



United States  
Office of  
Personnel Management

Washington, DC 20415-2001

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 1120

**FEDERAL LABOR RELATIONS AUTHORITY DECISIONS**

63 FLRA No. 11  
63 FLRA 26  
0-MC-23  
December 9, 2008

[National Treasury Employees Union \(NTEU\) and United States Department of the Treasury, Internal Revenue Service.](#) The Union filed with the Authority a request to issue a stay directing the Federal Service Impasses Panel to defer taking any action in *Department of the Treasury, Internal Revenue Service, Washington, D.C.*, Case No. 07 FSIP 10. The Agency filed an opposition to the Union's request. After the Union filed its request to stay the Panel's proceedings, the Panel issued a decision and order in 07 FSIP 10. The Panel relinquished jurisdiction over fifteen proposals in the Agency's twenty-three proposal package. The Panel found that the Union had not reached a negotiation impasse on the fifteen proposals. With regard to the remaining eight Agency proposals, the Panel found that the Union had never objected to their need to bargain over these proposals, unlike their refusal to bargain on the fifteen proposals above. The remaining eight proposals had been on the table throughout the bilateral negotiations. In resolution, the Panel imposed the Agency's final offer on a package basis. The Authority found the Panel's issuance of a decision and order in 07 FSIP 10 presented a threshold question of mootness and concluded the Union's request to stay the Panel proceedings was indeed moot. The Union's request was dismissed because there was nothing for the Panel to stay.

63 FLRA No. 12  
63 FLRA 28  
0-MC-24  
December 9, 2008

[National Treasury Employees Union and United States Department of Homeland Security, Customs and Border Protection.](#) The Union filed a request with the Authority to issue a stay directing the Federal Service Impasses Panel to defer taking any action in *United States Department of Homeland Security, United States Customs and Border Protection, Washington, D.C.*, Case No. 07 FSIP 92, which concerned a dispute over the Foreign Language Allowance Program (FLAP) performance awards. The Authority dismissed the request as moot. The Panel had issued a decision on this matter in 07 FSIP 92, ordering the adoption of the Agency's final package with modification. The Authority concluded that a bargaining proposal seeking to delay implementation of a regulation becomes moot when the regulation is implemented.

63 FLRA No. 13  
63 FLRA 30  
0-AR-4126  
December 12, 2008

[United States Environmental Protection Agency and American Federation of Government Employees \(AFGE\), Council 238.](#) The Agency filed an exception to an arbitration award finding the Agency violated the parties' agreement by unilaterally changing the established past practice of permitting Union officials to perform representation duties at remote locations and by failing to bargain with the Union over a proposal related to this change. The Authority found that the arbitration award is not contrary to law. The legislative history indicates that 5 U.S.C. §7131(d) makes not only the amount but also "all other matters concerning official time for unit employees engaged in labor-management relations activity subject to negotiation..." The Authority also found that the established past practice of permitting Union officials to perform representational duties on official time at remote locations is not contrary to Public Law 106-364, § 359 or AFGE, *National*

*Council of HUD Locals 222 and HUD*, 60 FLRA No. 68 (2004) as argued by the Agency. Lastly, the Authority did not find the arbitration award ambiguous. The arbitrator directed the parties to “bargain in good faith over the Union’s proposed MOU” addressing issues of official time.

63 FLRA No. 14  
63 FLRA 34  
DA-CA-06-0453  
December 12, 2008

[\*United States Department of Transportation, Federal Aviation Administration \(FAA\), Houston, Texas and National Air Traffic Controllers Association.\*](#) The Union filed an unfair labor practice (ULP) charge alleging the agency issued a reprimand to a Union official in retaliation for his protected activity. The Administrative Law Judge (ALJ) granted the Union’s motion for summary judgment and found that the Agency violated the Statute as alleged. The Agency filed exceptions with the Authority arguing that the ALJ improperly based her decision solely on its failure to file a timely answer. The Agency also asserted the ALJ exceeded her authority and violated the Privacy Act of 1974 by requiring the posting of a notice at its facilities and contended that she “exercised extreme prejudice” by failing to consider “pertinent and material evidence” in her summary judgment decision. The Authority rejected these arguments and found the ALJ did not err in concluding the Agency failed to establish “good cause” for the late filing of its answer to the complaint. The FLRA further rejected the Agency’s argument that the ULP was barred by an earlier grievance which raised the same issues because it provided no evidence to support its claim. Lastly, the Respondent’s argument the ULP was moot because it rescinded the reprimand also was denied. The Authority concluded the potential for further discrimination against Union officials remained. Further, when a cease and desist order and the posting of a notice remain viable remedies, a case is not moot.

