United States
Office of
Personnel Management

Washington, DC 20415-2001

In Reply To: **Your reference:**

1

1

DATE: November 1, 2007

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 1109

FEDERAL LABOR RELATIONS AUTHORITY DECISIONS

* We note the FLRA cases are not hyperlinked because they are not yet posted on the FLRA's website.

62 FLRA No. 41;
SF-RP-07-0005
September 28, 2007

U.S. Dep't of the Air Force, Edwards Air Force Base, CA and Sport Air Traffic Controllers Organization. The Union petitioned for the inclusion of a training manager in the bargaining unit and the Regional Director (RD) denied it finding the training manager was a confidential employee. The RD found the training manager's supervisor was significantly involved in labor-management relations and the training manager had a confidential working relationship with him. The FLRA denied the Union's application for review. The FLRA concluded the RD did not commit prejudicial procedural error by failing to accept into evidence an agency instruction designating the labor relations office as the contact point with the Union. Moreover, the Union did not show how it was prejudiced by this ruling, noting the instruction does not preclude the supervisor from engaging in labor-management activities. The FLRA also found the Union did not demonstrate how the RD committed a prejudicial error on a factual finding by relying on the supervisor's misstatement in his testimony about the status of contract negotiations. Specifically, it noted the RD relied on the statement only to demonstrate the supervisor provided advice to management on negotiations and, even if the supervisor's testimony was incorrect, this did not affect the RD's finding that he was involved. The FLRA further found no prejudicial error by the RD in disallowing Union questions concerning labor-management issues the supervisor was not involved in because they were irrelevant to the issue of what matters the supervisor was involved in. Finally, while the FLRA stated it may grant review if the RD's decision raises an issue for which there is an absence of precedent, it rejected this Union claim with respect to the collaborative activities of the training manager that are addressed by the RD's decision. Under Authority precedent, the confidential relationship that constitutes one of the requirements for finding an employee is a confidential employee concerns the relationship between the employee in question and that employee's supervisor. The FLRA found the Union's argument that some of the information exchanged between the employee and his supervisor was collaborative with the Union, rather than confidential, does not establish that the RD's decision was without precedent.

62 FLRA No. 42;
WA-RP-06-0022
WA-RP-06-0002
September 28, 2007

U.S. Dep't of Defense, Pentagon Force Protection Agency, Washington, D.C. and Fraternal Order of Police, D.C. Lodge 1, Defense Protective Service Labor Committee. Following a reorganization and the establishment of the Pentagon Force Protection Agency, the Union filed a petition to include in the existing unit police officers located at the Raven Rock Mountain Complex. Citing national security issues, the Agency filed a cross petition seeking to exclude all police officers in

the existing unit as well as the additional officers the Union sought to include. Relying on testimony of ten officers representing five different categories of law enforcement work, the Regional Director (RD) made numerous factual findings about the officers' work, their training, their access to classified information, and the facilities and persons they are assigned to protect. Finding the police officers ineligible for inclusion in any bargaining unit under § 7112(b)(6) of the Statute because they are engaged in security work that directly affects national security, the RD dismissed the Union's petition to include the Raven Rock officers and granted the Agency's petition excluding all officers. The FLRA rejected the Union's contentions the RD committed: (1) prejudicial error in refusing to hold another hearing concerning the status of a few police officers in another division and (2) clear and prejudicial errors in his factual findings. However, the FLRA found the RD failed to apply established law. The FLRA explained that bargaining unit determinations are made based on duties actually performed at the time of the hearing and the record indicated there were five different categories of police work in question, performed at two distinct locations. The RD made specific findings on the duties performed by the representative witnesses, but failed to base his conclusion on the specific duties when applying the statutory standard. In this regard, rather than consider the actual duties of the police officers within each of the five different categories as they are employed at the locations involved, the RD instead made general conclusions with respect to all police officers without reference to their actual duties. Accordingly, the FLRA granted the application for review and remanded the case to the RD to make specific findings as to actual duties performed and to then determine whether the work directly affects national security.

