



United States
Office of
Personnel Management

Washington, DC 20415-2001

In Reply To:

Your reference:

DATE: October 24, 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 1118

FEDERAL LABOR RELATIONS AUTHORITY DECISIONS

62 FLRA No. 95;
62 FLRA 513
WA-RP-06-0068
WA-RP-07-0009
WA-RP-07-0032
July 11, 2008

[SSA, Office of Disability Adjudication and Review and AFGE and NTEU.](#) In April 2006 the Office of the Federal Reviewing Official (OFRO) was established as a component of the Agency's Falls Church, Virginia Office of Disability Adjudication and Review (ODAR). The OFRO replaced the Office of Hearings and Appeals (OHA) located at its Washington HQs. The newly established Office eventually consisted of some employees who had been in existing AFGE and NTEU units. The remaining employees were non-bargaining unit or new employees. NTEU filed a petition seeking an election for these employees. AFGE filed the petition at issue here asserting its existing certification (for OHA Washington Headquarters) covered the ODAR professional employees because these employees were within the definition of its existing certification. AFGE requested an amendment to its certification to reflect that ODAR had replaced OHA and cited *Department of the Army Headquarters, Fort Dix, New Jersey*, 53 FLRA No. 39 (1997) as its support. The Regional Director (RD) rejected the application of *Fort Dix* to this case, finding the principles of *Fort Dix* "do not apply in a case involving the successorship doctrine." Applying the test for successorship in *Naval Facilities Engineering Service, Port Hueneme, California*, 50 FLRA No. 56 (1995), the RD found the employees who came from existing units were "transferred" to a new entity and composed an appropriate unit. Neither AFGE nor NTEU represented a majority of those employees. This called for an election among the professional employees. On review, the Authority determined the RD's ruling misinterpreted FLRA precedent and held the RD failed to note the Authority's explanation that the successorship doctrine applies to determine whether the transferred employees "retain their representative even though the existing certificate does not reference that entity." Accordingly the Authority found the RD erred in concluding that *Fort Dix* did not apply because successorship did. The application for review was granted and the case remanded to the RD for further action consistent with the decision.

62 FLRA No. 96;
62 FLRA 516
0-AR-4182
July 14, 2008

[DOT, FAA, and NATCA Engineers and Architects.](#) The parties negotiated a new pay system consisting of Career Level Descriptors (CLDs) to replace the Office of Personnel Management (OPM) classification system for various grade levels. Two engineers filed grievances claiming their descriptors should be increased from CLD 3 to CLD 4. One grievant claimed that lead engineers "across the country had been reassigned to CLD 4." The other grievant claimed his CLD 3 position did not accurately reflect his assigned duties and responsibilities. The grievances were not resolved and were submitted to arbitration. The Arbitrator rejected the Agency's argument that the grievances concerned classification. She found the grievants were challenging "the managerial assessment made as to whether their particular job duties fit within one or another career level descriptor." The Arbitrator found the first grievant should be promoted to Level 4 because the grievant's supervisor refused to promote him solely on the grounds that doing so would result in the

grievant reporting to someone who was also Level 4. Further, the Arbitrator found the grievant's duties required more than 25% of his time spent on Level 4 duties. Regarding the second grievant, the Arbitrator determined he should be promoted to Level 4 because, among other things, "almost all of his assigned duties fall within CLD 4, and other people doing the same work in different ...regions were given the CLD 4 designation." On exception, the Agency argued that the Arbitrator reclassified the grievants' positions when she ordered the grievants upgraded permanently from CLD 3 to CLD 4. The Statute specifically excludes classification matters as does the parties' negotiated grievance procedure. The Authority agreed with the Agency and set aside the award as inconsistent with § 7121(c)(5) of the Statute.