63 FLRA No. 15  
63 FLRA 42  
WA-RP-08-0019  
Dec. 12, 2008

[\*Int’l Broadcasting Bureau Broadcasting Bd. of Governors, and AFGE Local 1812.\*](#) The Union filed an application for review of the Regional Director’s (RD) dismissal of a petition to represent all of the Purchase Order Vendors (POVs) who contract with the Agency to provide video editing services. The Agency did not file an opposition. The RD found that the POVs were independent contractors, not federal employees, and the FSLMRS only applies to employees of the civil service as defined by § 7103(a)(2)(A). The Union contended that under some past precedents, a contract employee of an agency could be found to be an employee of the Agency. The Authority distinguished the cited precedents by finding that the POVs were not “under the control” of the agency, and the POVs contracts specifically state that the POVs work as independent contractors and “not as . . . employees of the Govt.” The Authority denied the Union’s application for review.

63 FLRA No. 16  
63 FLRA 47  
WA-RP-08-0002  
December 12, 2008

[\*National Labor Relations Board and National Labor Relations Board Professional Association.\*](#) The NLRB filed an application for review of the Regional Director’s (RD) finding that a consolidated bargaining unit consisting of the Union’s (NLRBPA) two professional bargaining units of attorneys was appropriate. After rejecting the Union’s untimely objection to the Agency’s application, the Authority considered the NLRB’s application and rejected each of the positions the NLRB took relative to the RD’s decision in the matter. Specifically, the NLRB advanced the following premises: (1) The Agency claimed the RD’s decision to consolidate the General Counsel (GC) and the National Labor Relations Board (the Board) bargaining units conflicts with the “complete separation” of GC and the Board functions required by §§3(d) and 4(a) of the National Labor Relations Act (NLRA); (2) The Agency also argued that established law and policy warrant reconsideration because the consolidation creates an unavoidable conflict between the NLRA and the Statute; and (3) The NLRB asserted the RD committed a clear and prejudicial error concerning a substantial factual matter by finding there was a history of “joint bargaining” involving the GC and the Board which could continue under the proposed consolidated unit. The Agency submitted that it engaged in “coordinated bargaining” which ultimately permits the Agency to retain the authority to negotiate contract terms individually between the bargaining units. The application for review was denied.

63 FLRA No. 17  
63 FLRA 55  
O-AR-4287  
December 16, 2008

[\*AFGE Local 1045 and U.S. Dept. of Veterans Affairs Gulf Coast Veterans Health Care System, Biloxi, MS.\*](#) The FLRA denied the Union’s contrary to law, nonfact and essence exceptions to an arbitration award, not otherwise described.

3 FLRA No. 18  
63 FLRA 56  
O-AR-4312  
December 17, 2008

[AFGE Local 3571 and SSA, Region V, Gary, IN.](#) The FLRA denied the Union's contrary to law, nonfact and essence exceptions to an arbitration award, not otherwise described.

63 FLRA No. 19  
63 FLRA 57  
O-AR-4316  
Dec. 17, 2008

[AFGE Local 2145 and U.S. Dept. of Veterans Affairs Medical Center, Richmond, VA.](#) The FLRA denied the Union's contrary to law, nonfact and essence exceptions to an arbitration award, not otherwise described.

63 FLRA No. 20  
63 FLRA 58  
O-AR-4366  
Dec. 23, 2008

[AFGE Local 4046 and U.S. Dept. of the Air Force, Minot AFB, ND.](#) The FLRA denied the Union's contrary to law, nonfact and essence exceptions to an arbitration award, not otherwise described.

63 FLRA No. 21  
63 FLRA 59  
O-AR-4156  
Dec, 23, 2008

[Department of the Airforce, Tinker Air Force Base, Oklahoma City, OK and AFGE, Local 916.](#) The Arbitrator concluded the Agency violated Article 13 of the Local Supplemental Agreement by denying the grievant an opportunity to volunteer for the evening shift and earn differential pay. The Agency excepted to the award, arguing the award was "unfounded in reason and fact and fails to draw its essence from the agreements." The Agency claimed the case involved a temporary loan of employees under Article 21 of the Master Agreement; not the establishment of a swing shift under Article 13 of the Local Supplemental Agreement. The Authority found that the Arbitrator determined which provision of the parties' agreement was applicable and was therefore a question for the arbitrator to rightfully decide and denied the exception. The Agency next argued the award was based on a nonfact because the Agency "did not establish rosters available to the Union" even though the Arbitrator had concluded the Agency "did use a loan roster." The Authority concluded that, contrary to the Agency's claim, the Arbitrator did not find Article 21 applied because Article 21 concerned "the assignment of a single employee, not an entire swing shift." The exception was denied.

