



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 1119

FEDERAL LABOR RELATIONS AUTHORITY DECISIONS

63 FLRA No. 1
63 FLRA 1
0-AR-4224
October 29, 2008

[Department of Defense, DLA, Tinker AFB and AFGE](#). The Union filed an exception to the award of Arbitrator Charles J. Crider. The Agency filed an opposition. The Union failed to show that the award was contrary to law, rule or regulation. The Union was unable to show the award was deficient on any of the grounds similar to those applied by federal courts in private sector labor-management relations: arbitrator bias, partiality or corruption; award based on a non-fact; award failed to draw its essence from the agreement where the award was so unfounded in reason and fact as to manifest an infidelity on the part of the arbitrator; the award did not represent a plausible interpretation of the agreement or evidence a manifest disregard of the agreement. Accordingly, the Union's exceptions were denied.

63 FLRA No. 2
63 FLRA 2
0-AR-4207
October 29, 2008

[Department of the Interior, Bureau of Indian Affairs and Indian Educators Federation](#). The Arbitrator found the grievance arbitrable as a threshold issue, where the Agency argued the terms of a last chance agreement were not arbitrable because the grievant had waived her appeal rights. In this regard, the Arbitrator found the grievant had only waived her appeal rights with respect to alcohol-related conduct; here there was no evidence of alcohol-related absences. On the merits of the grievance, the Arbitrator determined that discharge for AWOL was without cause and reduced the discharge to a thirty-day suspension based on mitigating factors. The Agency argued the Arbitrator lacked jurisdiction to adjudicate the grievance because the grievant waived her right to appeal through any administrative forum. The agency additionally argued the Authority has jurisdiction over the exception because it is not based on the removal decision, but rather on procedural and substantive grounds. The Authority held that Under § 7122(a) of the Statute, it lacks jurisdiction to review an arbitration award relating to "a matter described in § 7121(f) of the Statute." The Authority determined that an award relates to a matter described in § 7121(f) "when it resolves, or is inextricably intertwined with" a § 4303, § 7512, or similar matter, *AFGE, Local 1013, 60 FLRA No. 135*. In this regard the Authority looks to whether the "claim advanced in arbitration is one reviewable by the MSPB and, on appeal, by the Federal Circuit." The Authority dismissed the exceptions for lack of jurisdiction.

63 FLRA No. 3
63 FLRA 5
O-AR-4249
October 30, 2008

[AFGE Local 1709 and Department of the Air Force, 436th Airlift Wing, Dover AFB, Delaware](#). On exception to an arbitration award the Union failed to show the award was deficient as contrary to any law, rule or regulation, or on grounds similar to those applied in private sector labor-management relations: arbitrator exceeded his authority; award based on non-fact; award failed to draw its essence from the agreement where it was so unfounded in reason and fact as to manifest an infidelity to the obligation of the arbitrator. Accordingly, the Authority denied the exceptions.

63 FLRA No. 4
63 FLRA 6
0-AR-4254
October 30, 2008

AFGE and Department of the Air Force, HQ Fourth Air Force, March Air Reserve Base, California. The Union filed an exception to an arbitration award. The Union failed to show the award was deficient as contrary to law, rule or regulation or on grounds similar to those applied in private sector labor-management relations: arbitrator exceeded his authority; arbitrator failed to provide fair hearing; award based on a non-fact; award failed to draw its essence from the agreement where it was so unfounded in reason and fact as to manifest an infidelity to the obligation of the arbitrator. Accordingly, the Authority denied the exceptions.

63 FLRA No. 5
63 FLRA 7
O-AR-4373
November 4, 2008

NAGE, Federal Union of Scientists and Engineers, Local R12-198 and Department of the Navy, Port Hueneme Division, Port Hueneme, California. The Union excepted to an arbitration award arguing the Arbitrator exceeded his authority by treating the procedural question as a threshold matter to be decided separately from the merits of the grievance. The Authority presumed that arbitrators have substantial latitude to manage such issues as they deem appropriate in matters before them, *DHS, U.S. Customs and Border Protection, JFK Airport, Queens, N.Y., 62 FLRA No. 66 (2008) (citing AFGE, Local 22, 51 FLRA No. 121(1996))*. The Union failed to show that the award was contrary to law, rule or regulation or deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations. The exceptions were denied.

