



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 1121

FEDERAL LABOR RELATIONS AUTHORITY DECISIONS

63 FLRA. No. 22
63 FLRA 62
0-AR-4338
January 9, 2009

American Federation of Government Employees, Local 2119 and United States Department of the Army, Rock Island Arsenal, Rock Island, Illinois. The FLRA denied the Union's contrary to law, nonfact and essence exceptions to an arbitration award, not otherwise described.

63 FLRA. No. 23
63 FLRA 63
WA-RP-08-0007
WA-RP-08-0048
January 13, 2009

United States Department of the Navy Career Planning Activity, Chesapeake, VA and National Association of Independent Labor and International Federation of Professional and Technical Engineers, Local 1. The Union (NAIL) filed an application for review of the Regional Director's (RD) determination regarding a petition to clarify the bargaining status of 38 employees transferred and accreted to the United States Department of the Navy Career Planning Activity (the Activity) subsequent to a reorganization. The bargaining unit employees at issue were represented by NAIL and IFPTE, respectively. The RD determined that: (1) the two separate units sought by NAIL and IFPTE are not appropriate; (2) a unit of all of the Activity's professional employees is appropriate and IFPTE continues to represent them; and (3) a unit of all of the Activity's nonprofessional employees is appropriate, but an election is necessary to determine the exclusive representative of this unit. NAIL requested a review of the RD's decision on the ground that he failed to properly apply the appropriate unit criteria set forth in 5 U.S.C. § 7112(a) by not taking into account the "totality of the circumstances" when applying this criteria. The Activity challenged the Union's assertion, claiming its arguments were nothing more than disagreement with the RD and they fully supported the RD in his determination. The Authority denied the Union's application for review. It rejected all of NAIL's arguments, finding that the Union had provided no basis for finding the RD erred in his conclusions.

63 FLRA. No. 24
63 FLRA 70
0-AR-4089
January 21, 2009

National Treasury Employees Union and United States Department of the Treasury, Internal Revenue Service, Washington, D.C. The Union filed exceptions to an arbitration award finding the Agency's use of crediting plans in merit promotion actions was not improper. The arbitration resolved a grievance which claimed the Agency's use of crediting plans in merit promotion actions violated the parties' agreement, statutes, and regulations. Specifically, the Union asserted that the Arbitrator's award was contrary to law and regulation by violating the following:

5 C.F.R. Part 300 (governs employment practices of the Federal Government and agencies affecting the recruitment, measurement, ranking, and selection of individuals for initial appointment and competitive promotion)

The Uniform Guidelines, 29 C.F.R Part 1607 (in relevant part, requires Federal agencies to validate crediting plans that may have an adverse impact on any race, sex, or ethnic group)

5 C.F.R. Part 335 (requires an agency to demonstrate the crediting plans are based solely on job-related criteria)

5 U.S.C. § 7116(a)(1) and (5) (states it is an unfair labor practice to refuse to consult or negotiate in good faith with a labor organization as required by the Statute)

The Union further alleged the Arbitrator's award failed to draw its essence from the parties' agreement and that it was deficient due to the Arbitrator's failure to provide the Union a fair hearing. The Agency opposed the Union's exceptions, contending the Arbitrator's award was in line with applicable law and regulation and did properly draw its essence from the parties' agreement. The Authority agreed with the Agency. It denied every exception and upheld the Arbitrator's award.

63 FLRA No. 25
63 FLRA 76
0-AR-4381
January 22, 2009
63 FLRA No. 26
63 FLRA 77
0-AR-4387
January 22, 2009
63 FLRA. No. 27
63 FLRA 78
0-AR-4163
January 26, 2009

[*American Federation of Government Employees, Local 1858 and United States Department of the Army, United States Army Aviation and Missile Command, Redstone Arsenal, Alabama.*](#) The FLRA denied the Union's contrary to law, nonfact and essence exceptions to an arbitration award, not otherwise described.

[*American Federation of Government Employees, Local 2302 and United States Department of the Army, United States Army Armor Center, Fort Knox, Kentucky.*](#) The FLRA denied the Union's contrary to law, nonfact and essence exceptions to an arbitration award, not otherwise described.