### **FEDERAL SERVICE IMPASSES PANEL DECISIONS**

08 FSIP 89  
December 22, 2008

[Department of the Army Installation Management Agency, Fort Greely, Alaska and AFGE Local 1949.](#) The impasse before the Panel arose out of a dispute over the Agency's proposal to change the shift rotation period for its police officers. The current schedule required police officers to rotate between day shift and night shift duty every two pay periods. Under the employer's proposed change, the police officers would rotate between day shift and night shift duty every 17 pay periods (8 months). The Agency's rationale for the change included: (1) it would permit police officers to complete more special projects and assignments without disruption; and (2) it would provide better alignment of work schedules between police officers and their supervisors, enabling continuity of supervision and fair, consistent performance ratings. The Union preferred the current schedule, but was willing to concede to a 4-pay period (56 days) rotation schedule from day shift to night shift. The Union claimed the Agency's proposed schedule would have the following ill-advised effects: (1) it would hurt police officers' morale by creating longer periods of time where those police officers on night shift would be unable to spend time with their families during daytime hours; (2) it would deny day shift police officers night shift premium pay for 17 consecutive weeks; (3) night shift police officers would suffer from less communication regarding Department activities; and finally (4) day shift police officers would get an unfair advantage regarding job performance, as their accomplishments would be more visible. The Panel ordered adoption of the 4-pay period rotation to resolve the impasse.

08 FSIP 104  
December 22, 2008

[NASA Goddard Space Flight Center, Wallops Flight Facility, Wallops Island, VA and AFGE Local 2755.](#) The request for assistance before the Panel concerned the parties' disagreement over the extent to which employees in non-professional positions should be provided with information regarding promotions based upon an accretion of duties for their positions. Specifically, the Union proposed that management provide employees working at their full performance level a written description of duties deemed above the full performance level for the position. Additionally, the

Union requested that management refrain from assigning incidental duties and functions to employees, unless such assignments result in a promotion beyond the employees' full performance level. The Agency argued the Panel should order the Union to withdraw its proposal. In its view, the development of criteria for promotions based upon an accretion of duties for all non-professional positions in the bargaining unit would be an unduly costly and time-consuming exercise in light of the fact that such promotions are rare. The Agency further argued that the parties had already addressed the issue in a previously agreed-upon provision that requires management to provide employees a written assessment of readiness for promotion. The assessment would include: (1) an evaluation of the current grade level of duties being performed; (2) a description of higher level duties that would support a promotion based upon an accretion of duties; and (3) a determination of the need or availability of work at the next level. Finally, the Agency rejected the Union's proposal as an interference with management's right to assign work as it would restrict management's ability to assign "incidental duties" to employees. After carefully reviewing the parties' positions, the Panel ordered the Union to withdraw its proposal. The Panel held that the parties' previously agreed-upon provision and the promotion policy provided avenues for employees to pursue to determine whether they were consistently performing duties above the full performance level for their positions. The Union's position would require implementation of a redundant process for which there was no demonstrated need.

08 FSIP 106  
December 22, 2008

[Dept. of the Army, U.S. Army Corps of Engineers, Northwestern Div., Portland, Or. and United Power Trades Org. \(UPTO\)](#). The impasse before the Panel concerned a dispute between the parties over several ground rules for negotiating a successor CBA, specifically, (1) location of the negotiations, (2) negotiating schedule, including schedules of Union negotiators, (3) official time to prepare for negotiations, (4) payment of the Union's travel and per diem expenses during negotiation, and (5) number of Union representatives on official time, including payment of Union travel and per diem expenses to attend impasse hearings. The parties had agreed to ground rules covering all of these issues in a prior 1999 negotiation. The agency argued for (1) using Corps facilities in Portland, (2) adopting a 5/8 work schedule during negotiations, (3) reducing to a bank of 100 hours for official time, (4) paying expenses for up to five UPTO negotiators, for up to four weeks of negotiations, and (5) granting official time and expenses for only two UPTO representatives at impasse hearings. The union argued for (1) locating negotiations in southwestern WA, closer to the employees, (2) adopting a 4/10 work schedule, (3) increasing the official time bank to 200 hours, (4) payment for five negotiators for as long as negotiations last, and (5) allowing the same number of union representatives as agency representatives at impasse hearings. The Panel ordered (1) adoption of the 1999 rule requiring negotiation at a mutually agreed location in Portland, (2) a modified version of the 1999 rule creating a 5/8 schedule with ½ day negotiations on Mon. and Fri. to allow for travel to and from Portland, (3) adoption of the 1999 rule's 140 hour official time bank, (4) adoption of the Employer's proposal of five negotiators for four weeks of negotiations, and (5) adoption of the union's proposal for equal numbers of representatives at impasse hearings.

