United States
Office of
Personnel Management

Washington, DC 20415-2001

In Reply To: **Your reference:**

DATE: September 22, 2008

MEMORANDUM TO: MEMBERS
NETWORK ON EMPLOYEE & LABOR RELATIONS

FROM: ANA A. MAZZI
Deputy Associate Director
Center for Workforce Relations & Accountability Policy

SUBJECT: Case Listing Number 1117

FEDERAL LABOR RELATIONS AUTHORITY DECISIONS

62 FLRA No. 82;
62 FLRA 432
WA-CA-03-0127
May 30, 2008

SEC and NTEU. In this unfair labor practice dispute, the Administrative Law Judge (ALJ) concluded the Agency violated § 7116(a)(1) and (5) of the Statute when it failed to bargain to completion the implementation of a new pay system for employees and by terminating the previous system for within-grade increases (WIGIs) and quality-step increases (QSIs). The Agency argued on exception that the Judge erred in finding an unfair labor practice because he inappropriately placed a burden on the Agency to show that "delayed pay increases would have been disastrous for the Agency." The Agency argued it met its burden here by showing the implementation of the pay plan was necessary to perform its mission effectively. It was suffering a severe staffing shortage that impaired its ability to fulfill its law enforcement mission and the pay raise was necessary at that time because the Agency would lose its funding for this purpose in 2003. The Agency also argued the award was contrary to the Back Pay Act. The Authority agreed with the ALJ that the Agency did not show that the implementation of its pay system at the time was necessary for its effective and efficient functioning. In this regard, the Judge found that past pay raises had resulted in only short-term reductions in attrition. The Agency could use other financial inducements for retention. The pay raise used was at the low end of the scale when compared to other financial agencies. Because the respondent committed an unfair labor practice, the Authority held the Judge properly concluded the employees who would have been entitled to a WIGI between May 19 and November 8 effectively did not receive them because they were converted into the new pay system at lower pay.

62 FLRA No. 83;
62 FLRA 459
0-NG-2875
June 3, 2008

AFGE Local 1226 and Department of Veterans Affairs, The VA Central Iowa Healthcare System (CIHS) consisted of the Knoxville and Des Moines medical centers located 40 miles apart. Management decided to close the Knoxville center and reassign the Knoxville pharmacists to the Des Moines pharmacy. The union proposed that management provide transportation for the affected employees from Knoxville to Des Moines and the travel be considered duty time. The Agency said the proposal excessively interfered with its right to assign work and determine its organization. Further, it contended the proposal was contrary to law, 5 C.F.R. § 551. 422(b) and 31 U.S.C. § 1344(a), because home to work travel is not compensable and funds generally may not be spent on passenger vehicles to transport employees to their duty stations. The Union then proposed employees would be paid mileage for travel to the Des Moines center if transportation was not provided. The Agency responded the proposal was contrary to 5 U.S.C. § 5704 which precludes mileage allowance for non official purposes. The Union also proposed that travel to any site other than the employee's station of record will be on duty time. The Agency declared the proposal contrary to 5 C.F.R. § 551.422(b) because it would require employees to commute on duty time. Finally, the Union proposed if the Agency required employees to drive to Des Moines, they would be paid overtime or compensatory time for travel. The Agency declared the proposal inconsistent with 5 C.F.R § 551.422(b) as it required compensation for employees on commute time. The

Authority agreed with the Agency on all counts and found all four proposals outside the duty to bargain.

62 FLRA No. 84; 62 FLRA 466 0-AR-4055 June 6, 2008

AFGE Council 238 and EPA, Washington, DC. The Union filed a grievance alleging the Agency violated the Master Agreement when it linked employee performance standards to the Agency's strategic plan and refused to bargain over the change. The Arbitrator framed the issued as, "Can the Agency link the employee evaluation process to the Agency's strategic plan without bargaining with the Union?" The Arbitrator found that in 1998 and 1999 the Agency provided training to managers, employees and the Union about the linkage between individual performance standards and the strategic plan. The Agency had linked hundreds of individual plans to the strategic plan since 1998. This created a past practice where the Agency linked individual standards and the Agency's strategic plan without challenge until the grievance was filed years later in 2004. The Arbitrator denied the grievance. The Union argued on exception that the Arbitrator exceeded his authority by allowing the Agency to argue the link between individual performance standards and the Agency strategic plan for the first time at the arbitration hearing. The Authority determined the Arbitrator did not exceed his authority. As the parties did not stipulate to the issues before the Arbitrator, the Authority defers to the Arbitrator's framing of the issue. The Union further argued the Arbitrator's finding was based on a nonfact, alleging the record did not support a past practice of linking individual plans to the Agency strategic plan. The Authority concluded the award was not based on a nonfact. At arbitration, the parties disputed the factual question of whether a past practice existed.

