifically, the policy would prohibit use of cell phones while driving on the base, unless using a hands free device. The penalty for violation of the policy would be loss of on-base driving privileges for 30 days. The Union proposed alternate progressive penalties, e.g., a first violation would result in a 7-day suspension of driving privileges. The Union argued that this penalty structure would parallel the penalties for seat belt infractions and would provide a progressive set of penalties. The Agency argued the proposal is outside the duty to bargain because it affects its rights to determine internal security practices under 5 USC 7106(a)(1) and its right to discipline employees under § 7106(a)(2)(A). The Authority dismissed the union's petition for review. That the agency agreed to a similar provision regarding seat belts is no basis to find the proposal within the duty to bargain. Additionally, the Union offered no argument or precedent to dispute the Agency's claim that the proposal affects the exercise of management's rights and offered no support that the proposal constitutes an exception to management rights.

62 FLRA No. 69
62 FLRA 372
0-NG-2847
March 28, 2008

AFGE Local 727 and Court Services and Offender Supervision Agency. The Authority dismissed the petition for review without prejudice. The Agency issued an Operational Instruction which standardized procedures for referring offenders to community services as a sanction. The Instruction noted that community-based sanction activities generally are all day events that take place on Saturdays and that a team of three CSOSA staff would be assigned to each such authorized activity. When the Union learned of the Instruction, it submitted a proposal it intended would not require bargaining unit employees to work on weekends, since past practice shows their normal work schedule has been Monday through Friday. Requiring these employees to work on weekends would affect their personal lives with respect to child care, transportation, other employment, etc. The Agency maintains that the proposal is nonnegotiable as it would restrict management's right to assign work under § 7106(a)(2) of the Statute. The Agency did not file a statement of position. The Union declined to state its legal arguments in its petition for review until after the Agency filed a statement of position. The Authority concluded that the record was insufficient to make a negotiability determination under § 2424.24(a) and 2424.25(a) of the Authority's Regulations. Without the Agency's explanation as to how the proposal affects management's rights to assign work, and the Union's response to that explanation, it is not possible to determine whether the proposal is contrary to law. Where the record is not sufficient to assess the impact of a proposal on management's rights, the Authority has dismissed the petition for review.

62 FLRA No. 70
62 FLRA 375
0-AR-4094
March 31, 2008

AFGE Local 2357, National Joint Council of Food Inspection Locals and USDA, Food Safety and Inspection Service. The Arbitrator denied a grievance where management began operations one hour later than normal for one day. As a consequence of this action, bargaining unit employees' lunch periods were delayed. The Union filed a grievance arguing the Agency's action was contrary to the parties' agreement when management changed the lunch periods. The Arbitrator determined that, under the parties' agreement, employee lunch periods may not occur earlier than four hours after the beginning of scheduled operations or later than five hours after operations begin. The Arbitrator also determined the notice relied on by the Union, which limits midweek changes to inspectors' tours of duty, did not concern the scheduling of inspectors' lunch periods. The Arbitrator found the lunch periods are not part of the inspectors' tour of duty, and concluded the change in lunch break was not a change in the employees' tour of duty. The Arbitrator also rejected the Union's reliance on a previous arbitration award, finding the facts distinguishable from the instant case. On exception, the Union argued the award was contrary to law, the parties' contract, and a previous arbitration award. The Union claims the arbitrator erred in his interpretation of work schedules, schedule of operations and tours of duty. The Authority rejected the union's arguments and concluded the award was not deficient.