MERIT SYSTEMS PROTECTION BOARD DECISIONS

AT-1221-07-0049-W-1
2007 MSPB 225
September 17, 2007

Jessup v. Department of Homeland Security The appellant filed an individual right of action (IRA) appeal alleging the agency rescinded his pending appointment and placed him in "release" (non-duty, non-pay) status in his temporary position because of three disclosures protected by the Whistleblower Protection Act (WPA). The AJ dismissed the appeal for lack of jurisdiction because the appellant was appointed temporarily under the Stafford Act and so was not subject to Title 5 with any adverse action appeal rights and he failed to non-frivolously allege that his disclosures were protected under the WPA. The Board affirmed the initial decision dismissing two alleged disclosures (an equal employment opportunity complaint and a report made in the normal course of the appellant's duties) for failure to establish IRA jurisdiction under the WPA. However, the Board reversed and remanded the appellant's WPA claim based on his disclosure of his supervisor's statement that he would "throw [a part of appellant's body] under a bus…" Affirming that threats and intimidation by a supervisor can represent an abuse of authority under the WPA, the Board held that in spite of the appellant's misperception that the threat was solely to his body, he non-frivolously alleged facts before the Office of the Special Counsel (OSC) that a reasonable person would believe evidenced an abuse of authority subject to the WPA. The Board held that the agency's rescission of its job offer and placement of the appellant on "release" status, similar to leave without pay, are personnel actions for purposes of the WPA. The Board found the appellant made a non-frivolous claim his disclosure was a contributing factor in these personnel actions. The two personnel actions followed relatively close in time to the appellant's disclosure of his supervisor's threat and the appellant alleged that his supervisor used his influence within the organization to cause the Office of the General Counsel to take personnel actions.

PH-1221-07-0152-W-1
2007 MSPB 219
September 19, 2007

J. Larry Shope v. Department of the Navy The appellant filed an IRA appeal alleging that the agency barred him from the workplace in retaliation for an alleged protected disclosure, and he requested a hearing on this matter. During a prehearing conference, the AJ denied the agency's motion to dismiss for lack of jurisdiction, finding that the appellant presented a nonfrivolous allegation that his disclosure was protected under the Whistleblower Protection Act (WPA). Following the hearing, the AJ dismissed the appeal for lack of jurisdiction, finding that no such nonfrivolous allegation was presented. In his petition for review, the appellant asserted that the AJ erred in determining jurisdiction after the hearing, because the AJ had already found that jurisdiction existed, and that the hearing and decision should have focused on the merits of the claim. The Board determined that because the AJ found Board jurisdiction, this hearing should

have been on the merits of the claim, and the AJ therefore erred in dismissing the appeal for lack of jurisdiction. The Board found, however, this error was harmless because it agreed with the AJ's ultimate conclusion that the documentary evidence did not show that the appellant presented a nonfrivolous allegation that his disclosure was protected under the WPA. The disclosure at issue was the appellant's e-mail to his supervisor declining a $500 bonus the agency awarded the appellant. The Board concluded that, as the AJ correctly found, the e-mail statements constituted an unprotected, generalized, vague rant against the government and agency policy and decision-making. The Board further held that because the appellant did not meet his burden of proving jurisdiction, his allegations regarding discovery and new evidence did not change the outcome of the appeal and did not provide a basis for granting review.

AT-0330-07-0116-I-1
2007 MSPB 223
September 24, 2007

Lodge v. Department of Treasury The appellant, a veteran with a 30% service-connected compensable disability, applied as an external candidate for a Internal Revenue Officer position and was found "superior qualified" based on his application. The agency later notified that appellant that the external vacancy announcement was cancelled. The agency subsequently reopened the external vacancy announcement and notified the appellant that it had applied to Office of Personnel Management (OPM) to pass over him in order to select a qualified non-preference eligible because he was not qualified for the position. Thereafter, OPM returned the agency's pass-over request to the agency for additional justification, and the agency's second request cited the appellant's alleged misconduct during previous employment with the agency. The appellant subsequently filed two Board appeals for corrective action which were denied because the agency's pass-over requests were still pending before OPM. The agency's request was eventually denied and the appellant filed the underlying appeal. On appeal to the Board, the AJ found the agency violated the appellant's rights to veterans' preference, and ordered the agency to retroactively offer the appellant the position. The agency petitioned for review of the initial decision and the appellant filed a cross-petition for review along with other pleadings and motions. The Board held that reconstruction of the hiring process was the appropriate remedy in this case, rather than an order to retroactively appoint the appellant to the position, citing *Dean v. Department of Agriculture*, 99 M.S.P.R. 533 (2005) and *Walker v. Department of the Army*, 104 M.S.P.R. 96 (2006). The Board further held that an individual may be entitled to the retroactive remedies of back pay and compensation for loss of benefits if it is determined that he would have been hired by the agency in the absence of a violation of his rights. The Board denied the appellant's cross-petition for review.