62 FLRA No. 85; 62 FLRA 469 0-AR-4110 June 9, 2008

NATCA and Department of Transportation, FAA. As a result of operational errors, the grievant, an air traffic controller, received a 14-day suspension. The Union filed a grievance challenging the suspension. At arbitration, the Union argued the grievant's performance was no different than other air traffic controllers at the facility; thus he did not act carelessly as charged. The Union further argued the grievant was not given adequate notice that his operational deficiencies might be used in disciplinary action against him. The Arbitrator rejected these arguments. He found the Agency demonstrated by preponderant evidence that the grievant committed the operational errors as cited and that the suspension was for just cause. On petition for review, the Union argued the Arbitrator erred in finding the grievant acted carelessly. He ignored an overall increase in operational errors due to increased air traffic; further, similar performance records of other controllers showed no discipline. The Authority found the Arbitrator considered the very evidence the Union claimed he ignored, and denied the exception. The Union further argued the Arbitrator applied the wrong legal standard in the grievance by, among other things, not correctly applying the MSPB standards in resolving charges of careless performance. The Authority found the award was not contrary to law. In this regard, the Authority determined the Union failed to establish the Arbitrator was required to apply the principles encompassed in *MSPB Charges and Penalties*. Arbitrators are not required to apply MSPB standards in cases like this one that do not involve serious discipline under 5 U.S.C. §§ 4303 and 7512. See *Soc. Sec. Admin., St. Paul, Minn*., 61 FLRA 92, 94 n.6 (2005).

62 FLRA No. 86 62 FLRA 472 DE-RP-07-0014 June 10, 2008

Department of Commerce, NWS, Silver Spring, MD and AFGE. The Regional Director (RD) found an Agency realignment caused the bargaining unit represented by the union at the National Logistics Supply Center (NLSC) to no longer be appropriate. The RD concluded the employees from that unit accreted into a nationwide unit represented by the National Weather Service Employees Organization (NWSEO). The RD concluded the realignment: 1) caused the work of the NLSC to be performed in the larger context of the mission of the NWS; 2) caused the chain of command to change from NLSC to NWS; 3) caused labor policy formulation through NWS headquarters rather than NOAA's Central Administrative Support Center; 4) caused personnel policy to be set by NWS rather than NOAA; 5) placed NLSC employees in the same competitive RIF area with NWS employees; 6) caused the NLSC and a co-located organization, the NRC, to fall under an NWS Maintenance division. The RD also found the employees in the existing unit did not have a separate community of interest over and above the overall mission of the NWS. The Union requested review based on failure of the RD to apply established law in finding that a separate NLSC bargaining unit would no longer be appropriate. The Authority did not find the RD failed to apply established law. The RD properly considered that unit employees in NLSC no longer have a separate community of interest from other NWS employees considering functional and administrative integration. As a result, the RD was not required under Authority precedent to further examine the claim of successorship prior to considering the Intervener's (NWSEO) claim of accretion. Petitioner also argued the RD committed prejudicial error because he failed to properly weigh evidence such as the

relationship and history between Petitioner and NLSC. The Authority found that even if the RD could have given more weight to the evidence relied upon by petitioner, he would not be compelled to find the continuance of a separate unit appropriate.

62 FLRA No. 87
62 FLRA 477
0-AR-4113
June 10, 2008

AFGE Local 1242, Council of Prison Locals 33 and DOJ, FBP, US Penitentiary, Atwater, CA. The Union filed a grievance in 2005 alleging the Agency failed to distribute overtime opportunities "in a fair and equitable manner" as required by the collective bargaining agreement (CBA). The Agency denied the grievance finding it untimely. The Arbitrator limited the issue to arbitrability at the request of the parties. He decided the Union knew the Agency was changing its management of overtime hours prior to the time allotted to file a grievance. In denying the grievance, the Arbitrator found the CBA "clearly intends the parties to address potential violations when they are recent and can be remedied with accuracy." The Union contended, before the Authority, the grievance was timely filed since it was unable to assess the impact and implementation of the software program dealing with overtime until the final version was installed in 2005. The Union further contended the Agency continues to violate Article 18 of the CBA. Ordinarily, the Authority will not resolve exceptions unless the award is a complete resolution of all the issues. However, the Authority may review awards that are not final where the interlocutory appeal raises a plausible jurisdictional defect. Here the Arbitrator did resolve all the claims before him even if he did not reach the merits of certain claims. Specifically, the Arbitrator opined that further disputes would be resolved in other grievances. The Authority denied the exception because it constituted a challenge to the Arbitrator's procedural arbitrability determination, which the FLRA generally will find insufficient to reverse an arbitrator's ruling.

