



United States
Office of
Personnel Management

Washington, DC 20415-2001

In Reply To:

Your reference:

DATE:

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 1116

FEDERAL LABOR RELATIONS AUTHORITY DECISIONS

62 FLRA No. 73;
62 FLRA 385
0-AR-4166
April 30, 2008

[Dept. of Transportation, FAA and NATCA.](#) The Arbitrator declared that the grievants were entitled to interest on the payment of night differential and holiday pay for time spent on military duty. The grievants were also entitled to Sunday premium pay for time spent on military duty. The parties had agreed, through settlement agreements, that employees who served on military duty would be awarded back pay for unpaid night differential and holiday pay. The Arbitrator examined the Back Pay Act, various articles of the parties' Agreement and public laws regarding appropriations of the Department of Transportation and related agencies. She also reviewed a previous Authority case on which the Agency relied; ultimately finding for the grievants. On exception, the Agency argued the award of interest on backpay is barred by the doctrine of sovereign immunity. The Agency also argued the award of Sunday premium pay is contrary to law, since Congress has specifically prohibited payment of such premium to employees not working Sundays. The Union countered that the Agency adopted a backpay entitlement in its personnel system as well as provisions in the collective bargaining agreement. The Arbitrator's finding that the grievants were working for the government agrees with both the DOT Appropriations Act and the Military Leave Act. In its analysis, the Authority found the award of Sunday premium pay contrary to law. The Arbitrator's reliance on the requirement of the MLA that leave be granted without loss in pay does not support the award. In *FAA I*, 54 FLRA at 589, the Authority determined that the appropriations limitation applies not only to sick and annual leave, but to continuation of pay status as a result of a workplace accident; thus this language by its terms does not allow an exception to its coverage. Further, the legislative history shows that the actual performance of work is necessary for any payment of Sunday premium pay. The award of Sunday premium pay was struck from the award.

62 FLRA No. 74;
62 FLRA 391
0-AR-4081
May 6, 2008

[Bremerton Metal Trades Council and Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington.](#) The Agency revoked the grievant's security clearance. As a result he became ineligible to work in his position. The Agency proposed to terminate the grievant, but instead agreed to place him on indefinite suspension pending his appeal of the security clearance revocation. While serving the suspension, the grievant requested sick leave under the FMLA. The Agency rejected the request and the grievant filed a grievance that went unresolved and was submitted to arbitration. The Arbitrator agreed that an employee is entitled to FMLA leave where the employee is unable to work because of a "serious health condition." The Arbitrator found here the employee was unable to work "because he no longer had the required security clearance." The fact that "the grievant incurred a serious heart condition after he was suspended does not alter ... the fundamental reason for him being off work was a security clearance revocation." The Arbitrator denied the grievance. The Union argued before the Authority that the grievant was denied his rights under the FMLA because the arbitrator misinterpreted 5 C.F.R. § 630.1208(k). The Union

maintained that the grievant was not on indefinite suspension for disciplinary reasons, but rather, the grievant's security clearance was removed for national security interests. Thus, the grievant was not precluded from entitlement to leave under the FMLA. Further, the Union argued that even if the grievant's loss of a security clearance is a performance or adverse action, he would still be entitled to FMLA leave under 5 C.F.R. § 630.1208(k). The Authority determined that the award is not contrary to the FMLA. Nothing in 5 C.F.R. §630.1208(k) requires an Agency to grant FMLA leave in circumstances where such leave is not appropriate. Here, whether the grievant's suspension was or was not an adverse action had no bearing on the case because the grievant's illness occurred after he was placed on indefinite suspension. The Arbitrator found that he could not work due to the revocation of his security clearance; not a serious health condition. Therefore, the Union showed no statutory basis entitling the grievant to FMLA leave.