62 FLRA No. 71
62 FLRA 378

Department of the Interior, National Park Service, Women's Rights National Historical Park Northeast Region and AFGE, Local 3432. The Arbitrator sustained a grievance in which a park

0-AR-4065
March 31, 2008

ranger was reprimanded for failure to follow instructions and lack of candor when she cancelled the day's scheduled tour due to a staffing shortage. The Arbitrator found that as the highest ranking ranger on duty, the grievant acted within the agency's Standard Operating Procedures (SOP). The Arbitrator further determined the Agency's lack of candor charge was based primarily on the testimony of one ranger who had difficulty recalling the events and was confused. As such, he found no just cause for charging the grievant with lack of candor. The Agency argued the award was premised on "omission of facts," contending the Superintendent was the highest ranking ranger, and there was no staffing shortage on the day in question. The Authority denied the exception finding the agency did not make this argument before the Arbitrator. Thus, in accordance with the Authority's regulations, it will not consider evidence offered by a party, or any issue which was not presented in the proceedings before the arbitrator. *See, e.g., United States Dep't of the Air Force, Air Force Material Command, Robins Air Force Base, Ga.,* 59 FLRA 542, 544 (2003). The Agency next argued the award "disregards" management's right to determine the numbers, types and grades of employees assigned to a tour of duty. Specifically, the agency argued that the grievant precluded management from exercising its rights under 5 USC § 7106(b)(1) when she failed to consult with management regarding the staffing shortage. As such, the arbitrator's award disregarded management's right and does not allow the Agency the authority to properly manage the park by managing the tours of duty. The Authority found the process the grievant was to use under the terms of the SOP was a matter presented and disputed before the Arbitrator. Thus, the Agency has not identified a particular fact that was clearly erroneous, but for which the Arbitrator would have reached a different result.

62 FLRA No. 72 O. 72
62 FLRA 382
0-AR-4023
April 4, 2008

National Treasury Employees Union, Chapter 128 and U.S. Department of Homeland Security, Customs and Border Protection. The Arbitrator denied a grievance where she found a "nexus" between the grievant's failure to pay his debts and his position with the Agency as an auditor. On exception, the Union argued the award was contrary to law because either the Arbitrator relied upon a presumption of a nexus, or because the Arbitrator found an actual nexus without any factual support. The issue before the Authority was whether the Arbitrator's conclusion that there is a nexus between the efficiency of the service and the employee's misconduct is contrary to law. In *NAGE, Local R1-109, 58 FLRA 501, 504* (2003), the Authority determined that "generally, a nexus must be shown between an employee's off-duty misconduct and the efficiency of the service to support disciplinary action based on that misconduct." In this case, the Arbitrator did not rely on a legal presumption, rather, the Arbitrator found a nexus between the grievant's debts and his job, and thus found the misconduct affected management's trust and confidence in the grievant. The Union thus failed to show the award was contrary to law.

FEDERAL SERVICE IMPASSES PANEL DECISIONS

08 FSIP 21 and
08 FSIP 27
April 24, 2008

National Aeronautics and Space Administration Goddard Space Flight Center Wallops Island, Virginia and Local 2755, AFGE, AFL-CIO. The Union and the Employer filed separate requests for impasse assistance with the Panel over the implementation of a five-tier performance appraisal system. Specifically, the parties disagreed over how long to postpone a Performance Improvement Plan (PIP) meeting if an employee elects to have a Union representative present and one is not immediately available.

The Union proposed postponing performance meetings by no more than three workdays to accommodate the securing of a Union representative. The Employer's counter offer proposed postponing performance meetings by no more than one workday to accommodate the securing of a Union representative. However, exceptions may be granted where appropriate.

The Panel adopted the Employer's final offer. The Panel determined PIP-related meetings, among other things, are conducted to discuss with an employee what is needed to improve their performance and should occur without undue delay. The final offer also addressed the Union's concerns regarding difficulty in securing a representative in that it allows flexibility to increase the postponement period.