62 FLRA No. 88
62 FLRA 480
AT-RP-05-0024
June 17, 2008

Department of the Navy, NFECS, Jacksonville, FL, (Activity) and IAMAW, Local Lodge 192, and Department of the Navy, NFECS, Jacksonville, FL (Agency/Petitioner),and AFGE, Local 2010 (Incumbent/LO), AFGE Local 2298(Incumbent/LO), IAMAW, Local Lodge 192 (Incumbent/LO), AFGE, AFL-CIO (Incumbent/LO), AFGE Local 1566 (Incumbent/LO), AFGE Local 2244 (Incumbent/LO), AFGE Local 2053 (Incumbent, LO), AFGE ,Local 1735, (Incumbent/LO), NAGE, Local R5-87, (Incumbent/lLO), AFGE Local 2427 (Incumbent/LO), AFGE Local 1845 (Incumbent/LO), AFGE Local 696, (Incumbent/LO), Department of the Navy, NFECS, Jacksonville, FL (Activity), AFGE Local696, (Incumbent/LO), AFGE Local2010 (Petitioner, LO). As a result of Agency reorganizations of its public works functions in several states, various petitions were filed seeking determinations of successorship, accretion and unit clarification. The RD set forth the legal framework in *Department of Navy, Fleet and Industrial Supply Center, Norfolk, Virginia,* 52 FLRA 950 (1997) to assess the petitions. The RD concluded that in order for employees to continue in separate units, rather than a consolidated Naval Facilities Engineering Command, Southeast (NAVFAC- SE) bargaining unit, the evidence must show significant employee concerns unique from those of other employees in the gaining organization, NAVFAC- SE. The evidence also must show the employees have been so integrated with other organizational components that the establishment of a separate unit would cause inefficiency in dealings between labor and management. The RD found, with the exception of two successor units not at issue here, a consolidated NAVFAC SE bargaining unit of nonprofessional employees was appropriate. The employees throughout these sites share a clear and identifiable community of interest. The NAVFAC SE unit would promote effective dealings since all personnel and labor matters are administered centrally from NAVFAC- SE. In its application for review, NAGE Local R5-87 argued the RD failed to apply established law in making his findings, citing *FISC*, 52 FLRA 950. Specifically, NAGE contended, he should have found NAVFAC- SE a successor employer and certified NAGE Local R5-87 as the representative of a stand-alone unit at New Orleans because these employees have "purely local concerns." The Authority disagreed, and affirmed the RD's findings. AFGE, in its application, cited *5 C.F.R. § 2422.31(c) (3)(i)* asserting the RD "failed to follow established law when he refused to order an election among professional employees after a reorganization." AFGE claimed the same findings and evidence supporting a consolidated NAVFAC- SE nonprofessional unit calls for a consolidated NAVFAC SE professional unit. The Authority concluded AFGE did not make any specific arguments as to how the circumstances of the professional employees were the same as the nonprofessional employees nor did it explain how a consolidated NAVFAC SE unit of professional employees share a community of interest or promote effective dealings with the Agency. The Applications for review were denied.

62 FLRA No. 89
62 FLRA 490
0-AR-4061
May 17, 2008

NATCA and Department of Transportation, FAA. The Agency imposed a 3-day suspension on the grievant, a warehouse worker, for sleeping on the job. The Arbitrator reviewed the action as to whether the suspension was for just cause and promoted the efficiency of the service. The Arbitrator found the grievant was asleep on duty and previously had been warned about sleeping on the job. She also concluded the grievant occupied a position that potentially could endanger personnel and property and determined the Agency properly considered this in its penalty selection. The Arbitrator denied the grievance. The Union excepted to the award, first arguing the Arbitrator exceeded her authority by resolving an issue to which the parties did not stipulate: namely, the proposed suspension did not include an additional charge involving safety or endangerment to property or personnel. The Authority rejected the union's argument and found the Arbitrator resolved precisely the issues stipulated by the parties. The issue of safety or endangerment was directly relevant to the assessment of the appropriateness of the penalty. Second, the Union argued the award was based on a nonfact in that there was no evidence to support the grievant was working in a position where personnel or property could be endangered. The Authority concluded the parties clearly disputed these matters before the arbitrator and the Union's disagreement with her findings provided no basis for finding the award was based on a nonfact. Finally, the Union contended the grievant was entitled to written notice stating the specific reasons for the proposed action. In this regard, the notice was changed from the charge of "sleeping on duty" to a charge of "endangerment of personnel or property." The Authority concluded that although the Agency and the Arbitrator considered endangerment of personnel or property in assessing the appropriateness of the penalty, the Agency did not charge the grievant with endangerment of personnel or property, and the Arbitrator did not sustain such a charge. The exception was denied.