62 FLRA No. 75;
62 FLRA 395
0-AR-4083
May 7, 2008

[AFGE and Department of Defense, DFAS, Indianapolis, IN](#). The Union requested reconsideration of the Authority's decision in *AFGE, Local 1411*, 62 FLRA 75 (2007). The Authority's regulations allow a party to request reconsideration of an Authority decision where it can establish extraordinary circumstances. As relevant to the Union's motion for reconsideration, the grievant alleged that the Agency refused to restore unused use-or-lose annual leave. The grievant had requested to use leave, but was denied because of workload. The Agency gave the grievant a chance to reschedule leave, but she refused, insisting on the original dates of the leave. She thus forfeited the leave. In denying the grievance, the Arbitrator found no "absolute right" of the grievant to be granted the leave requested. The Union contends, under reconsideration, that the Agency's obligation to schedule an employee's annual leave request is "absolute" under 5 U.S.C. § 6304(d). There is no precedent holding that employees are obligated to cooperate with their employer in agreeing to alternate dates once a timely request has been made to schedule use-or-lose annual leave. The Authority denied the Union's motion for reconsideration. The Authority held that attempts to re-litigate issues previously raised and resolved by the Authority, which was attempted here, do not establish extraordinary circumstances exist for reconsideration.

62 FLRA No. 76;
62 FLRA 397
0-NG-2812
MAY 8, 2008

[NLRB UNION AND THE NLRB](#). The Union filed a negotiability appeal regarding five proposals. The proposals in general refer to how the agency shall comply with its EEO complaints processing policy. Proposal one stated that the parties agreed that the Agency's EEO program will be in compliance with EEOC's regulations. The Union maintained the proposal merely requires the Agency to comply with the EEOC's complaints processing requirements. The Agency maintained that this proposal is such a wide-ranging proposal that it "necessarily interferes with management's right to assign work in the EEO office." The Authority found the proposal outside the duty to bargain as it affected the Agency's right to assign work. Proposal two contained several parts and relates to how the Agency will form and/or implement certain documents in its EEO processing actions. The Union maintained that the proposal gives the OEEEO Director discretion as to who receives certain information to prevent management "interference" in the EEO process. The Agency stated that the proposal affects its ability to direct its non-unit staff members in the EEO office. The Authority found the proposal outside the duty to bargain as it affected management's right to assign or direct work. Proposal three stated that neither management nor Special Counsel will violate the mandated separation between adjudication and defensive roles in the EEO program. The Union held that the proposal merely requires the Agency to follow the EEOC policy. The Agency maintained that the proposal affects its right to assign work and direct employees. The Authority found the proposal affected management's right to direct employees and was outside the duty to bargain. Proposal four listed examples of acceptable investigative methods to be used by the OEEEO investigators. The Union claimed the proposal prevents Agency managers from interfering in the independence of the OEEEO Director. The Agency claimed the proposal affects its right to direct employees. The Authority found the proposal affected the right of the Agency to direct employees. Proposal five codified the practice that the Director of OEEEO drafts all Final Agency Decisions (FADs) regarding the discrimination complaints process. The Union maintained that this would require the Agency to separate its fact-finding from its defense counsel actions as required. The Agency claimed the proposal conflicts with its right to direct employees. The Authority found the proposal conflicts with the Agency's right to direct employees.

62 FLRA No. 77
62 FLRA 407
WA-RP-05-0090
May 8, 2008

[Department of the Army, Fort Detrick, Maryland and AFGE Local 2484 and AFGE Local 1923.](#) The AFGE Local 2484, AFL-CIO, filed a petition requesting to amend its certification as exclusive representative to AFGE, Local 1923, AFL-CIO, (a merger) pursuant to the Statute. The Regional Director (RD) granted Local 2484's petition. The RD found that a change in affiliation is an internal matter, unless a question concerning representation (QCR) is raised. The Court in *NLRB v. Financial Institution Employees of America, Local 1182*, 475 U.S. 192 (1986) identified two conditions necessary for an exclusive representative to change affiliation by a vote of its members: 1) due process (whether members have an adequate opportunity to vote on the change) and 2) evidence of substantial continuity before and after the change. The RD found both conditions were satisfied and granted the petition. In its application for review, the Agency argued the Authority should insert a sixty calendar day timeframe limitation before granting a petition seeking to amend a certification. This would ensure that the wishes of the members of the exclusive representative are accurately reflected. In support of its application, the Agency contended the change in affiliation from AFGE Local 2484 to AFGE Local 1923 does not currently reflect the wishes of the members of Local 2484 because it was filed more than two years after the members voted to change affiliation. In its analysis, the Authority found that the RD did not err in finding Local 2484's petition timely. The procedures for filing a petition to amend an existing certification of an exclusive representative are found in § 7111(b)(2) of the Statute, which does not require a time limit for filing a petition to amend a certification of an exclusive representative. Further, the fact that Congress did not include a time limit for filing such petitions but did include time limits for other filings, supports a presumption that Congress did not intend a time limit for these petitions.