63 FLRA No. 6
WA-RP-07-0069
November 7, 2008

United States Department of the Navy, National Union of Law Enforcement Associations, Fraternal Order of Police, First Federal Lodge 1F, International Federation of Professional Engineers and American Federation of Government Employees and International Brotherhood of Police Officers NAGE, SEIU. Eleven police officers represented by the Fraternal Order of Police (FOP) since 1979 were transferred from the Philadelphia, Pennsylvania area to the Commander, Navy Region Mid-Atlantic (CNRMA) in October, 2005 due to a reorganization. Their duty station remained unchanged. After the transfer, CNRMA filed a petition claiming the officers had accreted into the bargaining unit of employees represented by the National Union of Law Enforcement Associations (NULEA). A decision was rendered by the Regional Director (RD) which indicated that FOP's existing unit remained an appropriate successor unit and no election was necessary. NULEA filed the petition for review at issue and none of the parties filed an opposition. Both successorship and accretion principles apply to this case. The RD found the transfer of the Philadelphia police officers did not substantially impact their working conditions, change employees' ability to share a community of interest or fail to promote effective dealings. The RD was found to be correct in determining the FOP unit appropriate under successorship. Additionally, there is no finding the RD failed to apply established law in finding the FOP unit remained an appropriate unit to support their accretion claim. Under Authority precedent, successorship claims prevail over accretion claims. In this case, application of the accretion doctrine is not necessary since all other factors of successorship were correctly applied and in accordance with law.

63 FLRA No. 7
O-AR-4021
November 12, 2008

DOT, FAA, and National Air Traffic Controllers Association. The Boston radar facility hired four additional air traffic controllers. The job posting stated the Agency would pay a fixed relocation payment in the amount of \$27,000. It also stated the facility in Boston was scheduled to relocate to Merrimack, NH in February, 2004. In May, 2003, four air traffic controllers relocated from their residences in Virginia, Rhode Island, Connecticut, and Florida to Boston. The employees received payment for moving expenses associated with their relocation to Boston. Nine months later, the four employees were relocated from the Boston facility to Merrimack. The grievants requested payment for moving expenses for their move from Boston, MA to Merrimack, NH. The Agency denied the requests on the basis that the parties' collective bargaining agreement precludes two payments for moving expenses within a 12 month period. The Union filed a grievance over the denial of the moving expenses. The Arbitrator sustained the grievance and ordered the Agency to pay each grievant \$27,000 plus interest. DOT filed an exception to this arbitrator's award. The Agency contends that the award violates Article 58 of the parties CBA. The arbitrator found, as did the Agency's counsel, Article 58 of the CBA is silent on situations where there is an "involuntary" relocation of an employee's residence as a result of an Agency's decision to relocate the employee's duty station. The Authority denied the Agency's exception because it did not find the award failed to draw its essence from the parties' CBA, nor did the remedy granted violate any federal appropriation laws.

63 FLRA No. 8
0-AR-4292
November 12, 2008

[American Federation of Government Employees \(AFGE\) and Social Security Administration.](#) AFGE filed an exception to an arbitration award rendered by Arbitrator Charles J. Coleman. The Agency filed an opposition to the Union's exceptions. The Authority found that the award is not deficient. They determined the arbitrator did provide a fair hearing, the award did not fail to draw its essence from the parties collective bargaining agreement (CBA), and the award is not contrary to law.

63 FLRA No. 9
O-AR-4271
November 12, 2008

[American Federation of Government Employees \(AFGE\) and Department of Veterans Affairs, Perry Point, Maryland.](#) AFGE filed an exception to an arbitration award rendered by Arbitrator Alfred O. Haynes, Sr. The Agency did not file an exception. The Authority did not find the award is deficient on the grounds it failed to draw its essence from the parties collective bargaining agreement, is unfounded in reason and fact, and does not represent a plausible interpretation of the agreement. The Authority denied the Union's exception.