62 FLRA No. 97;
62 FLRA 519
O-AR-4145
July 14, 2008

[DOT, FAA, and Professional Airways Systems Specialists.](#) A joint labor-management team conducted a classification study of the Logistics Management Specialist position (LMS) at Career Level 1. The study recommended that any LMS who had been working at Level 1 for at least one year and had satisfactory performance should be promoted to Career Level 2. The classification study was disseminated nationwide and recommended that local management review the existing 121 LMSs to determine if it was appropriate to reclassify their positions as a Career Level 2. Subsequently, the Southern Region created a regional review committee to implement the classification study's recommendation for analysis of the LMS positions in their respective area. Their regional review committee included an Agency Classifier. At the end of their review, they concluded that 1 out of 27 would be promoted to a Career Level 2. Three LMSs filed a grievance when their jobs were not reclassified to Level 2. The grievances were submitted to arbitration for resolution. The arbitrator found in favor of the grievants. He determined the Southern Region had improperly denied promotions to the grievants "without acceptable justification for doing so" and awarded the grievants permanent promotions, retroactive to the date the classification group had issued their final report. On exception, the Agency argued that the Arbitrator reclassified the grievant's positions which is prohibited by 5 U.S.C. 7121(c)(5) which states, "the classification of any position which does not result in the reduction of grade or pay of any employee" is excluded from the scope of the negotiated grievance procedure. The Authority agreed with the Agency and set aside the award.

62 FLRA No. 98;
62 FLRA 522
DE-RP-07-0036
July 14, 2008

[DOI, Bureau of Reclamation, and International Brotherhood of Electrical Workers.](#) In the mid 1990's, there was a reorganization within the Bureau of Reclamation. The Hungry Horse Field Office (HHFO) was realigned under the Grand Colee Power Office (GCPO). The realignment did not result in the relocation of employees or any change in their work assignments. The International Brotherhood of Electrical Workers Local 77 filed a petition in August 2007 seeking to accrete unit employees at the Hungry Horse Field Office (HHFO) into an existing unit represented by the Columbia Basin Trades Council (CBTC) at the Grand Colee Power Office (GCPO). The Agency argued that the event triggering the Union's appeal (the realignment) was not appropriate. The International Brotherhood of Electrical Workers was certified as the exclusive representative of the employees at the HHFO in 1996. The Regional Director (RD) stated the Authority will not grant accretion in cases where the employees have not been functionally integrated into the larger unit. The RD found there had been no changes to the location, function or duties of the employees who were realigned in 1996. Simply because the employees received their first official notification, vis a vis SF-50s in 2005, does not negate the fact that the realignment occurred 7 years prior and there had been no subsequent change. The Authority found there were no organizational or operational changes that had occurred since the reorganization of 1996, and therefore accretion principles do not apply.

62 FLRA No. 99;
62 FLRA 526
O-AR-4069
July 14, 2008

[DOT, FAA, and National Air Traffic Controllers Association.](#) The Federal Aviation Administration notified the Air Traffic Controllers Association in December, 2004 of their intent to terminate an MOU on its February 10, 2005 expiration date. The Union requested the right to negotiate impact and implementation (I&I) bargaining over any changes. They also requested a briefing on the decision to terminate the MOU. Additionally, the Union asserted the terms of the MOU controlled until a new agreement was reached. The Agency briefed the Union in January, 2005 on why they chose to not renew the MOU. They identified the provisions of the MOU they believed were contrary to law and unenforceable. The Agency informed the Union the remaining provisions

contained within the MOU which were not contrary to law would terminate on February 10, 2005 unless the Union submitted bargaining proposals. On February 2, 2005, the Union sent a letter to the Agency asserting that a briefing was necessary to provide them with information to draft bargaining proposals. They also disagreed with the Agency that there were any provisions of the MOU that were contrary to law and submitted a proposal to maintain the status quo. The Agency did not terminate the MOU on February 10, 2005. On April 13, the Agency held a briefing with the Union regarding their intent to terminate the MOU in full. On May 20th the Agency sent a letter to the Union, stating that due to the Union's failure to submit any proposals to their notice of intent to sunset the MOU, they were terminating the MOU upon receipt of the letter. On June 10, the Union filed an unfair labor practice charge (ULP) alleging the Agency unilaterally terminated the MOU without negotiating with the Union. On July 28, the Union filed a grievance on this same issue. The Arbitrator agreed with the Agency. He indicated the Agency met its obligations when it provided the Union with a briefing on April 13 and again offered to negotiate on the impact of the termination of the MOU. He also agreed that the Union's February proposal to maintain the "status quo" did not pertain to I&I bargaining. The Union filed a petition for review claiming the award was based on a nonfact and that it failed to conform to statute. The FLRA rejected the union's nonfact argument and also found the Union misconstrued the award when it argued the arbitrator violated the Statute. Finally, the Authority agreed with the agency that, despite the Union's attempt to characterize the grievance as a different issue than the ULP, the underlying matter was the same, citing Dep't of Labor, 59 FLRA 112 (2003).