62 FLRA No. 78
62 FLRA 411
0-AR-4154
May 9, 2008

[Treasury, IRS and NTEU, Chapter 19.](#) The Arbitrator found the Agency unilaterally ended an established past practice without bargaining; thus violating the agreement by not granting employees' four hours of administrative leave to attend Employee Appreciation Day each year. In so finding, the Arbitrator rejected the Agency's argument that the awards ceremonies and the Employee Appreciation Day events were "separate and distinct." He found that the two were "part and parcel of a single event" and the Agency had been granting administrative leave to attend the event since the mid-1990s. The Arbitrator also rejected the Agency's claim that granting administrative leave for Appreciation Day was not a condition of employment. Noting *AFGE Local 2761 v. FLRA*, 866 F.2d 1443 (D.C. Cir. 1989), the Court held an Agency's past practice of permitting employees to attend an agency-sponsored picnic during work hours was a condition of employment. The Arbitrator found the case "on point." He ordered the Agency to continue the practice until fulfilling its bargaining obligations. On exception, the Agency argued that the award was contrary to law. The Agency was not required to give notice and bargain because the practice did not concern "a condition of employment." The Authority rejected the exception. It found that the Arbitrator did not err in finding the Agency changed a condition of employment when it stopped granting administrative leave for Employee Appreciation day. The Authority cited long standing precedent, particularly *Dept. of the Treasury, IRS and IRS Hartford District*, 27 FLRA 322, 324 (1987). Second, the Agency argued it was not required to give notice and bargain because it was exercising a management right to direct employees under the Statute. The effect on working conditions was de minimis because such events are "always held offsite, employees were responsible for paying for them, and awards were not distributed." The Authority rejected the exception. The Arbitrator did not err in finding the Agency was required to give the Union notice and an opportunity to bargain over the change. The Authority cited *NAGE Local R14-52*, 44 FLRA 738, 752 (1992). Third, the Agency claimed the award conflicts with laws governing time-off awards. The Authority found the Arbitrator did not award time-off awards in violation of law. The Agency has not demonstrated the award requires the Agency to grant time-off awards.

62 FLRA No. 79
62 FLRA 416
0-AR-416
May 14, 2008

[Department of Homeland Security, Customs and Border Protection, JFK Airport, Queens, NY and AFGE Local 1917.](#) The Union filed a grievance on behalf of all Customs and Border Protection (CBP) Officer Enforcement personnel ("6C" officers) in the New York District. The grievance alleged the Agency failed to make the HIP program available to its New York employees. The HIP program had been initiated by the Immigration and Naturalization Service (NIS), the predecessor Agency to CBP. CBP, however, continued to offer the program in all ports of entry except New York. The HIP program was initiated to help officers maintain physical fitness and allowed exercise

on duty time up to three hours a week; as permitted by the local supervisors. The grievance went unresolved and was submitted to arbitration. The Arbitrator found the Agency had an official policy creating HIP for all INS “6C” officers, including the New York District. This created a condition of employment, access to HIP, that continued after the employees were transferred to CBP. The Agency was obligated to continue that condition of employment provided “it did not interfere with Agency operations.” The Arbitrator determined the Agency “has not found continuation of the legacy INS HIP to interfere with agency operations.” She ordered the Agency to take appropriate steps to remedy the violation. On exceptions, the Agency disputed the Arbitrator’s findings on several grounds. It argued the award was based on a non-fact. Specifically, no evidence was presented that the JFK Airport ever allowed duty time to be used for fitness activities. Therefore, a HIP program was never established as a condition of employment at JFK. The Authority rejected the Agency argument. It found that the Arbitrator already made a factual determination about access to HIP at the New York District as this issue was already disputed before the Arbitrator. The Agency also argued that the award violated its right to assign work. The assignment of work would include “the determination to permit employees to engage in fitness activities rather than other duties...”. The Authority rejected this argument by stating the award merely requires the Agency to provide officer enforcement personnel with access to HIP. This does not preclude the parties from bargaining by law over the particulars of the program.