08 FSIP 108  
December 22, 2008

[Dept. of HHS, NIH, NIEHS, Research Triangle Park, N.Car. and Local 2923, AFGE](#). The impasse before the Panel concerned a dispute between the parties over negotiations for relocation of approximately 80 bargaining unit employees to a newly-renovated building. At impasse, the parties disagreed over 13 issues including the size of offices, office selection criteria and process, a separate telework agreement for employees with offices of less than 100 square feet, and handicapped accessibility recommendation implementation. The Union proposed offices of 100 square feet or more with hard walls; to be selected on a seniority basis; when employees were assigned to smaller offices, they should be allowed to opt for telework (3 or more days per week); and management provide an explicit reason for not implementing any recommendation from a qualified professional after conducting a handicapped accessibility assessment. The Employer proposed 135 square feet enclosed offices for senior staff (GS-13 thru 15) and 80 square feet workstations for administrative staff (GS-1 thru 12); and management selection of offices for employees on the basis of function (existing status quo) in order to realize a chief "efficiency of workflow" goal of relocation to a new building. The Employer opposed providing explicit reasons for not implementing accessibility recommendations, proposing instead to "evaluate suggestions

and satisfy any bargaining obligations required under the law.” Regarding the union proposal for a new telework agreement, the employer made no counter offer stating, “management only has an obligation to bargain over the impact and implementation of its decision to relocate affected bargaining-unit employees to the Keystone Building, and these matters do not fall within the scope of that obligation.” The Panel ordered adoption of most of the employer’s proposals; however, it adopted the Union’s proposal on providing explicit reasons for not accepting handicapped accessibility recommendations. The Panel determined that the Employer’s interest in grouping employees functionally in offices of sufficient size outweighed the adverse affect of the relocation on employees, and those adverse affects did not justify a second telework agreement that would apply only to unit employees at the Keystone Building.

## MERIT SYSTEMS PROTECTION BOARD DECISIONS

DC-1221-04-0616-  
M-1  
DC-0752-04-0642-  
M-1  
2009 MSPB 3  
January 8, 2009

[Chambers v Department of the Interior](#) The Board revisited a protected disclosure issue in a case remanded by the Federal Court. The appellant was the former Chief of the U.S. Park Police who was removed by the agency on several charges. The removal was sustained by the Board, and the appellant appealed to the Federal Circuit Court of Appeals. The Court affirmed the Board’s conclusions on the merits of the charges and reasonableness of the penalty, but it remanded the case, finding the Board had applied an incorrect standard in evaluating the appellant’s claim of reprisal for her alleged disclosures of risks to public safety. On remand, after applying the standard instructed by the Court, the two Board members disagreed on whether the appellant’s alleged disclosures were protected under 5 U.S.C. § 2302(b)(8). Chairman McPhie argued some of the appellant’s public safety disclosures were protected; however, in his view, the agency presented clear and convincing evidence that it would have taken the same action against the appellant in the absence of those disclosures. Vice Chairman Rose opined the appellant made no protected disclosures, so she therefore would not reach the issue of whether the agency would have taken its actions in the absence of the appellant’s allegedly protected statements. Both members agreed, in light of their conclusions, the appellant’s removal must be sustained and her request for corrective action was denied.