62 FLRA No. 90
62 FLRA 493
0-AR-4149
June 19, 2008

United Power Trades Organization and Department of the Army, U.S. Army Corps of Engineers. The Arbitrator decided a grievance on the timing of the termination of dues withholding. A unit employee, who had authorized dues withholding since 2000, requested termination of dues withholding in May, 2005. The Agency processed the request in August 2005, terminating withholding the following month. The Union filed a grievance claiming a violation of the contract, which required dues withholdings not be terminated until the first pay period after January 1, regardless of when the employee submits a request to terminate. The employee may terminate withholding after one year of participation in dues withholding. The Arbitrator found the contract did not preclude the Agency from terminating dues withholding in August 2005 because the contract provision was "flawed." Namely, it conflicted with Authority precedent prohibiting dues withholding provisions by requiring employees to pay union dues for more than one year. The Arbitrator ordered the parties to bargain to correct the flaw in the relevant Article. On exception, the Union argued the award was contrary to law, namely, §§ 7115 and 7116 of the Statute and Authority precedent. It contended the Agency should have terminated dues withholding either in January 2006, as required by the contract, or in March 2006, which the Union claimed is the anniversary date of the employee's dues withholding authorization. The Authority denied the exception because the dues allotment provision in the contract prevented bargaining unit members from revoking their dues allotment for a period beyond one year. Consistent with *NAGE, SEIU, AFL-CIO*, 40 FLRA 657, 688 (1991), the parties' contract is inconsistent with § 7115(a) of the Statute. The Union next argued the award fails to draw its essence from the contract. The Union claimed the Arbitrator did not find the contract Article contrary to law, thus it was valid and enforceable. The Authority declared that while the Arbitrator found the contract Article "flawed" and not contrary to law, he found the Article unenforceable because it prevented employees from revoking their authorization of dues withholding for a period greater than one year, thus contrary to NAGE, 40 FLRA at 688. The Union additionally claimed the award was based on a nonfact because the Arbitrator found the contract language at issue a permissive subject of bargaining, while the union argued it was a mandatory subject of bargaining. The Authority found the Arbitrator made no such finding and the Union did not show a central fact underlying the award was clearly erroneous. The Union's additional argument alleging the Arbitrator exceeded his authority also was denied.

62 FLRA No. 91
AT-RP-07-0024
June 26, 2008

United States Department of the Navy, Fleet and Industrial Supply Center Norfolk, Norfolk, Virginia and American Federation of Government Employees, Local 2326; and American Federation of Government Employees, Local 2906; and American Federation of Government Employees, Local 1923; and National Association of Government Employees, Local R1-100 and National Association of Government Employees, Local R1-77 and American Federation of Government Employees, Local