62 FLRA No. 80
62 FLRA 419
0-AR-4084
May 14, 2008

[Government Printing Office, Washington, DC and IBEW, Local 121.](#) The grievant, a Union Steward, applied but was not selected for an Electrician Leader position. The grievant applied for a second Electrician Leader position, and despite being on the best qualified list, was not selected for this position either. He filed a grievance alleging he was not selected because of his Union activities and his age. The grievance went unresolved and was submitted to arbitration. The Arbitrator determined that the grievant “established a prima facie case of discrimination based on his protected union activities in violation of 5 U.S.C. § 7116(a)(2) and the parties’ agreement.” For example, she found that the grievant had filed numerous complaints for unit employees over the years, and successfully challenged certain actions taken by the selecting official in this case. Further, she found the grievant better qualified than the selectee as he had several master electrician certificates as well as the ability to repair printing equipment. Although the Agency put forth several legitimate reasons the selectee was better qualified for the position than the grievant, the Arbitrator pointed to factors that showed the reasons were pretext for unlawful discrimination. The Arbitrator also found that the grievant was not selected for the position because of his age, crediting testimony that found the Agency had hired only one candidate over age 50 for the last 12 Electrician Leader positions. In her final award, the Arbitrator ordered a retroactive promotion with back pay, finding the grievant was affected by an unjustified personnel action that resulted in a loss of pay. She found attorney’s fees appropriate. The Agency filed exceptions, making several contrary to law arguments and several non-fact arguments. The Authority denied the Agency’s arguments and did not find the award contrary to law. In that regard, the Authority found that the Arbitrator adequately reconstructed what the Agency should have done regarding the selection, but for the unlawful discrimination. Although not all candidates’ applications were available for review, review of applications not submitted into evidence is not necessary to find the grievant entitled to the position. Regarding the Agency’s arguments based on a nonfact, the Authority rejected these arguments and found the Arbitrator independently evaluated the grievant in comparison to other candidates and concluded the grievant would have been selected based on the facts before her.

62 FLRA No. 81
62 FLRA 428
0-AR-4125
May 27, 2008

[AFGE National Border Patrol Council, Locals 2544, 2595 and Department of Homeland Security, CBP, Yuma and Tucson Sectors.](#) The Arbitrator initially found in this case that Border Patrol agents in remote regions in the Arizona/Mexico Border were restricted to their posts by official order. Next she found that their activities were substantially limited because they had limited ability to use their free-time for personal purposes. Lastly, she found that the agents were required to remain in a state of readiness to perform work. The question at the arbitration was whether these agents were entitled to standby pay for work-related reasons under Title 5 of the United States Code and the Code of Federal Regulations. Despite the Arbitrator’s finding that the agents were required to remain on standby duty status, she found they were not entitled to standby pay because they did not qualify under 5 U.S.C. §5545. Specifically, the agents did not “regularly remain at, or within the confines of

their stations.” This was because their weeklong tour of duty at the camps did not occur on a regularly recurring basis, as defined in 5 C.F.R. §550.143(a)(2). The Union argued before the Authority that the award was contrary to law. Specifically, the Arbitrator “failed to analyze part 551, and those regulations applicable to the FLSA.” The Union held the agents were entitled to standby pay under the FLSA, as that provided the greater entitlement to pay. The Authority did find that the Arbitrator erred in some of her legal conclusions. For example, the Arbitrator’s conclusion that the employee qualified for standby duty when his activities were substantially limited and he was expected to remain in a state of readiness to perform work, was contrary to 5 C.F.R. § 551.432 and Authority precedent. Nevertheless, the Authority determined her conclusion that the agents were not entitled to standby pay for non-duty time was correct and denied the Union’s exceptions.