FEDERAL SERVICE IMPASSES PANEL DECISIONS

Case No. 08 FSIP 63
August 22, 2008

[Pension Benefit Guaranty Corporation \(PBGC\), Washington, D.C. and Local R3-77, National Association of Government Employees \(NAGE\), SEIU](#)

The PBGC filed a request with the Panel to help resolve a dispute NAGE concerning ground rules for negotiations under the mid term reopener provision in the parties' collective bargaining agreement. The Union did not propose any reopeners while the PBGC did. Initially, NAGE asserted the Panel lacked jurisdiction because the FMCS had not declared the parties at an impasse. The Panel found that 5 C.F.R. § 2470.2(e) has no such requirement and concluded, based on the facts of the case, that the parties were at impasse. The Union then argued the Panel did not have jurisdiction over the entire dispute because the Agency would not bargain over some of its proposals. The Panel denied this jurisdictional claim because there is no statutory requirement entitling the union to a negotiability ruling. The Panel found jurisdiction on the impasse and issued a ruling on the merits of the proposals submitted by both parties.

In regard to the merits of the case, the parties disagreed over 12 separate ground rules. The Panel found the Agency proposed the more reasonable ground rules. The ground rules encompassed 4 major areas of concern, including: (1) when proposals should be exchanged; (2) how the bargaining should be scheduled; (3) the number of bargaining team members and alternates; and (4) whether recording of the negotiation sessions should be permitted.

08 FSIP 68
August 19, 2008

[DOJ, Federal Bureau of Prisons, Federal Correctional Institution, Talladega, Alabama and Local 3844, Council of Prison Locals #33, AFGE](#). The Union proposed a 5-4/9 compressed work schedule (CWS) for the Food Service Warehouse Material Handler Foreman. The Warehouse Foreman would work from 6 a.m. to 3 p.m. Monday through Wednesday, 7 a.m. to 3 p.m. on Thursday and Friday would be his regular day off for the first week. In the second week he would work 6 a.m. to 3 p.m. five days a week. The Agency refused to implement the schedule and argued the schedule was likely to cause an adverse Agency impact. Productivity would be reduced because the Warehouse Foreman would have an hour of idle time each day where he was not performing his primary function of supervising inmates. The proposal would also place inmates in a non-work status every other Friday, during which time they would be unproductive. The only alternative would be to assign the inmates to another detail or to assign another employee to supervise the inmates during the Warehouse Foreman's regular day off. The Union argued the Agency already assigns the Food Service Assistant to work at the Warehouse during the Warehouse Foreman's absence with no loss

of productivity. Further, assigning inmates to other Food Service details would not reduce productivity as two other Food Service details are understaffed and could use the help. The Panel is required to take action in favor of the Agency if its determination not to establish a CWS is supported by evidence to show the schedule would cause an “adverse agency impact.” In this regard, the Panel here decided the Agency met its burden of establishing an adverse impact is likely to occur if the Union’s proposal is implemented. It ordered the Union to withdraw its proposal.

08 FSIP 72
August 22, 2008

DVA, VA Medical Center, Minneapolis, Minnesota and Local 3669, AFGE, AFL-CIO. The Union proposed various procedures for the Center’s “Guidelines for Telemetry” with respect to staffing ratios for RNs. The proposals included a 1:3 ratio of nurses to patients on loading or continuous cardiac/vasoactive drips. The ratio can be increased if certain actions are taken. The Agency argued the Panel had no jurisdiction because the matter pertained to the Agency’s numbers, types and grades of employees to be assigned to a particular work unit or tour of duty, and was therefore negotiable only at the election of the Agency, citing 5 U.S.C. § 7106(b)(1). The Agency further argued the Union’s proposal raised issues of patient care within the meaning of 38 U.S.C. § 7422(b) and, as such, is nonnegotiable. The Union cited Article 44 of the parties’ Master Agreement which stated, “the [VA] will bargain on the numbers, types and grades of employees and positions assigned to any organizational subdivision, work project, tour of duty and the means and methods of performing work.” The Union further argued that “a mere announcement” of a section 7422 exclusion was not enough to exclude the issue from bargaining. That required a formal ruling from the Under Secretary of Health. After review, the Panel declined jurisdiction of the parties’ dispute. The Agency had raised questions regarding its obligation to bargain the proposal but had not yet submitted proof that the VA Under Secretary had excluded the matter from bargaining under section 7422 of the Statute. The Panel concluded the issue must be resolved in a more appropriate forum before the Panel can determine whether the parties are at impasse.