1603;and American Federation of Government Employees, Local 2024;and International Federation of Professional and Technical Engineers, Local 4; and American Federation of Government Employees, Local 1659; and National Association of Government Employees Local R3-15; and American Federation of Government Employees, Local 1156; and American Federation of Government Employees, Local 190; and American Federation of Government Employees, Local 2172; and American Federation of Government Employees, AFL-CIO; and International Federation of professional and Technical Engineers, Local 3; and National Association of Government Employees Local 53. In June 2003 and June 2004, the Department of the Navy realigned all of its supply chain management services to become part of the Naval Supply Systems Command (NAVSUP). The Navy administratively transferred to the Fleet and Industrial Supply Center (FISCN) 265 GS employees who performed the supply functions at approximately 18 Naval facilities. During the time pertinent to the petition, the transferred employees were in bargaining units represented by various labor organizations. The affected, incumbent labor organizations sought to continue the status quo and maintain smaller, separate units based on geographic location. The transferred employees went under the command and control of the FISCN. The FISCN filed a petition seeking to clarify the unit status of the transferred employees, claiming they had accreted into a larger unit represented by AFGE, Local 53, which represented employees at FISCN headquarters and other sites throughout the northeastern United States. The affected incumbent labor organizations sought to continue the *status quo* with respect to their representation of bargaining unit employees. Having determined a hearing was unnecessary, the Regional Director (RD), upon completion of the investigation, concluded there was no evidence to support finding the transferred employees constituted separate appropriate units or that separate units based on geographical location were appropriate. In applying the successorship principal set forth in *FISC and Naval Facilities Engineering Service Center, Port Hueneme, California*, 50 FLRA 363, 368 (1995) (Port Hueneme), the RD found, among other things, separating the employees into smaller units would result in unwarranted fragmentation. The RD further determined the transferred employees shared a clear and identical community of interest with the employees represented by AFGE local 53 and the transferred employees had been so organizationally integrated that they lost their separate identity. The affected labor organizations made several arguments against the Regional Director's decision which included failure to apply established law or prejudicial procedural error and failure to apply established law in determining the appropriate unit. The Authority held in determining whether a petitioned-for unit is appropriate, the proposed unit must meet three criteria in order to be found appropriate: (1) ensure a clear and identifiable community of interest among the employees in the unit; (2) promote effective dealings with the agency; and (3) promote efficiency of the operations of the agency. 5 U.S.C. § 7112(a). FISC, 52 FLRA at 959. The Authority found no fault with the RD's reasoning and denied the applications for review.

62FLRA No. 92
0-AR-4151
June 27, 2008

American Federation of Government Employees, Local 1770 and U.S. Department of the Army, Headquarters, XVII Airborne Corps and Fort Bragg, Fort Bragg North Carolina. The Union filed an exception to an Arbitration Award sustaining the agency's removal of the grievant. The Arbitrator framed the issue before him as "whether the grievant's employment rights were controlled by the parties 2000 Collective Bargaining Agreement (CBA) during whose term the grievant was removed by the Agency and the grievance was filed." Shortly after the grievant was removed from her position, the Agency and the Union entered into a new Collective Bargaining Agreement (2006). During arbitration, the parties disputed whether the Union could properly bring the grievance under the parties' 2006 CBA to challenge the removal action. The 2006 CBA grievance procedure included matters appealable to the Merit Systems Protection Board, wherein the parties former 2000 CBA excluded such matters. The Arbitrator found the 2000 CBA applied to the removal action and not the 2006 CBA. As such, the grievance was not grievable under the 2006 CBA. The Union argued the award failed to draw its essence from the 2006 CBA in that the 2006 CBA clearly stated the 2000 CBA was no longer effective. The Union further argued the matter resolved at arbitration was not inextricably intertwined with a matter covered by 5 U.S.C. § 4303 or § 7512 as the procedural arbitrability issue was severed from the substantive removal case. The Agency asserted the Authority lacked jurisdiction to hear the case because the Arbitrator's procedural determination related to a removal action taken under 5 U.S.C. § 7512, which is barred from Authority review pursuant to 5 U.S.C. § 7122(a). The Agency further contended the Union's essence claim was without merit. The Authority determined the resolution of the removal matter was dependent on the

resolution of the procedural arbitrability issue before the Arbitrator and the two matters were inextricably intertwined. Citing *Unites States Dep't of the Army, Military Dist. Of Wash.*, 35 FLRA 1272 (1990), the Authority concluded the exception was not within its jurisdiction and dismissed the Union's exception.

62 FLRA No. 93
0-AR-4143
June 27, 2008

American Federation of Government Employees, Local 2145 and U.S. Department of Veterans Affairs, Medical Center, Richmond, VA. The Union filed a grievance challenging the grievant's removal and the matter ultimately was submitted for arbitration. Prior to the hearing, the agency rescinded the removal action and removed all documents pertaining to it from her record. Still proceeding to arbitration as the grievant claimed whistleblower reprisal, the Union presented the issue as whether the grievant was entitled to additional remedies beyond the rescission of the removal, and the Agency framed the issue as whether the grievant was entitled to compensatory damages. The Arbitrator found the grievant was collaterally estopped from raising her whistleblower claim because that claim had been raised in a prior arbitration and the agency had a non-discriminatory reason for issuing the removal. The Arbitrator concluded since the grievant had been restored to the *status quo ante*, there was no basis for awarding her any other remedy, and denied the grievance. On exception to the Authority, the Union asserted the Arbitrator erred in finding against the grievant on the whistleblower reprisal claim and further argued the Arbitrator imposed a "harmful error test" in applying the parties' agreement concerning time limits where no such test exists in the provision. In response to the FLRA's order to show cause why the exceptions should not be dismissed for lack of jurisdiction, the Union claimed the case was not "inextricably intertwined" with the grievant's removal action because the removal action had been canceled prior to the arbitration hearing. Therefore, it asserted, there was no underlying issue which would give rise to MSPB jurisdiction. The Authority concluded the issues before the Arbitrator were inextricably intertwined with the grievant's removal because there was no evidence the relief sought by the Union depended on factors other than the removal action. Citing MSPB precedent, the Authority further held the rescission of the removal action and restoration to the *status quo ante* after the grievance was filed did not impact the viability of the grievant's claim for compensatory damages and the MSPB would not have been deprived of jurisdiction to resolve it. Accordingly, the Authority dismissed the Union's exceptions for lack of jurisdiction.