PH-3443-07-0050-I-1
PH-3443-06-0643-I-1
PH-3443-06-0645-I-1
2007 MSPB 224
September 25, 2007

Buckheit v. United States Postal Service The appellant, a preference eligible, petitioned for review of an initial decision dismissing his appeal under the Veterans Employment Opportunities Act (VEOA) for lack of jurisdiction and denying his request for relief under the Uniformed Service Employment and Reemployment Rights Act (USERRA). The appellant was employed at the agency's Linthicum, Maryland office as a PS-5 Mail Processing Clerk. The agency provided the appellant advanced notification that his position was being abolished. The appellant received subsequent notifications stating the agency was not conducting a RIF and preference-eligible employees would be given the opportunity to keep their PS-5 clerk position at another facility or stay at Linthicum as a PS-4 mailhandler. The appellant submitted a bid for a PS-5 position at a different facility. He filed an appeal with the Board alleging that the agency had conducted a RIF, that the agency violated his rights as a preference eligible and in doing so, discriminated against him based on his prior military service. The AJ dismissed both the VEOA and USERRA claims. The Board concurred with and affirmed the AJ's findings on the USERRA claim that the appellant's reassignment was voluntary and he failed to show the agency treated him less favorably than it treated non-preference eligibles. The Board found it had jurisdiction over the appellant's VEOA claim because an employee's rights under 5 CFR part 351 are based in part on whether the employee is a preference eligible and a violation of those regulations may constitute a violation of an agency provision relating to veterans preference. Although the appellant's allegation constituted a non-frivolous claim under VEOA, the Board held that the RIF regulations apply only when an agency releases an employee from his competitive level by reassignment requiring displacement. Because the evidence shows that the appellant's reassignment did not require displacement, the appellant did not show that he was denied any preference-related rights to which he was entitled under Part 351.

CB-1216-06-0007-T-1
2007 MSPB 227
September 26, 2007

Special Counsel v. Acconcia The agency petitioned for review of the ALJ's recommended decision (RD) which found that the respondent, an Assistant United States Trustee, violated several provisions of the Hatch Act, 5 U.S.C. §§ 7321-7326, but recommended that the respondent serve a 45-day suspension rather than be removed. The respondent gave an invitation to a fundraiser soliciting contributions on behalf of a Democratic candidate for Governor of Missouri to a subordinate. The Board adopted the RD with regard to the ALJ's findings that the respondent violated the statute, but ordered the respondent removed from her position. The Board analyzed the six factors, under *Special Counsel v. Lee,* 58 M.S.P.R. 81, 91 (1993), it considers in determining the appropriateness of a penalty for a federal employee's violation of the Hatch Act. Regarding the nature of the offense and the extent of the employee's participation, the Board found in this case that the coercion of political contributions is one of the most pernicious of the unlawful activities and solicitation of political contributions from a subordinate has been found to warrant removal. Second, the Board held that the employee's motive and intent to benefit a friend rather than herself was not a significant mitigating factor. Third, although the record did not reflect the respondent received advice of counsel regarding her activities, the Board found that the respondent is an attorney with knowledge of the Hatch Act proscriptions and responsibility to ensure her subordinates were aware of them. Also, the respondent stated "that she knew [it] was 'a little outside the rules.'" Regarding the fourth factor of whether the employee had ceased the activities and appeared unlikely to repeat the activity, the Board found some support in favor of mitigating the penalty. In considering the fifth factor, the Board noted the respondent's past employment record, which included four counseling memos and a 14-day suspension based on misconduct toward the subordinate she solicited for a contribution, was not a significant mitigating factor. As to the final factor, the Board found the attempt to coerce a political contribution for a gubernatorial candidate associated with a national political party was an act with significant political coloring. Thus the Board found the presumptive penalty of removal was appropriate.