FEDERAL SERVICE IMPASSES PANEL DECISIONS

08 FSIP 34
July 3, 2008

Department of Homeland Security and Local 1917, American Federation of Government Employees, AFL-CIO. The Agency filed a request for assistance with the Panel to help resolve a dispute with the Union concerning the implementation of a casual dress day policy in District 3. Specifically, the parties disagreed over what the dress standards should be for casual dress day. The Agency’s proposal specifically identified denim and sneakers as inappropriate dress attire for men and women for the designated casual dress day. The Agency contended the specific articles of clothing were inappropriate because dress practices in District 3 on Fridays have “deteriorated substantially.” The Agency argued District 3 has a unique mission devoted to upholding public trust and maintaining the public’s confidence that decisions are made by those with the highest professional standards. Moreover, the Agency’s “surge initiative” to establish increased contact with community residents and groups will substantially increase contact with the public even on Fridays when there may be no interviews scheduled. The Union proposed to maintain District 3’s past practice permitting employees who are not interviewing, meeting, or conducting business with the public to wear denim and sneakers. The Union argued the past practice was consistent with the majority of the agencies co-located with USCIS which allowed wearing denim and sneakers on casual dress days. The Union further contended the Agency failed to provide any evidence that Friday dress has “deteriorated substantially” or given any legitimate business reason to eliminate the established past practice. It further asserts the practice provides for a more comfortable atmosphere, thereby creating a relaxed environment which improves employee morale. The Panel noted the majority of agency interviews with the public were conducted Mondays through Thursdays. The Panel concluded the Agency did not demonstrate the need to change the current practice permitting employees who are not interviewing, meeting, or conducting business with the public to wear denim and sneakers on Fridays. The Panel further concluded that, while a projected increase in customers visiting the agency may require interviews on Fridays, managers may ask employees to dress in business attire to meet this need. The Panel ordered the Union’s proposal be adopted.

08 FSIP 47
July 3, 2008

Department of Housing and Urban Development, Region 9 San Francisco, California and Local 1450, National Federation of Federal Employees, Federal District 1, IAM&AW, AFL-CIO. The Union filed a request for assistance with the Panel to help resolve a dispute with the Agency concerning ground rules for negotiating a successor collective-bargaining agreement (CBA). Specifically, the parties disagreed on four issues in their ground rules negotiations for a successor CBA which included: (1) the payment of travel and per diem expenses for Union negotiators; (2) the starting time for Monday bargaining sessions and whether the Employer should approve non-contract airline carriers for negotiators; (3) the site of bargaining; and (4) official time for Union negotiators to prepare between weekly bargaining sessions. Among other things, the Union’s final offer provided the Agency would grant official time and pay for the Union’s travel and per diem expenses as needed for up to four bargaining unit team members; Monday negotiations would begin at 2:30 p.m.; the site of negotiations would alternate each week between Los Angeles and San Francisco; and bargaining-unit team members would be authorized up to 16 hours of official time to prepare for scheduled weekly bargaining sessions. The Union argued it did not have the funds to pay the expenses for four bargaining-unit team members. The Union further contended that alternating negotiation sites would defray travel costs and allowing 16 hours of official time for bargaining-unit team members will promote the efficiency of the bargaining process. The Agency’s

final offer provided travel and per diem for three bargaining-unit team members; Monday negotiations to begin at 2:00 p.m.; all negotiations to be held in the San Francisco Regional Office; and each bargaining-unit team member be authorized 8 hours of official time to prepare for upcoming weekly bargaining sessions. Among other things, the Agency argued its proposal was consistent with section 7131(a) of the Statute, and there was no legal requirement that the Agency pay for travel and per diem expenses for all of the Union's bargaining-unit team members. The Agency further contended conducting the negotiations in the San Francisco Regional office is consistent with a long-established Region-wide practice and Union team members had plenty of travel options which allowed sufficient time to attend the 2:00 p.m. Monday sessions. The Panel adopted the Agency's final offer finding there was no need to change the parties' long-standing practice, which has been previously unchallenged by the Union, that negotiations would be held at the San Francisco Regional Office and 8 hours of official time was sufficient time for Union officials to prepare for the upcoming weekly meetings. Moreover, the Panel concluded the Agency's final proposal provided a more reasonable basis for resolving all the issues and it limited the financial burden of the parties as well as the taxpayer.