MERIT SYSTEMS PROTECTION BOARD DECISIONS

DC-1221-07-0640-W-1
2008 MSPB 51
March 6, 2008

Fisher v EPA The Board denied the appellant's petition for review, reopened the case on its own motion, and then upheld the agency's 4-day suspension for offensive and disrespectful conduct. The appellant filed an individual right of action appeal alleging his suspension was reprisal for whistleblowing activities. The AJ dismissed the appeal for lack of jurisdiction, finding the appellant failed to make a non-frivolous allegation of a protected disclosure. The Board categorized the appellant's alleged disclosures over an eight year period as (1) the agency had violated multiple accountability laws and intentionally deceived Congress in the process; (2) heads of various government entities had intentionally provided untested and deficient accounting and financial software standards and processes; and (3) the agency had systematically eliminated all of the other accountants with accounting degrees and replaced them with employees who did not possess the same accounting educational level. The Board determined the last two categories of allegations did not reveal anything more than a questioning of management decisions and expenditures that are merely debatable. However, the Board found the allegations in the first category were sufficient to satisfy the non-frivolous standard for establishing Board jurisdiction. The Board then decided it was most efficient to bypass the issues of whether the appellant proved he engaged in whistleblowing and whether his whistleblowing was a contributing factor in the personnel action at issue, and to proceed to the issue of whether the agency showed by clear and convincing evidence that it would have taken the same action absent the purported whistleblowing activity. After reviewing the evidence, the Board found the appellant was not entitled to corrective action because the agency provided clear and convincing evidence it would have taken the same personnel action absent the appellant's disclosures.

PH-3443-07-0469-I-1
2008 MSPB 60
March 14, 2008

Haasz v. Department of Veterans Affairs The Board denied the appellant's petition for review in a VEOA case but reopened on its own motion, denying the appellant's claim on its merits. The appellant, a 5-point preference eligible, applied for a merit promotion vacancy and was found qualified. He was interviewed, but the agency then closed the vacancy announcement without making a selection and posted a new announcement open to outside candidates. The appellant did not apply under the new vacancy announcement and was therefore not selected. He filed an appeal, and the AJ dismissed the appeal without a hearing. According to the board, the precise grounds for the AJ's dismissal were unclear. The Board noted the AJ's decision concluded by stating that the appeal was dismissed for failure to state a claim, but the first paragraph indicated a hearing was not held because the appellant "failed to allege a non-frivolous basis for the [Board] having jurisdiction over this matter." The Board, citing *Cruz v. Department of Homeland Security*, 98 M.S.P.R. 492 (2005), indicated an appellant need not state a claim upon which relief can be granted for the Board to have jurisdiction over a VEOA claim. The Board therefore found the appeal was within the Board's jurisdiction. However, the Board determined the appellant was not entitled to relief under VEOA since veteran's preference does not apply to in-service placement actions such as promotions.

DC-0752-07-0729-I-1
2008 MSPB 61
March 14, 2008

White v. Government Printing Office The Board affirmed in part and vacated in part the initial decision upholding the agency's action. The agency both demoted the appellant and suspended him for 14 days for allowing two people to enter and remain in the lobby of a secure agency building without verifying they had the required identity badges and without examining visually or by x-ray a bag one of them carried. The Board took issue with the AJ's denial of a motion to compel discovery filed by the appellant. The appellant had timely filed his initial discovery request seeking disciplinary records of other agency police officers for the purposes of proving his affirmative defense of race discrimination. The 20-day period expired in which the agency was required to respond, and the appellant then filed a motion to compel within the prescribed ten days, according to § 5 CFR § 1201.73 (d)(4). However, the AJ denied the motion to compel because the motion had been filed after the deadline date she had set for the completion of discovery. The Board found the AJ erred by setting such a restrictive deadline, effectively denying the appellant an opportunity to contest any of the agency's objections, file a motion to compel, or follow up with requests for further discoverable material based upon the agency's initial response. The Board therefore vacated

the initial decision with regard to the appellant's affirmative defense of race discrimination and the penalty. It affirmed the remainder of the initial decision and remanded the appeal, ordering the appellant be allowed to complete discovery on his race discrimination claim.
It further ordered the AJ to issue a new initial decision addressing the discrimination claim and, if discrimination is not proved, to incorporate her prior findings with regard to the penalty.