DC-3443-07-0181-I-1
2007 MSPB 229
September 27, 2007

Shaver v. Department of the Air Force The appellant petitioned for review of an initial decision that denied her request for corrective action under VEOA. Among other allegations, the appellant alleged that the agency's practice of giving military spouses priority over veterans violated her rights as a preference-eligible candidate for positions with the agency. After several motions and filings, the AJ issued an initial decision which denied the appellant's request for corrective action. The AJ found the appellant established Board jurisdiction, but denied the appellant's request for corrective action on the grounds that the information she supplied as to the position at issue was so vague as to make it impossible to determine what positions the appellant actually applied for and whether she was qualified for the positions. The Board found that the appellant exhausted her remedy with the DOL with respect to one vacancy of the several vacancies she claimed were at issue. To the extent the appellant sought an advisory opinion from the Board without any reference to a special action affecting her, the Board found the AJ properly declined to issue such a decision and affirmed the Board does not have the authority to issue such opinions. Still, rather than finding that the Board had jurisdiction over the appellant's appeal and then denying corrective action on the basis of the garbled and vague nature of the appellant's allegations in the current record, the Board found the better practice would have been for the administrative judge to require the appellant to clarify her submissions to identify the specific agency actions at issue in her appeal. The Board vacated the initial decision and remanded the case for further adjudication. On remand, the appellant must state the specific actions she is attempting to appeal to the Board and demonstrate that she has exhausted her remedy with DOL.

CH-0752-07-0121-I-1
2007 MSPB 231
September 27, 2007

Rose v. United States Postal Service The appellant petitioned for review of the initial decision (ID) dismissing his indefinite suspension appeal as withdrawn. The appellant asserted that his two conditions for withdrawing his appeal (reimbursement for annual leave used during the suspension period and back pay for the rest of the suspension period) were not met. The Board vacated the ID and remanded the appeal, finding the record did not establish the appellant relinquished his right to appeal by clear, unequivocal, and decisive action. The Board based its decision on the following facts: 1) there was no record of the appellant's receiving reimbursement for the annual leave used

during the suspension period; 2) the appellant's pro se status, his claim that his agreement to withdraw his appeal was based on certain conditions and the absence of any evidence in the record that the alleged conditions were satisfied; 3) the lack of a detailed status conference record as to what occurred during the telephonic status conference; and 4) the appellant's lack of opportunity to object to the conclusions in the status conference summary since the ID was issued on the same day as the summary.

AT-3443-06-0730-I-1
2007 MSPB 234
September 28, 2007

Haskins v. Department of the Navy The appellant appealed a decision that denied corrective action with regard to four disputed dates of military leave benefits, claims under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), and dismissed the remaining portion of her appeal as moot. The Board cited *Pucilowski v. Department of Justice*, No. 2006-3388, (Fed. Cir. Aug. 29, 2007) a recent Federal Circuit slip opinion that overruled *Dombrowski v. Department of Veterans Affairs,* 102 M.S.P.R. 160 (2006). Previously, the Board had held in *Dombrowski* that it lacks the authority to order an agency to correct employees' military leave records. In light of *Pucilowski,* an appellant may establish entitlement to relief under USERRA by showing that the agency improperly charged her military leave, whether or not the improper charging of military leave resulted in the appellant's being forced to use annual leave or leave without pay. The Board held *Pucilowski* does not change the outcome of this appeal, however, because the appellant did not submit sufficient evidence to establish that, more likely than not, the agency improperly charged her military leave on nonworkdays. In finding that the appellant could bring a petition for enforcement if she had any claims about the relief provided by the agency after the appeal was dismissed as moot, the Board held the analysis of those cases relied upon by the AJ (*Hill v. U.S. Postal Service*, 69 M.S.P.R. 453, 456, *aff'd,* 104 F.3d 376 (Fed. Cir. 1996) and *Hatler v. Department of the Air Force*, 3 M.S.P.R. 322, 325 (1980) are legally unsound. The Board overruled these and any others that conclude a petition for enforcement can be brought after an appeal is dismissed as moot. Further, the Board found the appropriate test for determining when an appeal is moot is no longer affording the appellant compensation for the annual leave that she was improperly forced to take and instead the AJ must determine, taking *Pucilowski* into account, whether the agency's action affords the appellant all of the relief to which she would be entitled under 38 U.S.C. § 4324(c), if she were to prevail in her appeal. Finally, the Board overruled its decision in *Dellera v. Department of Housing and Urban Development*, 65 M.S.P.R. 636, 642 (1994), *aff'd*, 82 F.3d 434 (Fed. Cir. 1996) (present intent to restore the appellant to the status quo ante was sufficient to render the appeal moot). The Board found an appeal may not be dismissed as moot until the agency provides acceptable evidence showing that it has actually afforded the appellant all of the relief that she could have received if the matter had been adjudicated and she had prevailed. Applying these principles to the appellant's case, the Board found the AJ erred by dismissing the appeal as moot and remanded the case.