08 FSIP 41
June 25, 2008

Department of the Navy, U.S. Marine Corps, Marine Corps Logistics Base Barstow, California and Local 1482, American Federation of Government Employees, AFL-CIO. The Union filed a request for assistance with the Panel under the Federal Employees Flexible and Compressed Work Schedules Act of 1982 (Act) regarding a determination by the Agency that implementation of the Union's proposed 4/10 compressed work schedule (CWS) would cause an adverse agency impact. An adverse impact is defined as a reduction in productivity; a diminished level of services furnished to the public; or an increase in the cost of agency operations other than a reasonable administrative cost. The Union argued the Agency did not meet its burden under the Act in that it failed to demonstrate how the proposed 4/10 CWS is likely to cause an adverse agency impact. Among other things, the Union contended the software the Agency used to measure the repair cycle time for the delivery of equipment to customers is ineffective. The software measures in increments of days not hours. Therefore, contrary to the Agency's contention, a 4/10 CWS would not diminish the level of services to the public because the software does not account for the extra hour a day employees would work under a 4/10 CWS. The Agency contended the time it would take to repair equipment would increase by a significant number of days and cause an undue delay in delivering equipment to customers. Moreover, to offset the effect on additional repair time caused by a 4/10 CWS, the Agency would have to assign additional overtime, thereby increasing the cost of Agency operations. The Panel concluded the Union's proposal was incompatible with the effective performance of the Agency's mission and the Employer met its burden under the Act of establishing that an adverse agency impact is likely to occur under the Union's proposal. Thus, the Panel ordered the Union to withdraw its proposal.

MERIT SYSTEMS PROTECTION BOARD DECISIONS

CH-315-H-08-0062-
I-1
2008 MSPB 110
May 28, 2008

[Rivera v. Social Security Administration](#) The Board vacated and remanded an initial decision in a probationary removal case. The agency terminated the appellant during his probationary period but the appellant was able to show his prior service qualified him as an employee with full appeal rights to the MSPB. The agency rescinded his removal and the AJ, with no objection from the appellant, dismissed the appeal for lack of jurisdiction. Subsequently, the appellant filed a petition arguing the agency did not purge his file but, instead, proposed to suspend him for the same charges on which his removal had been based, failed to return him to his former set of duties, and failed to correct his Thrift Savings Plan to show he was currently employed. The Board stated there is no general requirement for the agency to destroy all records relating to an action and the agency would have been permitted to take a new disciplinary action based on the same incidents underlying the original action. However, the Board vacated the initial decision and remanded the case for the AJ to address the appellant's claims regarding whether he had been restored to *status quo ante* in returning him to employment following the removal.

CB-7121-07-0028-
V-1
2008 MSPB 124
June 10, 2008

[Fanelli v. Department of Agriculture](#). The Board upheld an arbitrator's decision upon the appellant's request for review. The agency had removed the appellant, who elected to appeal through the negotiated grievance procedure. The agency determined his grievance was untimely, and the arbitrator upheld the agency on the timeliness issue. The Board noted it gave greater scrutiny to an arbitrator's interpretation of a purely procedural provision when it overturned an arbitrator's interpretation last year, in *Morales v. Social Security Administration*, 107 M.S.P.R. 360 (2007). Because the Board recognized a question as to whether *Morales* overruled *sub silentio* its previous deferential standard of review in such cases, it took this opportunity to revisit the issue and clarify the proper standard of review in cases involving procedural provisions. The Board found any arbitration award drawing its essence from the CBA is entitled to deference and any doubts concerning the propriety of the merits of an arbitrator's decision must be resolved in favor of the decision. Moreover, the Board recognized the Federal Labor Relations Authority (FLRA) approach to this issue as instructive. The FLRA finds an arbitration award deficient for failing to draw its essence from the CBA when the appealing party establishes that the award: (1) 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 CBA as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. Applying these standards, the Board found the appellant had not overcome the greater degree of deference afforded arbitration decisions and sustained the arbitrator's final decision.