[*American Federation of Government Employees and United States Department of Veterans Affairs Medical Center, Richmond, Virginia.*](#) The Union filed an exception to an arbitration award. The grievance concerned whether the grievant was entitled to additional remedies where management failed to comply within the time frame in the grievance procedure, and thereafter, rescinded its proposed disciplinary action. The arbitrator concluded the Agency fulfilled its obligation when it rescinded the grievant's suspension and the grievant was not entitled to additional remedies. The Union filed an exception to the arbitration award based on the following: (1) award fails to draw its essence from the parties' agreement; (2) award is contrary to law. The Authority deferred to the Arbitrator's interpretation of the agreement and did not find the arbitration award failed to draw its essence from the parties' agreement. The Union's claim that the award is contrary to law was denied as the Arbitrator's findings were directly responsive to the issue before the arbitrator.

63 FLRA No. 28
63 FLRA 81
0-AR-4384
January 26, 2009

[*NFFE, Local 1937, IAM&AW and USDA, Forest Service, Six Rivers National Forest.*](#) The FLRA denied the Union's contrary to law, nonfact and essence exceptions to an arbitration award, not otherwise described.

63 FLRA No. 29
63 FLRA 82
0-AR-4395
January 26, 2009

[*National Air Traffic Controllers Association and United States Department of Transportation, Federal Aviation.*](#) The FLRA denied the Union's contrary to law, nonfact and essence exceptions to an arbitration award, not otherwise described.

63 FLRA No. 30
63 FLRA 83
O-AR-4424
January 27, 2009

[*National Association of Independent Labor, Local 7, and United States Department of the Air Force, Seymour Johnson Air Force Base, Goldsboro, North Carolina.*](#) The FLRA denied the Union's contrary to law, nonfact and essence exceptions to an arbitration award, not otherwise described.

63 FLRA No. 31
63 FLRA 84
O-AR-4364
January 27, 2009

[*LIUNA, Local 205 and HHS, Indian Health Service, Aberdeen Area Service Units.*](#) The FLRA denied the Union's contrary to law, nonfact and essence exceptions to an arbitration award, not otherwise described.

63 FLRA No. 33
63 FLRA 87
0-AR-4389
Jan. 30, 2009

[*National Association of Independent Labor, Local 7 and Department of the Air Force, Seymore Johnson AFB, Goldsboro, North Carolina.*](#) . The Union filed a grievance alleging the Agency failed to temporarily promote the grievant to a GS-07 position based on the duties she had been performing since she was selected for her GS-05 position. During the course of the grievance process, the grievant's request for a desk audit was granted and she was promoted to a GS-06 position. The Union proceeded to arbitration to seek the temporary promotion to a GS-07. The Arbitrator found that the underlying issue in the grievance was one of position classification, rather than temporary promotion. The Arbitrator also found the grievant's claim for temporary promotion was not supported because there was "no established GS-07 Security Assistant Position in the grievant's section." Therefore, the Arbitrator found the Union's grievance not arbitrable because the grievance involved a classification matter within the meaning of §

7121(c)(5) of the Statute. The Union filed an exception to the arbitration award. The Agency filed an opposition to the Union's exception. The Union alleged that the Arbitrator's arbitrability determination was contrary to Authority precedent, which holds that temporary promotions under collective bargaining agreements are different from classification matters and are therefore arbitrable. The Union also asserted that the Arbitrator failed to consider whether the Agency violated the "equal pay for equal work" requirements of 5 U.S.C. § 2301(b)(3). The FLRA found the Arbitrator's interpretation of the agreement was not contrary to law, therefore, the contractual requirements for a temporary promotion were not met, and the award was not deficient. For this reason, the FLRA did not address the Union's remaining exceptions.

63 FLRA No. 34
63 FLRA 88
0-AR-4234
Jan. 30, 2009

[AFGE Local 3239 and SSA Region V](#). The FLRA denied the Union's contrary to law, nonfact and essence exceptions to an arbitration award, not otherwise described.

63 FLRA No. 35
63 FLRA 89
0-AR-4265
Jan. 30, 2009

[AFGE Local 15 and Department of the Army, HQ, Army Sustainment Command, Rock Island, IL](#). The FLRA denied the Union's contrary to law, nonfact and essence exceptions to an arbitration award, not otherwise described.

63 FLRA No. 36
63 FLRA 91
0-AR-4369
Jan. 30, 2009

[AFGE Local 15 and Department of the Army, HQ, Army Sustainment Command, Rock Island, IL](#). The Union filed exceptions to an arbitration award after the arbitrator denied the Union's request for attorney fees. The Agency filed an opposition to the exceptions. In his original award, the arbitrator awarded a grievant priority consideration to the next GS-13 position, but did not award retroactive promotion or backpay. The Union contended that the grievant had prevailed on every aspect of the grievance and, even though the Arbitrator did not award backpay as a remedy, an award of attorney fees was appropriate in the interest of justice. The Agency argued that the arbitrator properly denied the request for attorney fees because he did not have authority to award attorney fees without an award of backpay. The Authority held that the Back Pay Act allowed entitlement to attorney fees only with: 1) a finding that the grievant was affected by an unjustified or unwarranted personnel action, which resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials; and 2) a grant of such pay, allowances, or differentials. Accordingly, the Authority denied the Union's exceptions.