63 FLRA No. 10
WA-RP-07-0058
November 13, 2008

[Department of the Army, Fort Bragg, NC and American Federation of Government Employees \(AFGE\)](#)
AFGE filed a petition to determine if a Clinical/Infection Control Nurse position (CIC Nurse) met the definition of a supervisor within the meaning of § 7103(a)(10) of the Federal Service Labor-Management Relations Statute. The Regional Director (RD) stated the Statute does not define "nurse," however there is sufficient evidence to conclude that the CIC nurse is not a supervisory nurse within the meaning of the statute. The Department of the Army requested a review of the RD's decision because the decision does not reflect any precedent and "nurse" is not defined in the Statute. They argued review of the RD's decision was necessary to clarify the definition of "nurse" for purposes of the special supervisor rule under § 7103(a)(10). Dept. of the Army argued that the special rule for nurses and firefighters in §7103(a)(10) is not applicable. Separate from the special rule, a "supervisor" must be an individual employed by an agency having authority to hire direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such an action. The Authority found no dispute to the RD's finding that the CIC nurse did not perform supervisory duties nor did she have the authority to recommend supervisory actions be taken. Therefore, the application for review was denied as the RD accurately determined that the CIC Nurse was not a supervisor within the meaning of §7103(2)(10) of the Statute.

FEDERAL SERVICE IMPASSES PANEL DECISIONS

Case No. 08 FSIP 74
October 23, 2008

[Department of the Navy, U.S. Navy Exchange, Norfolk, Virginia and American Federation of Government Employees \(AFGE\).](#) AFGE filed a request with the Panel to help resolve a dispute which concerns negotiations over a successor collective bargaining agreement. The Panel determined it would resolve the dispute through single written submissions from both parties. The parties' impasse involved one article where the parties disagreed over whether certain bargaining-unit employees who are issued uniforms should be allowed to wash their uniforms on duty time. Employees involved in dirty work receive uniforms which are laundered by the employer. Other employees that are required to wear a uniform but are not involved in 'dirty work' are issued uniforms and provided facilities to wash their clothes. Employees in the Beauty Shop, Barber Shop, and Navy Lodge currently wash their uniforms on duty time as they have laundry facilities in their work areas. The Union wishes to expand the practice of washing uniforms on duty time to all bargaining unit employees, including 30 employees who work in the Sight and Sound Warehouse facilities. The Employer indicated this would create an undue hardship as it would necessitate employees transporting their uniforms to laundry facilities and waiting for them to complete the wash cycle or return to the facility once the cycle is complete. This could result in lost time of 1 hour or more. The Panel ordered adoption of the Agency's proposal. It found the cost to the Navy Exchange in terms of lost productivity and impact to customer service outweighed the benefits of permitting Sight and Sound and Warehouse employees the ability to wash their uniforms on duty time. The Navy Exchange is a retail business that competes with other retailers and time spent not performing regularly assigned duties would have an impact on its ability to remain competitive.

Case No. 08 FSIP 78
November 26, 2008

[Department of Commerce, Patent and Trademark Office, Alexandria, Virginia and Patent Office Professional Association.](#) The Patent Office Professional Association (the Union or POPA) filed a request with the Panel to consider a negotiation impasse. The Patent and Trademark