SF-0752-06-0805-I-2
2008 MSPB 73
March 28, 2008

Slater v. Department of Homeland Security The Board granted the agency's petition for review and affirmed the initial decision as modified. The appellant was removed from his position for inability to perform the duties of his position. The initial decision found the agency failed to meet its burden of establishing a nexus between the appellant's medical condition and observed deficiencies in his performance or conduct, or "a high probability of hazard" when his condition may result in injury to him or others because of the kind of work he does. The agency filed a petition for review, arguing the AJ's application of the high probability of hazard standard set forth in *Owens v. Department of the Air Force*, 8 MSPR 580 (1981) was changed in 1981 when OPM issued new regulations. Therefore, the standard promulgated by OPM in its current regulations is the proper one: to justify disqualification based upon a medical condition alone, the agency must show that the condition itself is disqualifying, its recurrence cannot be ruled out, and the duties of the position are such that a recurrence would pose a reasonable probability of substantial harm. The Board then applied the correct legal standard to the present case and found, given the inconsistent medical reports and absence of direct testimony by any examining doctor, the agency did not meet its burden of proving the appropriate standard. The Board ordered the agency to cancel the removal and retroactively restore the appellant.

NY-0752-03-0330-X-2
2008 MSPB 77
March 31, 2008

Henry v DVA The Board dismissed as moot the appellant's petition for enforcement of an initial decision in which an AJ found the agency in noncompliance of a final Board order. The appellant had been removed for being unable to perform an essential function of her position. On appeal, the AJ found the appellant had a legitimate disability and the disability was the reason for her removal. The AJ ordered the agency to cancel the removal, restore the appellant effective the date of the removal, and reasonably accommodate the appellant' disability in her program support clerk position or reassign her to a position not involving heavy lifting. Several compliance proceedings followed, involving adjudication of whether various proposed modifications to the program support clerk position and proposed reassignments to other positions would constitute reasonable accommodations or would impose an undue hardship on the agency. The appellant asserted in her petition for enforcement the reassignment did not constitute compliance because the agency failed to reasonably accommodate her in her prior position and division. The board found the record did not show the appellant could be accommodated in her former position and division because a filing system proposed by the appellant would impose an undue hardship on the agency. The Board determined the agency, in accordance with its previous order, had accommodated the appellant by reassigning her to a position that did not involve heavy filing. The Board also found the appellant's allegation regarding the agency's failure to engage in an interactive process does not overcome the mootness of this compliance action, and it opined the AJ in her limited scope of reviewing compliance should not have revisited the merits of the alleged failure to engage in the interactive process. Finally, the Board decided the appellant's claim for compensatory damages, raised at the compliance stage, did not overcome the mootness of this compliance action. At no point had the Board ordered compensatory damages in the case.

PH-0752-07-0579-I-1
2008 MSPB 79
April 3, 2008

Cirella v. Department of Treasury The Board denied the appellant's petition for review of the AJ's initial decision, granted her request for review of an arbitration decision, and sustained the arbitrator's decision. The employee was removed from her position as an IRS Bankruptcy Specialist after threatening in a billing dispute to have the IRS audit the other party. The appellant elected to pursue the removal action through the negotiated grievance procedure instead of filing a Board appeal. However, after an arbitrator issued a decision sustaining the removal, the appellant filed an MSPB appeal that went to a regional AJ, requesting a "de novo review" as well as a review of the arbitrator's decision. The AJ found the appellant had failed to raise a non-frivolous allegation that her request for a de novo review of her removal is within the Board's jurisdiction, and her election precluded a Board appeal. The AJ acknowledged the appellant also requested review of the

arbitrator's decision but found the request should have been submitted to the Board. The appellant then filed a petition for review and request for review, arguing the arbitrator's decision as a "clueless wrongful decision," and "all wrong," including the facts and credibility determinations. The Board denied the petition for review, finding the appellant simply made vague allegations, unsupported by specific references to the record. The Board determined the arbitrator did not commit any legal error to warrant modifying or setting aside the decision.