63 FLRA No. 37
63 FLRA 92
0-AR-4380
Feb. 3, 2009

[AFGE Local 53 and Department of the Navy, Naval Facilities Engineering Command, Mid-Atlantic, Norfolk, VA](#). The FLRA denied the Union's contrary to law, nonfact and essence exceptions to an arbitration award, not otherwise described.

63 FLRA No. 38
63 FLRA 93
0-AR-3989
Feb. 3, 2009

[AFGE Local 520 and VA Regional Office Columbia, SC](#). The FLRA denied the Union's contrary to law, nonfact and essence exceptions to an arbitration award, not otherwise described.

63 FLRA No. 39
63 FLRA 95
0-AR-4080
Feb. 4, 2009

[IAMAW District Lodge 776 and Department of the Army, Corpus Christi Army Depot, TX](#). The Agency filed an exception to an arbitration award, in which the Agency prevailed, because the Agency believed the issue should not have been arbitrable. The Union did not file an opposition to the exception. The original grievance alleged that certain wage grade employees had been performing duties outside of their job description that were performed by higher paid and graded engineers at other Agency facilities. The Union had requested backpay with interest. The arbitrator first determined that the issue was arbitrable because the union did not claim any misclassification or request a change in classification; the grievants were only seeking equal pay for duties outside of their job description. On the merits, the arbitrator determined the grievants were not performing substantially equal work to that of the higher paid engineers and denied the grievance. The Agency contended the grievance involved classification and the arbitrator exceeded his authority by ruling on the merits. The Authority stated that "an arbitration matter becomes moot when the parties no longer have a legally cognizable interest in the dispute." Reversing its precedent that it will always resolve exceptions to arbitrability where the excepting party prevailed on the merits ([60 FLRA 598 \(2005\)](#) and [26 FLRA 292 \(1987\)](#)), the Authority dismissed the Agency's exception as moot because the matter had been resolved in the Agency's favor.

63 FLRA No. 40
63 FLRA 100
0-AR-4256
Feb. 11, 2009

[NTEU Chapter 110 and DHS CBP](#). The Union filed exceptions to an arbitration award denying a grievance protesting the Agency's refusal to negotiate over implementation of changed work assignments at the Port of Philadelphia. The Agency filed an opposition to the Union's exceptions. The arbitrator had determined that the agency was not required to bargain under a National Bid and Rotation Memorandum of Understanding (MOU), a locally negotiated verbal bid and rotation agreement, an expired national labor agreement (NLA), or a National Inspectional Assignment Policy (NIAP), because a Revised National Inspectional Assignment Policy (RNIAP) had eliminated the duty to bargain under all of those previous agreements. The Union argued that the arbitrator erred by 1) failing to apply the MOU and verbal rotation agreement; and 2) failing to find a violation of § 7116(a)(1) and (5) resulting from the Agency's refusal to bargain under those agreements. The Authority found the arbitrator properly interpreted the previous agreements and the RNIAP, and the award was not contrary to law because the RNIAP terminated any previous local bargaining requirements. The Authority denied the Union's exceptions.

FEDERAL SERVICE IMPASSES PANEL DECISIONS

09 FSIP 9
JAN 17, 2009

[Department of the Navy, Naval Academy Nonappropriated Fund Program Division and AFGC Local 896](#). The Agency filed exceptions to an arbitrator's award of attorney fees under the Fair Labor Standards Act (FLSA). The Union filed an opposition to the Agency's exceptions. In her original award, the arbitrator found the Agency had failed to properly pay certain workers and awarded backpay and liquidated damages under the FLSA. After that award was final, the Union requested and was awarded attorney fees and expenses under the FLSA. The Agency contended that the arbitrator exceeded her authority by awarding attorney fees under the FLSA because the parties' agreement provided an exclusive remedy for attorney fees under the Back Pay Act. The Agency also asserted that the arbitrator failed to state which *Laffey* matrix was used to calculate the fees and that the fees were incorrectly calculated. The Authority found that the parties' agreement regarding the Back Pay Act was not an exclusive remedy and did not prevent the arbitrator from applying another statutory remedy. The Authority further found the fees were properly calculated and denied the Agency's exceptions.