62 FLRA No 94
0-AR-4074
July 10, 2008

United States Department of Veterans Affairs, St. Cloud VA Medical Center, St. Cloud, Minnesota and American Federation of Government Employees, Local 390. The Arbitrator determined that the Agency's selection of two nurses for advertised vacant positions was in violation of the master collective bargaining agreement (CBA) and a memorandum of understanding (MOU) because the Agency failed to select the applicants with the requisite qualifications and the most seniority. The agency argued the award violated its right to assign and hire employees, assign work, and make selections from any appropriate source under 5 U.S.C. § 7106(a). The agency further argued bargaining over the use of seniority in making assignments has been permitted only after "management has determined that… employees are equally qualified." The Union contended the award did not violate management's rights to assign employees and assign work because management already "deemed" the non-selected employees to be qualified for the positions. The Authority concluded the award was contrary to management's right to assign employees under §7106(a)(2) of the Statute. When the Authority determines an award affects management's rights under the Statute, it applies the framework established in *United States Dep't of Treasury, Bureau of Engraving & Printing, Wash., D.C.*, 53 FLRA 146 (1997) (BEP). In applying this standard, the Authority found the award excessively interfered with management's right to assign employees under section 7106(a)(2) of the Statute and as such failed to satisfy prong I of BEP. The Authority determined the contract provisions involved in this case were not enforceable based only on the Arbitrator's interpretation of the provision – as encompassing only minimal qualifications and not equal qualifications. Accordingly, the Authority set aside the pertinent portions of the award relating to the Agency's contrary to law exception.

MERIT SYSTEMS PROTECTION BOARD DECISIONS

CH-0752-06-0580-I-1
2008 MSPB 150
July 3, 2008

Bruton v Department of Veterans Affairs The Board reversed the agency's decision to remove the appellant for charges of absence without leave (AWOL). The appellant had incurred an on-the-job injury limiting him, according to his doctor, to 3 hours of work each day. The Office of Workers' Compensation Programs (OWCP) required a second opinion which differed from his doctor. A third

opinion determined the appellant could work 8 hours a day, and the agency directed him to do so. The appellant returned to work, but only for 3 hours a day, and VA subsequently removed him with an AWOL charge. The AJ sustained the agency's removal action at the initial stage. Fourteen months later, the appellant filed a petition for review based on a decision from the Employees' Compensation Appeals Board (ECAB) reversing its earlier decision and reinstating his benefits to cover the entire period of the agency's AWOL charge. Because the appellant had new evidence not available at the time the initial decision was issued, the Board granted the appeal and found the removal could not be sustained.

AT-0752-07-0539-I-1
2008 MSPB 151
July 9, 2008

Gaudin v. Department of the Treasury The Board affirmed an initial decision as modified. The agency removed the appellant from his position based on several charges, one of which centered on failure to file properly Federal income tax returns. The deciding official determined the appellant's failure was a willful violation and, according to Section § 1203 of the Restructuring and Reform Act of 1998 (RRA), a willful violation required removal. In accordance with agency policy concerning RRA violations, the case was referred to the Commissioner's Review Board (CRB) for mitigation consideration, and the CRB returned it without mitigating the removal penalty. At the initial MSPB hearing, the AJ cited mitigating factors and modified the penalty to a downgrade, resulting in the agency's petition for review and a cross petition from the appellant. The Board agreed with the AJ's finding the appellant's conduct was not willful, but found the AJ erred in independently weighing mitigating factors without determining first the penalty was too severe or that the deciding official failed to consider relevant mitigating factors agency or otherwise abused his discretion before deciding the penalty. The Board found the deciding official failed to consider relevant mitigating factors. Although the deciding official stated he had considered the Douglas factors, the Board determined he believed he had no discretion to act, since he stated the primary reason for removal was the willful nature of the appellant's actions and only the IRS Commissioner had the authority to mitigate or lessen the penalty.