DC-0752-07-0231-I-1
2008 MSPB 88
April 10, 2008

Durden v. Department of Homeland Security The Board reversed the agency's removal of the appellant for inability to perform the duties of her position. The Initial decision affirmed the appellant's removal, finding the agency proved its charge, the appellant failed to establish her affirmative defenses of harmful error, discrimination, and reprisal, and the penalty did not exceed the bounds of reasonableness. In her petition for review the appellant argued the agency committed disability discrimination by failing to engage in the interactive process to find her a reasonable accommodation, and that she was a victim of sex discrimination because she was disparately treated concerning her request for light-duty. The Board indicated the AJ correctly noted several differences between the appellant and the male employee: the male only had knee surgery while the appellant had both neck and knee surgery, and the male had not informed the agency he could no longer work as an aircraft mechanic while the appellant had done so. However, the Board determined the AJ erred in finding the two employees were not similarly situated since both were physically incapable of performing some of the essential functions of the aircraft mechanic position. The agency allowed the male employee to work light-duty for an indefinite period of time until he eventually found a position with less demanding physical requirements, but the appellant, was forced to document her physical condition and was then removed. The Board therefore found disparate treatment in the agency's handling of light-duty. It further decided the appellant's removal was motivated by discrimination against her on the basis of her sex, and determined the agency's stated reason for removal, physical inability to perform the duties of the Aircraft Mechanic position, was pretext. The agency failed to remove a similarly situated male aircraft mechanic even though its stated reason for the appellant's removal applied equally to the male employee. The Board ordered the agency to cancel its action and to restore the employee with appropriate back pay, interests, and benefits due.

AT-3443-07-0016-I-2
2008 MSPB 81
April 4, 2008

Erickson v. United States Postal Service The Board modified the initial decision in a USERRA case. In 2000, the agency removed the appellant for continued absence on military leave. He had been absent all but two days of the previous three years. He initially enlisted with the Florida Army National Guard for three years in December 1990 and at the time of his removal, was serving under his fifth consecutive voluntary re-enlistment. He completed his military service on December 31, 2005. The initial MSPB decision found the agency violated USERRA by removing the appellant, but denied him relief because he had waived his reemployment rights under USERRA by abandoning civilian employment for his military career. The appellant filed a petition for review and the agency filed a cross petition. The Board analyzed the appellant's appeal as two separate USERRA claims: 1) he alleged the agency's removal action in April 2000 amounted to discrimination on the grounds of his military service, and 2) he alleged, since he ended full-time military service in December 2005, the agency had refused to reemploy him in violation of his USERRA reemployment rights. The agency expressly stated in its removal notices the basis for its action was the appellant's continuing absence on military leave. The Board declared although on its face this appears to be direct evidence the appellant's military service was a motivating factor, the removal notice made clear the real reason for the appellant's removal was his absence, regardless of its cause. The Board therefore determined the appellant failed to meet his burden of a USERRA violation in the removal action. The Board further determined there was no evidence in the record the appellant submitted a reemployment application and even if he had, he was not entitled to reemployment rights because his cumulative absence from civilian service exceeded the five year limit in USERRA.