09 FSIP 16
FEB 5, 2009

[Department of the Treasury, IRS and Chapter 118, NTEU](#). The Union proposed to create an office in the Bakersfield, California, post of duty in addition to the Union office already provided at the Camarillo, California, duty station. The Union would combine two interview rooms for the space it needed. The Union claimed the IRS had four interview rooms that were rarely used. The rooms must be vacated for agency use 20% of the time so the Union could conduct its business. The Union claimed this arrangement would still give the Agency two interview rooms to meet its business needs. The Agency proposed to maintain the Union's current situation where the size of the Chapter President's office is commensurate with the work space of a Revenue Officer. The Chapter President could reserve conference room space as needed. The Agency claimed the current space was adequate for both the Chapter President's regular duties and union activities. The Panel ordered the Agency to provide the Union with office space of between 100 to 156 square feet for its exclusive use.

09 FSIP 20 & 21
FEB 5, 2009

[Department of the Air Force, McChord AFB, Washington and Local 1501, AFGC](#). The Union proposed that all bargaining unit employees working in the 62nd/446th MXG have the opportunity to work a 4/10 CWS. The Union claimed productivity would actually increase if this shift were adopted because over 23,000 hours were lost in 2008 due to physical training (PT) days. The gap between shifts on PT days would be filled by civilians to a greater degree than currently. The Union claimed the Air Force has enough manpower with special skills in several fields to fill-in where necessary. The Agency maintained the proposed schedule would cause a reduction in the Agency's productivity. Flight-line maintenance operates in a dynamic environment where mission requirements frequently change because of world events. Moreover, many of these employees already work a 5-4/9 CWS which already results in a loss of 188 days each month. The 4/10 CWS option could result in 748 days per month when employees are not available for work. The Panel concluded the Agency met its burden of establishing that an adverse impact would likely to occur under the Union's proposal. The Panel ordered the Union to withdraw its proposal.

MERIT SYSTEMS PROTECTION BOARD DECISIONS

DC-0752-08-
0598-I-1
2009 MSPB 8
January 30, 2009

[Department of Veterans Affairs, VA North Texas Health Care System, Dallas, Texas and Local 2437, AFGE](#). The Agency's two requests for Panel assistance were consolidated on the issue of terminating the 5/4-9 CWS for the Secretary in Spinal Cord Injury Services. The Agency maintained that the schedule caused a diminished level of service to customers. On the Secretary's regular day off, volunteers are limited to answering phones and taking messages. They cannot perform complex secretarial duties like make appointments, answer staff questions or type correspondence. During her absence, issues are deferred until she returns. The Union maintained that the volunteers do in fact adequately cover for the Secretary; that there is no diminished level of service to customers. Further, an individual is available from the Work Study Program to provide more complex secretarial support on the regular Secretary's day off. The Panel found that the Secretary's 5-4/9 CWS caused a diminished level of service to customers. It ordered the Secretary's 5-4/9 CWS be terminated.

AT-3443-06-
0118-C-1
2009 MSPB 14
February 11,
2009

[Deida v. Department of the Navy](#) The issue before the Board was whether it had jurisdiction to consider the appellant's appeal as a reduction in pay when the agency determined that the position to which the appellant had been recruited and in which he served for seven months was covered by the NSPS. Although his appointment would have been a promotion under the GS pay system, his new position and the position that he previously occupied were both assigned to the same broader pay band in NSPS. Therefore, the agency determined that the appellant was not entitled to a promotion when he was converted to the NSPS pay system. The Board first held that it was undisputed that the appellant was not reduced in grade. As to the cancellation of a promotion or appointment, the Board found that once an appellant has made a prima facie case of jurisdiction by showing that he was appointed to a position by an authorized official, that he took some action to denote acceptance of the promotion, and that he actually performed in the position, the burden of production shifts to the agency to show that the promotion or appointment was an error contrary to law or regulation. To the extent that prior decisions of the Board regarding the cancellation of a promotion or an appointment have indicated that the appellant bears the burden of production on this issue, the Board overruled those decisions. In the instant case, the Board found the burden was wrongly placed on the appellant, and that the agency bears the burden of showing that it set the appellant's pay at a rate contrary to law or regulation. The appeal was remanded for a jurisdictional hearing, with the agency bearing the burden of showing that it originally set the appellant's pay at a rate contrary to law or regulation.