Office had implemented the “eRed Folder System” in March 2008. The system is called the “next step” to a paperless office that automates the process of patent examining. The Union submitted various proposals on this issue and the Agency offered various counter proposals. With regard to the Union’s first proposal, the Panel ordered the Union to withdraw it because it contained disputed factual information regarding the impact of the eRed Folder system on working conditions. The Panel declined jurisdiction on the Union’s second proposal because the Union had filed a grievance requesting a remedy on the same issue through that forum; it is not entitled to pursue essentially the same interest in two forums. The Union’s next proposal dealt with training procedures for the eRed Folder system and the Panel adopted a majority of the Agency’s proposals as providing adequate training on the system. The Union next proposed certain procedures that defined “quality problems;” “error” and “turn-around” time. The Panel declined jurisdiction because not all voluntary efforts to reach agreement had been exhausted. The Union proposed an “enhancement” to the eRed Folder system that would allow patent examiners to retrieve and make corrections to work products before they are electronically submitted to a patent applicant. The Panel ordered the Union to withdraw the proposal. The enhancement proposed is unnecessary given the capabilities of an existing system. Further, the more practical alternative is for the examiner to notify the supervisor that they wish to make corrections before the work advances through the issuance process. The Union submitted various proposals on canvassing for employee feedback on the eRed Folder system. The Panel decided the Agency’s proposals provided a more reasonable approach to the information and provides the Union with sufficient feedback from users of the system without overly burdening management with collecting information from unidentified sources.

08 FSIP 80
October 29, 2008

[Department of Agriculture Farm Service Agency \(FSA\), Kansas City, Mo. And National Treasury Employees Union, Chapter 264.](#) The Department of Agriculture, Farm Service Agency, (FSA) filed a request for assistance with the Federal Services Impasse Panel concerning a negotiation impasse on a ground rules agreement for a successor collective-bargaining agreement (CBA). There were three issues at impasse in the proposed ground rules. FSIP requested each party submit a written submission of their position on the items at impasse and they would render a decision accordingly. The first issue at impasse concerns the use of a technical advisor/subject matter expert. FSIP ordered adoption of a modified version of the submitted proposals. There will be consistent use of the term ‘TA/SME’ throughout the provision. The TA/SME will not be restricted to answer questions that relate solely to bargaining unit. The 2nd impasse item in dispute is whether the Union should have 60 calendar or 60 workdays to submit its proposal. FSIP agreed 60 calendar days provides sufficient time for the Union to submit their proposals. The 3rd impasse concerns the parties proposals to invoke a dispute resolution procedure prior to contacting the Panel for assistance pursuant to 5 U.S.C. §7119 of the Statute. FSIP order the parties to withdraw their proposals on the proposed dispute process and rely on the impasse resolution processes provided by statute.

08 FSIP 81
October 23, 2008

[Department of Veterans Affairs South Texas Veterans Health Care System, San Antonio, Texas and Local 3511, AFGF, AFL-CIO.](#) AFGF Local 3511 filed a request for assistance with the Panel to consider a negotiation impasse. The Agency had issued a Memorandum of Understanding (MOU) on dress code for the South Texas Veterans Health Care System (STVHCS) in November 2007. Although several affiliated unions agreed with the MOU, Local 3511 did not. The Union questioned the need for a dress code and estimated only 1 percent of employees dressed inappropriately. The Union preferred the MOU be used as a “guideline” rather than a mandatory dress code policy. The Union also proposed several changes to the MOU. The Agency proposed that the MOU be a policy and apply to all employees in the STVHCS. The Panel decided to adopt the Agency’s final offer but with modifications. The Panel considered the Agency’s final offer where the MOU would apply to “all employees” and would be issued by the Acting Director. It determined the Agency’s final offer must be changed to reflect that the document is not official VA policy but rather an MOA between the parties that applies only to the employees represented by the Union. Further, in agreement with the Union, the Panel found the Agency’s wording regarding displaying and wearing of electronic devices inconsistent with the parties’ local supplement (LS). Unless the Union agreed to reopen the LS to address the matter, the Agency could only address this issue when it had the opportunity to renegotiate the entire LS.