SF-3443-02-159-X-1
2008 MSPB 155
July 29, 2008

Dow v. General Services Administration The case was before the Board on a Recommendation of the AJ finding the agency in noncompliance with a previous Board order. The previous order directed the agency to reconstruct the hiring process since it had violated the appellant's rights under the Veterans Employment Opportunities Act of 1998 (VEOA) by appointing at least one non-preference eligible who had not taken an examination for a position in the Outstanding Scholars Program (OSP). The appellant subsequently filed a petition to enforce the Board's reconstruction order. The agency argued in response it could not fully reconstruct all the names of the individuals on the Certificate of Eligibles because the eight year old Certificate had been destroyed in the normal course of business. The agency also argued it requested "passover" approval on the appellant's selection from OPM. The Board found the agency was not in compliance with its earlier order. The Board determined the agency, in order to be in compliance, must make a good faith effort to reconstruct the names of at least three of the individuals from the OSP announcement, it must remove the selected individuals from the certificate, it must indicate the copy constitutes a reconstructed Certificate of Eligibles with at least three names for appointment in accordance with 5 U.S.C. § 3317(a), and it must indicate it submitted the names to the appointing authority for a selection decision under 5 U.S.C. § 3318(a). Further, the Board found the agency must submit evidence it obtained OPM's passover approval for the appointment of the selectee.

CH-0752-08-0238-I-1
2008 MSPB 169
July 30, 2008

Baldwin v. Department of Veterans Affairs The Board denied the appellant's petition for review (PFR) but reopened on its own motion, vacating the initial decision and remanding the case. The agency issued the appellant a decision letter removing him for, among other things, lack of candor in responding to questions by Office of Inspector General (OIG) agents and making a comment about how easy it would be to sabotage boiler-plant operations. The appellant indicated his desire to retire, but the agency processed his separation as a resignation. He filed an MSPB appeal alleging involuntary retirement, and the AJ dismissed his appeal for lack of jurisdiction. The appellant filed a PFR arguing 1) the Board has jurisdiction over the removal of an employee who retires when faced with removal; 2) the charges pertaining to the boiler comment and lack of candor were stale charges referring to incidents that happened more than ten years before the agency proposed removal; and 3) his separation was the product of agency misinformation. The Board determined his separation was a resignation rather than a retirement because he lacked the requisite age and years of service to retire; therefore, his argument the Board has jurisdiction over a retirement in the face of removal was inapplicable. The Board also found unavailing the appellant's assertion of stale charges. Although

the Board has recognized a charge may be dismissed if the agency's delay in proposing it is unreasonable and prejudicial, the appellant did not assert he was unable to defend himself because of the elapsed time. Further, although OIG agents questioned the appellant about a comment he allegedly made several years before, his lack of candor in responding occurred less than three weeks prior to issuance of the proposed notice. The Board held, however, the appellant did present a nonfrivolous allegation his resignation was involuntary. A Human Resources Specialist typed the word "retirement" on the SF-52 processing his separation and, in so doing, could have led misled him into believing his separation was a retirement rather than a resignation. The Board remanded the case for a jurisdictional hearing on the allegation of agency-supplied misinformation.

CH-0752-07-0531-I-1
2008 MSPB 167
July 30, 2008

Cunningham v. U.S. Postal Service The Board reversed the initial decision and sustained the appellant's removal. After engaging in a physical altercation with a co-worker on postal property, the appellant was charged with Improper Conduct/Violation of Zero Tolerance Policy and removed from his mail handler position. Following a hearing, the AJ sustained the charge but found the appellant acted in self defense and responded to his co-worker's physical aggression with reasonable force. The AJ also determined the deciding official believed the agency's zero tolerance policy required removal and abused his discretion in imposing the removal penalty without considering the relevant mitigating factors under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). For these reasons, the AJ did not afford deference to the agency's penalty determination and instead found a 30-day suspension was the maximum reasonable penalty. The agency petitioned for review. Reversing the initial decision, the Board found the AJ erred in accepting the appellant's self defense claim because the appellant was not free from fault in bringing on the difficulty and he did not take all reasonable steps to avoid the fight. The Board further found the deciding official considered the *Douglas* factors in imposing the penalty, rather than rigidly applying the zero tolerance policy, and sustained the agency removal of the appellant.