PH-315H-07-0634-
I-1
2008 MSPB 127
June 19, 2008

[Blount v. Department of the Treasury](#). The Board reversed and remanded the initial decision dismissing the appellant's appeal of her removal for lack of jurisdiction. The appellant, a preference eligible, was terminated from her competitive service position during her probationary period for failure to file a 2002 Federal income tax return and improper use of a cell phone during an agency training class. At the initial stage the appellant alleged the agency terminated her for pre-appointment reasons without following the procedural requirements in 5 CFR 315.805. The agency responded even if it failed to comply with these procedural requirements, such a failure would not constitute harmful error. The appellant attempted to submit responses to the agency's argument; however, the AJ rejected the submissions as untimely. On appeal, the Board stated the AJ's order contained no notice of a jurisdictional requirement relating to harmful error and noted an appellant must receive explicit information on what is required to establish an appealable jurisdictional issue. An AJ's defective notice can be cured if the agency's pleadings contain the notice that was lacking. The agency response to the appeal did raise the harmful error issue; however, because the AJ rejected the appellant's submissions responding to the harmful error argument, she was unable to address the issue of harmful error prior to filing her petition for review. As such, the Board determined it is appropriate to consider the evidence and argument on the harmful error issue the

appellant proffered in her petition for review. Accordingly, the Board remanded the case for further adjudication.

SF-3443-05-0484-I-
4
2008 MSPB 128
June 19, 2008

Heckman v Department of Interior In a case involving USERRA and VEOA claims for nonselection, the Board denied the appellant's petition for review but reopened the case on its own motion. The Board affirmed the AJ's denial of corrective action under USERRA. It also agreed with the AJ, except with regard to one nonselection action, that the VEO claims lacked jurisdiction. Regarding one nonselection, the AJ had decided the MSPB lacked jurisdiction because the complaint was resolved when the agency notified the Department of Labor (DOL) it would provide the appellant with priority consideration for a future vacancy, and DOL notified the appellant it considered that an appropriate redress, and considered his case closed. The Board concluded priority consideration was an ineffective resolution and found the agency must reconstruct the selection process for the vacancy announcement. The Board further stated the appellant is not necessarily entitled to be appointed to the position, but if the reconstructed selection process results in the appellant's selection, he may be entitled to an award of compensation for any loss of wages or benefits suffered by reason of the violation of his veterans' preference rights.

DA-0752-07-0550-I-
1
2008 MSPB 137
June 23, 2008

Stoddard v. Dept. of the Army. The Board reversed one of the charges in a removal case but supported the agency's removal penalty for the charge it affirmed. The appellant had been fired for two reasons: 1) creating a disturbance by implying he would inflict bodily harm on his supervisor and co-workers (the incident occurred the day after shooting deaths at Virginia Tech. University); and 2) AWOL. Prior to removal, the appellant had been issued a "leave control" letter requiring medical certificates supporting each absence. For each of his absences the appellant presented medical certificates signed by a nurse and requesting that his absences be excused "due to medical issues." His certificates were rejected because they were not signed by a physician and because they did not state he was incapacitated for duty. The initial decision upheld both agency charges. On review, the Board referred to language in the leave control letter requiring signature of medical certificates by a physician "or licensed practitioner," and noted the state of Texas requires nurses to be licensed. The Board also held although the leave letter required certificates to include a statement the appellant was incapacitated for work, it did not indicate the statement had to include any particular combination of words. The Board determined the statement the absences were "due to medical reasons" was arguably sufficient. Finally, the Board concluded the agency had not asserted the appellant's absences were disruptive. Although it did not support the AWOL charge, the Board found the penalty of removal was warranted for the charge it affirmed.