MERIT SYSTEMS PROTECTION BOARD DECISIONS

- AT-3330-08-0385-I-1
AT-4324-08-0389-I-1
2008 MSPB 330
October 6, 2008
- Downs v. Department of Veterans Affairs* The Board affirmed in part and vacated in part an initial decision pertaining to an alleged USERRA and VEOA violation. The appellant had filed two MSPB appeals pertaining to nonselection for a position, one alleging a USERRA violation and the other a VEOA violation and discrimination. The AJ in a single decision dismissed both appeals for lack of jurisdiction. The Board affirmed the initial decision in part, holding although the employee met the general USERRA jurisdictional test, he had been discharged under other than honorable conditions, thereby eliminating his standing to bring a USERRA appeal. The Board vacated the initial decision's dismissal of the VEOA claim, finding the appellant did in fact establish jurisdiction for his VEOA claim. However, the Board referred to its discretion to dispose of a VEOA appeal without a hearing where there are no material disputes of fact, and it denied the VEOA claim because the selection at issue was under the merit promotion process in which the appellant was not entitled to any point preferences.
- DA-3443-05-0090-M-1
2008 MSPB 233
October 21, 2008
- Beeler v. Department of the Air Force* The Board reversed and remanded the initial decision. The appellant's initial appeal had been dismissed by the AJ as moot, but the Federal Circuit disagreed, vacated the Board's decision and remanded the appeal. However, prior to the remand hearing, the appellant's attorney signed and submitted a single sentence motion stating: "Appellant hereby withdraws the above captioned appeal." The appellant neither signed the motion nor did his name appear on the certificate of service. When the AJ dismissed the appeal as withdrawn, the appellant petitioned for review asserting his counsel withdrew the appeal without his consent. While the appellant is typically responsible for the errors of his or her chosen representative, the Board found the appellant's PFR presented new and material evidence and raised a genuine question of fact as to whether he acted in a clear, unequivocal and decisive way to relinquish his Board appeal rights. The Board remanded for a determination of whether the appellant's withdrawal of his appeal was voluntary.
- SF-0752-07-0403-I-2
2008 MSPB 234
October 22, 2008
- Thomas v Department of Transportation* The Board granted the agency's petition and upheld a removal action. The appellant had been removed from her air traffic control specialist position in 2007 with a charge of negligent or careless work performance supported by four underlying specifications, three of which occurred in 2004 or early 2005. The fourth specification involved a plane having leveled at the wrong altitude and on a collision course with another plane. The appellant failed to notice the error. She eventually took action to divert the two planes after another specialist alerted her to the error, but only after the planes had already passed each other at a distance closer than desired. The AJ reversed the agency, finding three of the four specifications were untimely under the provisions of the collective bargaining agreement and decided the agency failed to prove the fourth specification because it had not charged the appellant with what is termed by the agency as an "operational error." The Board decided the AJ erred in concluding absence of an operational error precluded a finding of negligence. It held the agency met its required burden of proof for negligence by showing failure to exercise the degree of care required under the particular circumstances which a person of ordinary prudence in the same situation and with equal experience would not omit. The Board upheld the removal action.
- NY-1221-05-0076-X-2
2008 MSPB 238
October 30, 2008
- Markey v. Department of Transportation* The Board found the agency breached a non-disclosure provision of a settlement. Following the appellant's original appeal, she entered into a settlement in which she agreed to resign. The language also stated the "settlement shall be confidential, and that this agreement's terms will not be disclosed by either party, except to the MSPB or to other government officials responsible for implementing the agreement." The appellant's petition for enforcement alleged the agency violated the non-disclosure provision when it revealed the terms of the settlement to an EEO investigator who was investigating her EEO complaint. The agency admitted it disclosed the existence and terms of the settlement to the agency EEO investigator, but

argued its disclosure was consistent under the “implicit” terms of the agreement. The Board held there was no basis for finding the EEO investigator was a government official responsible for implementing the agreement or for disclosing the existence of the settlement, given the agency could have simply provided the investigator with copies of the Standard Form 50 effecting the appellant’s resignation. Since the appellant had indicated in her response to the AJ’s recommendation she did not want the agreement to be rescinded, the Board found there was no available enforcement remedy that would cure the breach and, in the absence of a viable enforcement remedy, dismissed the petition.