AT-0752-07-0820-I-1
2008 MSPB 90

Drain v. Department of Justice The Board granted the agency's petition for review, reversed the initial decision, and sustained the agency's action in an indefinite suspension case. The agency indefinitely suspended the appellant in July 2006 based upon a pending investigation into

April 11, 2008

allegations that the appellant committed a crime by introducing contraband into the prison complex. The agency indicated the action would remain in effect pending disposition of any criminal charges against the appellant, or until there was sufficient evidence to either return her to duty or to support a subsequent administrative action that may be warranted. In May 2007, the appellant requested the agency end the suspension and return her to work, but the agency denied her request. She filed an MSPB appeal arguing she had never been charged or indicted for introducing contraband into the prison facility and the alternative condition subsequent, the agency's determination to return the appellant to duty or take an administrative action, was improper because it was connected to the resolution of nonexistent criminal charges. The administrative judge framed the issue as whether the continuation of the indefinite suspension was proper. The AJ concluded it was not because it had lasted a year, and ordered the agency to cancel the action and restore the appellant to duty. On petition for review, the Board found the indefinite suspension was proper when effected because it had an ascertainable end. As to its continuation, the Board found no support for the AJ's conclusion the passage of one year, by itself, renders an otherwise properly effected indefinite suspension improper. The Board referred to evidence of record that the agency's Office of Inspector General was conducting an ongoing criminal investigation into the appellant's alleged introduction of contraband. The Board further referred to new evidence submitted by the agency in its petition for review showing a grand jury indicted the appellant on November 28, 2007, for two counts of violating federal law by introducing contraband into the prison facility. As of January 24, 2008, the criminal matters had not been finally resolved. The Board held because the condition subsequent had not yet occurred, the continuation of the indefinite suspension was proper. In light of this conclusion, the Board found it need not address the question of the appropriate date upon which the suspension should be deemed to have ended.

NOTEWORTHY COURT DECISIONS

Fed.Cir. No. 2007-3200
April 11, 2008

Rice v. Merit Systems Protection Board and Department of the Navy The Court affirmed the Board's dismissal of the petitioner's appeal of her removal from her excepted service position. The appellant had been removed from the Naval Intelligence Processing System, a predecessor of the Office of Naval Intelligence, for adulterating a urinalysis sample. The appellant raised the following arguments in her court appeal: 1) the Office of Naval Intelligence does not qualify as an intelligence component of the Department of Defense under 5 U.S.C. § 7511(b)(8), so she was therefore not excluded from the definition of an "employee" for purposes of adverse action appeals; and 2) she was not given sufficient notice at the time she accepted the appointment to the Naval Intelligence Command that she would no longer have the right to appeal to the Board from any adverse action. The Court held 5 U.S.C. § 2302(a)(2)(C)(ii) assigns to the President or his delegate the task to decide a particular agency has as its principal function foreign intelligence or counterintelligence activities, and the appellant's agency had been so designated. The Court also concluded the Board's decisions require an employing agency to expressly advise the employee regarding the loss of tenure and Board appeal rights attendant to that change. The latter was not done in the case of the petitioner. Stating it need not decide whether it would adopt the rule set forth in the Board's cases, the Court affirmed the Board's jurisdictional ruling on a different ground. The Court determined it was the petitioner's status as a non-preference eligible employee of an intelligence component of the Department of Defense that barred her from having Board appeal rights, and any failure to give the petitioner explicit notice "is insignificant in light of the amendments." The Court found the Board correctly ruled it did not have jurisdiction over the petitioner's appeal.

Fed. Cir. 2007-3261
April 29, 2008

Leatherbury v. Department of the Army The Court reversed and remanded the Board's final decision upholding the agency's removal of the appellant from his position with the agency. The appellant, an agency employee for 29 years with no prior discipline, was removed from his position for allegedly filing false overtime claims and for filing and approving false travel reimbursement claims. The AJ sustained only one of the four agency charges finding the appellant lacked the requisite intent for the other three charges, and mitigated the penalty to a written reprimand. The agency petitioned for review and the Board reversed the AJ, sustaining three of the charges and reinstating the removal penalty imposed by the agency. The Court

reversed and remanded the Board decision concluding that one of the charges sustained by the Board was not supported by substantial evidence and finding the Board failed to give the AJ's credibility determination deference when the Board improperly overturned the AJ on the other charge. The Court reinstated the mitigated penalty of a written reprimand.