NY-315H-05-0133-  
X-1  
2009 MSPB 5  
January 23, 2009

[Cunningham v. Office of Personnel Management](#). The Board granted a petition for enforcement in a breach of settlement case. The appellant was an investigator for OPM, was removed during his probationary period, filed an MSPB appeal, and a settlement was reached. The agreement contained a confidentiality clause which provided nondisclosure of the facts unless required by law, regulation, subpoena or court order. Thereafter, the appellant obtained an investigator position with USIS, a contractor who conducts background investigations for agencies, including OPM. He required a background investigation, during which the agency provided information pertaining to the appellant’s removal. The appellant filed a petition for enforcement alleging the agency’s disclosures breached the confidentiality clause contained in the settlement. The agency argued it was justified in disclosing the information because *Gizzarelli v. Department of Army*, 90 MSPR 269 (2001), permits a material breach of an agreement in the interest of public policy. The Board stated *Gizzarelli* was narrowly tailored to the circumstances associated with criminal conduct. It concluded the agency’s public interest here in disclosing information about performance or non-criminal conduct, did not outweigh the appellant’s interest in enforcing the terms of the settlement. The Board returned the case to the field office with instructions to provide the appellant the option of rescinding the agreement and reinstating his appeal.

## NOTEWORTHY COURT DECISIONS

Fed. Cir. No.  
2007-3292  
December 24,  
2008

[Gingery v. Department of Defense](#) The Court reversed and remanded a nonselection case alleging a VEOA violation. The agency selected two nonpreference eligibles over the appellant, a preference eligible, for positions filled under the excepted service Federal Career Intern Program (FCIP). The appellant filed an MSPB appeal, and both the initial

decision and subsequent Board decision found in the agency's favor. On appeal to the Federal Circuit, the appellant argued the procedures at 5 CFR § 302.401(b) that the agency used in passing over him were invalid because the agency was required to use the same procedures it would have used for competitive service hiring. The appellant also argued the FCIP was unlawful in its entirety because it violates the requirement 5 U.S.C. § 3302(1) that exceptions to the competitive service be necessary for conditions of good administration. The Government argued that, according to *Patterson v. Department of the Interior*, 424 F.3d 1151 (Fed. Cir. 2005), OPM had responsibility for implementing all veterans' preference rights in the excepted service and, in doing so, it is not required to follow the exact statutory protections enacted by Congress. The Court found 5 CFR § 3320 provides for application to the excepted service of the competitive service passover provisions in § 3318. It held 5 CFR § 302.401(b) is invalid because it does not give effect to the unambiguously expressed intent of Congress in enacting 5 U.S.C. §§ 3320 and 3318. The Court reversed and remanded the case in accordance with its findings. It did not address the argument regarding whether the FCIP or the decisions to place the auditor positions into the excepted service via the FCIP was lawful. Instead, the Court stated, should it become necessary to resolve that issue, the MSPB should do so in the first instance and if the remand does not resolve the case, the appellant is not precluded from renewing his FCIP challenges before the MSPB.

Fed. Cir. No.  
2007-3309  
January 8, 2009

[\*Gonzalez v. Department of Transportation\*](#) The Court upheld a Board decision denying back pay. The appellant had been separated by the FAA, filed an appeal with the MSPB, and an initial decision reversed the separation and ordered back pay. The agency did not file a petition for review, and the initial decision became final. Subsequently, the agency notified the appellant that it did not intend to comply. The appellant file a petition for enforcement, and the administrative judge found the previous decision to be incorrect, based on *Ivery v. Department of Transportation*, 102 M.S.P.R. 356 (2006), which states the FAA is not subject to the Back Pay Act. The Board affirmed, and the appellant appealed to the Federal Circuit, arguing that the Board erred by entertaining a collateral attack on its earlier final decision. The Court found the Board has authority to enforce its own orders where it has jurisdiction, but the original decision was void *ab initio*, and the Board lacks jurisdiction over a back pay claim involving an agency which has not waived its sovereign immunity.

Fed. Cir. No.  
2008-3093  
January 12, 2009

[\*Ramos v. Department of Justice\*](#) This decision addresses the issue of bifurcated attorney fee proceedings for the same work and which entity, the Board or the Court, will decide the litigant's entitlement to the fee under the Back Pay Act. The Court held the Board did not have authority to grant attorney fees for work performed on the appellant's interim appeal to the Court. The Court relied on *Phillips v. General Services Administration*, 924 F.2d 1577 (Fed. Cir. 1991), which states a request for attorney fees under the Back Pay Act must be directed to "this court." The Court also stated, although the appellant might be foreclosed from seeking fees from the Court because Rule 47.7 of the Federal Circuit Rules requires an application for fees to the Court within 30 days after the Board decision creating the possible fee entitlement, it waived the requirement of Rule 47.7 in this case.