CB-1205-08-0013-
U-1
2008 MSPB 242
November 13, 2008

[National Treasury Employees Union v. Office of Personnel Management and Department of Homeland Security](#) The Board denied a request for regulation review. In 2004 the National Treasury Employees Union (NTEU) filed a grievance alleging the agency violated the parties’ collective bargaining agreement by implementing Personal Appearance Standards (PAS) for all of its uniformed officers without exhausting its bargaining obligations with the union. An arbitrator agreed with the union and the Federal Labor Relations Authority denied the agency’s exceptions. The NTEU filed another grievance when the agency did not implement the prescribed remedy, and a second arbitration opinion concluded the PAS constituted an “employment practice” and held the agency failed to take required steps before it implemented the employment practice. The agency filed exceptions to the opinion and the matter remains pending with the FLRA. The NTEU also filed a request for regulation review with the Board. The Board cited its original jurisdiction and authority under 5 U.S.C. § 1204 to review rules and regulations promulgated by OPM. However, in determining whether to exercise its regulation review authority, the Board also considers such factors as the likelihood the issue will be timely reached through ordinary channels of appeal. The Board declined to exercise its review authority, noting the issue is now pending before the FLRA and the petitioner has other remedies at its disposal.

NOTEWORTHY COURT DECISIONS

Fed. Cir. No.
2008-3048
October 7, 2008

[Drake v. Agency for International Development](#) The Court reversed the AJ’s decision in a whistleblower reprisal case. The appellant had been reassigned a short time after he sent an email message to management officials stating he had witnessed at an embassy party large amounts of alcoholic beverages being served, extensive toasting, and intoxication of certain agency and State Department officials. The MSPB AJ found the appellant’s email message was not a protected disclosure because 1) although a Foreign Affairs Manual (FAM) provision cited intoxication as an offense subject to disciplinary action, the FAM was not a law, rule, or regulation in terms of the Whistleblower Protection Act (WPA); 2) even if it was, the violation was of such a trivial nature the appellant could not reasonably believe he was reporting a genuine violation; and 3) a disinterested observer could not have concluded the disclosure evidenced a violation. The Federal Circuit on review concluded the AJ erred legally on all three prongs. The Court noted the agency conceded the FAM provision is a law, rule, or regulation under the Whistleblower Protection Act. It also concluded the AJ misinterpreted some of its earlier decisions on disclosures deemed to be of a trivial nature. In those cases, unlike the present case, the disclosures were not protected because they did not report violations of any laws, rules or regulations, but rather reported minor and inadvertent miscues occurring in the conscientious carrying out of a federal employee’s assigned duties. The Court also held the AJ erroneously required the appellant to prove agency personnel were intoxicated. The Court stated the test is not whether the appellant could prove the behavior he observed was in fact caused by intoxication, but whether a disinterested observer with knowledge of the same essential facts could reasonably conclude the agency personnel were intoxicated and that a violation occurred. In light of its findings, the Court reversed and remanded the case.

Fed. Cir. No.
2008-3142
October 31, 2008

Dean v. Consumer Product Safety Commission The Court found no violation of the appellant's VEOA or USERRA rights. The appellant had applied for a position with the agency under an announcement specifying candidates who wished to be considered under both merit promotion or special hiring authority and competitive procedures must submit two applications and, if only one application was received, it would be considered only under the special hiring authority or merit promotion procedures. The appellant's cover letter accompanying his single application requested "Non-Competitive Appointment." The agency placed him on the merit promotion certificate but selected another applicant from the certificate. The appellant's original MSPB appeal was dismissed by the AJ for failure to state a claim upon which relief could be granted, the Board agreed, but the Court remanded the case for determination of whether the agency's practices were in accordance with law and merit principles. On remand the AJ concluded the appellant had full opportunity to compete for the job and found the agency's practice of requiring two applications applied equally to veterans and nonveterans, and the impact of filing a single application was the same regardless of military status. On review the Board agreed with the remand decision, and the appellant again appealed to the Federal Circuit. The Court affirmed the Board's decision, holding no violation of statute or regulation was established.