MERIT SYSTEMS PROTECTION BOARD DECISIONS

- CH-0752-07-0675-I-1
2008 MSPB 204
August 21, 2008
- [Heath v. Department of Agriculture](#) The Board dismissed the agency's petition for review (PFR) as untimely. The initial decision reversed the agency's removal action, and the Board subsequently granted the agency representative's request for an extension of time to file a PFR. The representative requested another extension three days after the expiration of the first extension. The Board denied the second request because it was untimely filed. The representative nevertheless submitted the PFR 23 days late, explaining she intended to submit the PFR on the due date but lost the "thumb drive" containing the document. She stated she chose to wait until the following Monday to request a second extension because requesting an extension at the last hour would seem suspect, so she believed it would be best to avoid that suspicion. She added her workload and military reserve commitments prevented her from submitting the PFR sooner. The Board stated while her predicament may have been unfortunate, her failure to follow the Board's instructions constitutes failure to exercise due diligence and ordinary prudence, and other work commitments do not constitute good cause. The Board dismissed the PFR as untimely filed and ordered the agency to cancel the appellant's removal.
- 2008 MSPB 202
August 21, 2008
- [Mangano v. Department of Veterans Affairs](#) On appeal to the Board for a second time, the Board vacated and remanded a removal case alleging whistleblower reprisal. The appellant was a staff physician whose duties included supervising and evaluating University of California San Francisco (UCSF) Medical School students and residents. He filed an MSPB appeal alleging his removal and other agency acts were retaliation for whistleblowing. In 2006, following the appellant's petition for review (PFR), the Board remanded the case with instructions to the AJ to conduct further adjudication regarding whether it was practical to allow an anesthesiologist in the appellant's circumstances to remain employed and of the motive to retaliate by agency officials involved in the removal. However, the AJ on remand ruled the practicality of retaining the appellant had never been an issue and was irrelevant. The appellant filed another PFR asserting the AJ failed to follow the Board's remand instructions and committed the same errors identified in the prior decision. The Board now holds the AJ was in error because 1) an AJ is required to follow the Board's remand instructions; 2) the AJ's insistence the faculty appointment was a condition of employment issue violates the law-of-the-case-doctrine; 3) the AJ's reasoning that practicality is irrelevant was wrong; whether it may have been practical to retain the appellant without his faculty affiliation goes to the strength or weakness of the agency's evidence supporting its decision to remove the appellant; and 4) the conclusion that a faculty affiliation was a "de facto" condition of employment cannot stand on the basis of the current record. The Board remanded the case again, stating the appellant must be allowed to show, as he requested, he could remain a productive employee performing other duties unrelated to the faculty requirement. The Board further instructed the AJ to allow the appellant to develop and present evidence regarding agency officials' retaliation motives, and to consider that evidence along with the agency's evidence to make a determination whether the agency met its burden of showing it would have taken the same action absent the disclosure by the appellant.
- CB-1216-08-0006-T-I
2008 MSPB 203
August 21, 2008
- [Special Counsel v. David Briggs](#) The Board affirmed the initial decision ordering the U.S. Department of Labor (DOL) to remove the respondent from his position as a coal mine inspector. The Office of Special Counsel (OSC) filed a disciplinary complaint with the Board alleging the respondent violated the Hatch Act by continuing his candidacy for partisan political office as a Township Supervisor after becoming a Federal employee. Despite repeated warnings from OSC and DOL, the respondent refused to withdraw as a candidate, arguing he was entitled to continue the candidacy he started before he became a Federal employee. The Board disagreed, stating an employee is prohibited from being a candidate for partisan political office at any time the employee is covered by the Hatch Act. Addressing the respondent's claim he did not intend to violate the Hatch Act, the Board noted that an employee's intent, while relevant to the penalty determination, is not relevant to the issue of whether the Hatch Act is violated. A respondent who is found to have violated the Hatch Act has the burden of presenting evidence showing the presumptive penalty of removal should not be imposed. The Board found the respondent failed to make this showing and

ordered DOL to remove him from his federal position.