AT-0752-06-
0350-R-1
2009 MSPB 16
February 12,
2009

[Williams v. Department of the Air Force](#) The Board found the agency's reconstructed selection process did not comply with its Opinion and Order when the appellant, a preference eligible, was still not selected for the position. In its previous decision in this case, the Board found the agency had violated the appellant's rights under the Veterans Employment Opportunity Act of 1998 (VEOA) when it selected non-preference eligibles using the Outstanding Scholar Program (OSP) instead of him for several GS-7 Contract Specialist positions. The Board cited *Endres v. Department of Veterans Affairs*, 107 M.S.P.R. 455 (2007), *enforcement dismissed*, 108 M.S.P.R. 606 (2008), regarding agency obligations in VEOA compliance. The Board found several deficiencies in the agency's reconstructed selection process. These included: (1) it appeared, based on the agency's prior stipulations and explanation, the agency would reconstruct the process and place the appellant in the position, (2) the reconstructed selection process was incomplete as to whether the agency filled all of the positions competitively (in particular, whether some of the original OSP candidates remained in the Contract Specialist positions), and (3) there was an apparent error in the order of the agency's consideration of candidates. The Board included specific instructions to the agency so that there is no misunderstanding with respect to its subsequent reconstructed selection process.

DA-0752-07-
0066-C-1
2009 MSPB 19
February 13,
2009

[Pedeleose v DoD](#) The Board revisited a 30-day suspension case in which the Office of Personnel Management (OPM) filed a petition for reconsideration. In the original decision, the Board held that the agency failed to prove the charges on which the action was based, and that the agency's action was in retaliation for the appellant's whistle blowing activities. The Board stated that the application of the "obey now, grieve later" exception to an employee's failure to follow an order must include consideration of whether an exception is warranted in circumstances where the employee doubts the

legality of the instruction. OPM filed a petition for reconsideration of the Board's decision arguing that the Board vastly expanded the recognized exceptions which should only apply in extreme cases where compliance would involve clear physical danger. Additionally, OPM argued that the Board erred in finding a protected disclosure in the appellant's allegations by misapplying the test. In its reconsideration decision, the Board recognized that it had expanded the exception to the "obey now grieve later" rule and agreed there was a lack of support for the appellant's claim of whistleblower reprisal. For these reasons, the Board granted the Director of OPM's petition for reconsideration, vacated the Board's previous decision and upheld the agency's 30-day suspension of the appellant.

NOTEWORTHY COURT DECISIONS

Fed Cir. No.
2008-3038
February 23,
2009

Torres v. Department of Homeland Security The Board found the agency's settlement agreement with the appellant precluded agency officials from providing an investigator with information about the appellant's removal. Revealing such information in violation of the agreement would be a material breach of the agreement, which provided in effect that the appellant was to be given a clean record. The Board applied the principles in *Pagan v. Department of Veterans Affairs*, 170 F.3d 1368 (Fed. Cir. 1999), and its progeny, which require construing a settlement agreement in a way that will provide the appellant the benefits for which he bargained. In this case, the agreement must be construed as requiring that the agency's communications with third parties reflect what the replacement SF-50 shows--that he resigned--and that it not disclose the circumstances of the removal. The board found however that the record did not establish whether such a breach occurred and further development of the evidence was required. The Board remanded the case and required the timeliness of the appellant's petition for enforcement be addressed first to determine when he was aware of the alleged breach so as to trigger his obligation to file an appeal.

Delalat v. Department of the Air Force The Court held that reemployed annuitants are "employees" for purposes of the Federal Employees' Compensation Act (FECA) and are therefore entitled to a statutory right to restoration. In 2002, four years after appellant retired he was hired by the Air Force as a reemployed annuitant. Shortly thereafter he suffered an on-the-job injury but, months later after being cleared by his physician, the Air Force did not respond to his requests for restoration and terminated him. The AJ dismissed his case for lack of jurisdiction, holding that a reemployed annuitant lacks restoration rights under 5CFR 353.301(a) and the Board denied the resulting PFR. The Court ruled that the MSPB erred, saying that the appellant meets the definition of 'employee' with respect to his restoration rights. Despite the fact that a reemployed annuitant is an at-will employee, the Court stated firmly that it does not mean they are not wholly without rights. Section 3323 of title 5, U.S. Code does not exclude reemployed annuitants from statutory protections involving restoration rights based on a compensable injury. In addition to title 5, 5 CFR 353.304(a) also states that an employee (including a reemployed annuitant) may appeal to MSPB for an agency's 'failure to restore', the Court vacated and remanded the case back to the Board.