SF-3443-07-0070-I-
1
2008 MSPB 141
June 24, 2008

Leite v. Department of the Army The Board denied the appellant's petition for review in a USERRA case and affirmed the initial decision as modified. The appellant while serving in a GS-13 position was called to active military duty and, while she was gone, the agency abolished her position and created in its place a GS-14 position. She argued the agency committed a USERRA violation when it did not place her in the GS-14 position upon her return. The position had been filled competitively, after the agency had considered abilities of qualified candidates, including the appellant. In its analysis, the Board relied on the "escalator principle." (Specifically, under 38 U.S.C. § 4313(a)(2)(A) and successor provisions, an employee absent for more than 90 days for military duty is entitled to be restored, upon return, to "the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform...") The Board in this instance found advancement to the GS-14 position was not a "perquisite of seniority" dependent on continuing employment, but rather was "dependent on fitness and ability and the exercise of a discriminating managerial choice." The AJ had dismissed the appeal as moot. However, the Board determined it was not moot because if the appellant were to prevail on her claim, she would be entitled to further relief. For an appeal to be deemed moot, the employee must have received all the relief which would have been received if the matter had been adjudicated and he had prevailed. The Board modified the initial decision

accordingly, but denied the appellant's request for relief, rejecting her argument she would have been promoted to the position had she been able to work temporarily, as did the selectee, in the new GS-14 position.

NOTEWORTHY COURT DECISIONS

Fed. Cir. No.
2007-3322
June 2, 2008

[Romero v. Dept. of Defense](#) The Court vacated a Board decision in a removal for failing to maintain a security clearance. The Board affirmed the agency's removal of the appellant, holding it could not review the merits underlying a security clearance revocation. The appellant had held a secret security clearance since 1999, and in 2004 his supervisor sought clearance for him to obtain access to "Sensitive Compartmented Information" (SCI) so he could assist with auditing work at the National Security Agency. A final decision was issued denying access as well as revoking his secret security clearance. The reason cited was the Honduran citizenship of the appellant's wife and stepson. Following an appeal to the Defense Office of Hearing and Appeals, a final decision by the Defense Intelligence Agency Security Appeals Board (DIA- SAB) affirmed the appellant did not meet eligibility requirements for SCI access, but it made no mention of the revocation of the appellant's access to "collateral information," (i.e., his Secret security clearance). The Court acknowledged it may not review the substance of the revocation decision, but it vacated the decision because the Board did not address whether the agency complied with its own procedures when revoking the appellant's security clearance. The Court determined the Board did not address the appellant's arguments the DIA-SAB was not authorized to revoke his Secret security clearance and did not actually revoke the clearance even if it had authority to do so. The Court remanded the case for the Board to determine whether the appellant can show the agency failed to follow its procedures and whether any such failure resulted in harmful error.

Fed. Cir. No.
2007-3216
June 11, 2008

[Kahn v Department of Justice](#) The Federal Circuit reversed an MSPB decision in an IRA appeal. The appellant, an agent of the Drug Enforcement Agency (DEA), alleged he was transferred to another location in retaliation for having made protected disclosures under the Whistleblower Protection Act. He had disclosed to his superiors another agent used confidential sources in drug transactions without following required procedures. The appellant argued his job description and normal duties did not involve reporting of misconduct committed by others, but the reason for his disclosure was because he believed he was obligated to report misconduct if he was aware of it. His supervisor stated he designated Mr. Kahn to report to him daily regarding administrative matters and law enforcement operations at the Beaufort Office, presumably including the appellant's disclosures concerning the other agent. The MSPB AJ dismissed the appeal for lack of jurisdiction, finding the appellant's disclosures were not protected because they were made as part of normal duties through normal channels. The Court called it a close case, determining the combination of Mr. Kahn's job description and competing sworn statements of Mr. Kahn and his supervisor placed the evidence on the question of the appellant's normal duties in equipoise. The Court found the appellant presented non-frivolous allegations his disclosures were not part of his normal duties, and remanded the case for a hearing on the merits.