DC-0752-07-0821-I-
1
2008 MSPB 209
September 10, 2008

[Aldridge v. Department of Agriculture](#) The Board remanded the appeal in a case alleging involuntary retirement. The agency proposed to remove the appellant but she retired under a voluntary early retirement program prior to issuance of a decision letter. The appellant provided a declaration stating she was told by her second line supervisor she was being terminated “as of this date,” she asked if that meant she would lose her retirement benefits, and she was told, “That is exacting (sic) what it means.” The agency argued the fact she was faced with a choice between removal and retirement did not render her retirement involuntary, but the agency did not dispute any of her factual assertions. The AJ determined, notwithstanding the lack of a written decision, the appellant had been removed, and issued a decision supporting the removal action. On review, the Board held, contrary to the initial decision, the agency did not effect the removal action. The Board also found the appellant made a non-frivolous allegation her retirement was involuntary. It remanded the case for a hearing on the issue of whether the appellant’s retirement was the result of agency misinformation.

AT-3443-07-0829-I-
1
2008 MSPB 212
September 17, 2008

[Shapley v Department of Homeland Security](#) The Board granted the appellant’s petition and reversed the initial decision in a VEOA case. The agency had announced a Bridge Program Administrator position and subsequently granted priority consideration to two applicants who were improperly excluded from the hiring certificate. Later it announced another Bridge Program Administrator position and selected one of the applicants who had been granted priority consideration following the earlier announcement. The appellant, a preference eligible, argued he was denied the opportunity to compete when the agency’s personnel office refused to provide the certificate of eligibles to the selecting official until after the two applicants entitled to priority consideration were considered. The agency responded he was provided the opportunity to compete because his name was on the certificate of eligibles. The agency further argued it relied on OPM’s Delegated Examining Operations Handbook in determining the two individuals with priority consideration had to be ranked ahead of all 10-point preference eligibles. On review, the Board determined the issue was whether the appellant was provided a bona fide opportunity to compete. The Board recognized agencies may use priority consideration under various circumstances. However, opined the Board, OPM’s Handbook is subject to, and may not override, applicable laws, including 5 U.S.C. § 3304(f). The Board in reversing the AJ’s decision held the agency improperly denied the appellant the opportunity to compete for a bona fide vacancy and directed the agency to reconstruct the hiring process for the position.

DC-0752-07-0911-I-
1
September 19, 2008

[Booker v. Department of Veterans Affairs](#) The Board affirmed the initial decision as modified, still sustaining the agency’s removal action. The agency removed the appellant from his position of Supervisory Pharmacy Technician based on an incident of sexual harassment involving unwanted touching and kissing of an employee who worked in his area. The appellant asserted, since the agency’s sexual harassment policy explicitly referenced Title VII of the 1964 Civil Rights Act (Title VII), the agency was required to prove a violation of Title VII but had failed to do so. Neither the agency’s proposed removal nor its decision letter specified the definition of sexual harassment being utilized, but a policy memorandum the appellant obtained through discovery showed the agency’s sexual harassment policy was based on Title VII. The Board decided the AJ erred in failing to determine whether the agency met its burden to show a Title VII violation. The Board stated the charge turns on whether the incident was sufficiently severe to create a hostile or abusive environment by the standard of a reasonable person. After a review of the facts and the credibility determinations of the AJ, the Board sustained the charge and penalty, holding the appellant’s actions constituted a physical assault. The Board cited its own case law and EEOC policy guidance that a single unwelcome physical advance can seriously poison the victim’s working environment.

NOTEWORTHY COURT DECISIONS

Fed. Cir. No.
2007-3238
September 4, 2008

[Smith v. Postal Service](#) The Court vacated a Board decision involving a USERRA violation. The appellant bid on a full time custodian position during his absence for military duty but, upon his return, he was placed in a part time position with a schedule alternating between the afternoon shift and the night shift. The appellant filed a Board appeal arguing he should have been placed into the full time position immediately upon his return from military service. The agency conceded his point and restored pay and benefits, including back pay for the difference in the part time and full time positions. One issue remaining before the Board, however, was the appellant's contention he was entitled to "out-of-schedule premium" pay because the schedules he worked in the part time position were not the same as the schedule he should have been given upon his return from military service. The Board decided he was not entitled to the pay premium while he occupied the part time position because only full time employees were entitled to the premium under agency pay rules, and because no other full time custodians in the work center received out- of-schedule pay during the same time period. The Court disagreed with the Board, finding a day shift is a benefit of employment, other full time custodians enjoyed the benefit while the appellant was deprived of the benefit, and 38 U.S.C. § 4324 (c)(2) directs compensation for loss of benefits. The Court vacated and remanded the decision for determination of the proper compensation for the loss of the benefit.