NY-0752-07-0195-I-1
2008 MSPB 180
August 1, 2008

Miller v. Department of Transportation The Board denied the agency's and the appellant's petitions for review and reopened on its own motion, vacating the initial decision and dismissing the appeal for lack of jurisdiction. The appellant, an Air Traffic Control Specialist, was deemed not able to perform his duties for medical reasons. The collective bargaining agreement provides employees medically unqualified to perform active air traffic duties would be reassigned to other duties if such duties are available. The appellant filed an MSPB appeal arguing the agency had "medically suspended" him intermittently for a total of 19 days over a period of just over two months when it barred him from performing air traffic duties and did not provide him other work. The AJ held the agency constructively suspended the appellant without providing him notice of his right to appeal his placement on enforced leave. The Board stated precedents leave open the possibility non-consecutive suspensions may be combined when they are based on the same reason and there is evidence the agency attempted to circumvent Board jurisdiction by imposing multiple suspensions of 14 days or less. The appellant was absent from duty on multiple occasions for the same reason, but there was no evidence the agency imposed periods of suspension to prevent the appellant from exercising appeal rights. Consequently, the Board held the appellant was not subjected to an adverse action suspension or furlough; therefore, the Board lacked jurisdiction over the appeal.

AT-0752-07-0971-I-1
20008 MSPB 178
August 1, 2008

Vaughn v. US Postal Service The Board sustained the appellant's reduction in grade and pay on a charge of failure to perform her duties in an effective manner. The appellant, a manager, was alleged to have failed to provide information to the union and to schedule grievance meetings with the union pertaining to the negotiated grievance procedure resulting in grievance payouts totaling nearly $28,000. In an initial decision issued without a hearing, the AJ found the agency failed to prove its charge. The agency had submitted grievance decisions signed by another management official and a union official citing the appellant's failures. However, the AJ determined the grievance decisions were not sworn statements, their findings were conclusory in nature and did not set forth specific supporting factual findings; therefore, they were insufficient, without more, to support the charge of ineffective performance. In its petition for review, the agency argued the grievance decisions constituted business records and, as such, were an exception to the hearsay rule. The Board determined the AJ had not rejected the decisions as inadmissible but simply found they lacked sufficient probative weight to prove the charge. However, the Board decided the grievance decisions constituted probative evidence supporting the charge. The agency's agreement to pay a significant amount of money to the union supported the trustworthiness of the documents, the appellant did not allege the grievance signatories harbored any animosity towards her, the signatories

were disinterested witnesses, and several of the decisions specifically referred to the appellant, stating she should "cease and desist" not providing requested information to the union and should meet with the union. The Board reversed the initial decision, thereby sustaining the agency's reduction in grade and pay of the appellant.

NOTEWORTHY COURT DECISIONS

Fed. Cir. No. 2007-3224
July 16, 2008

Lizzio v. Department of the Army The Court vacated and remanded the MSPB decision upholding the agency removal of the appellant for breaching his last chance agreement (LCA) Facing removal from his position as a special agent, the appellant entered into a LCA with the agency. In the LCA, the agency agreed to hold his removal in abeyance and cancel the proposed removal if the appellant refrained from misconduct for one year and agreed to waive his rights to appeal to the Board. Following subsequent alleged misconduct within the year, the agency issued a notice of breach and removed the appellant. He appealed to the Board arguing he had not breached the LCA. Though the Board generally lacks jurisdiction when a person waives his or her appeal rights in a LCA, an appellant may establish jurisdiction by demonstrating 1) he or she complied with the agreement, 2) the agency breached the LCA, or 3) he or she did not knowingly or voluntarily enter into the LCA. In the initial MSPB decision, the AJ found the appellant's conduct was "rude and obnoxious" but not "embarrassing to the government" as charged. The AJ reversed the agency's removal action finding the agency had not proven the charge in the notice of breach. The Board reversed the initial decision, finding the AJ erred in limiting the issue of whether the appellant breached the LCA on the grounds cited in the notice of breach. The Board declared it is free to rely on a different ground than the agency in determining whether the appellant established he complied with the last chance agreement. The Board held regardless of whether the appellant embarrassed the agency, he nevertheless breached his LCA by acting in a rude and discourteous manner. Vacating and remanding the Board's decision, the Court held the Board erred in its reliance on a ground for breach different from the one found by the AJ to have been asserted by the agency in the notice of breach which effectively deprived the appellant of his right to establish Board jurisdiction by proving he did not breach the LCA.