DC-0752-07-0338-I-1
2007 MSPB 233
September 28, 2007

Johnson v. Department of the Army The appellant was removed from her intelligence specialist position, in the Defense Civilian Intelligence Personnel System (DCIPS), for excessive absenteeism. The AJ dismissed the appeal finding that under 5 U.S.C. § 7511(b)(8) the Board lacked jurisdiction to adjudicate the removal. Under 5 U.S.C. § 7511(b)(8), a non-preference eligible may not appeal her removal from a position within an intelligence component of the Department of Defense (DoD) (as defined by section 1614 of title 10), or an intelligence activity of a military department covered under subchapter I of chapter 83 of title 10. The appellant petitioned for review challenging the AJ's finding the organization where she worked was an intelligence component of DoD, an organization covered by 10 U.S.C. § 1614(2)(D). The appellant argued that 10 U.S.C. § 1614(2)(D) was inapplicable without the Secretary of Defense designation that the organization was an "intelligence component." The Board agreed the appellant was not excluded from the Board's jurisdiction based upon 10 U.S.C. § 1614(2)(D), however, the Board found the appellant, as a DCIPS employee, was an employee of an intelligence activity of a military department covered under subchapter I of chapter 83 of title 10. As such, she was excluded from the Board's jurisdiction under 5 U.S.C. § 7511(b)(8).

AT-3443-07-0244-I-1

Mitchell v. Department of Commerce At least 17 months beyond the statutory 60-day time limit for doing so, the appellant allegedly made an inquiry with the Department of Labor regarding the filing

2007 MSPB 235
September 28, 2007

of a complaint of violation of his veteran's preference rights under the Veterans Employment Opportunities Act (VEOA) of 1998, due to the agency's nonselection of him for an advertised position. The request was not made in writing, as required under the VEOA. The AJ dismissed the appeal for lack of jurisdiction, finding no evidence showing the appellant had filed a timely complaint with DOL. The Board found that although veterans' preference rules do not apply to a merit promotion action, the procedure the agency stated it used, the Board did not need to reach the merits issue because the appellant failed to establish Board jurisdiction by preponderant evidence. The Court analyzed the question of whether the doctrine of equitable tolling was applicable to this case under the Federal Circuit's decision in *Kirkendall v. Department of the Army,* 479 F.3d 830, 835-44 & n.2 (Fed. Cir. 2007), which was guided by the decision of the U.S. Supreme Court in *Irwin v. Department of Veterans Affairs*. In *Irwin*, the Supreme Court noted that "Federal courts have typically extended equitable relief only sparingly." The Board held the appellant did not meet the two situations where the Supreme Court has allowed equitable tolling, specifically where the claimant: (1) has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or (2) has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. The Board found the appellant's failure to file a complaint with DOL resulted from his failure to exercise due diligence in preserving his legal rights, which the Supreme Court has indicated is an excuse for which it has "generally been much less forgiving" in terms of applying the doctrine of equitable tolling.

NOTEWORTHY COURT DECISIONS

Fed. Cir. No.
2007-3006
September 20, 2007

Jacobsen v. Department of Justice The appellant appealed from a final opinion and order of the Board affirming the denial of his motion for attorney fees pursuant to 38 U.S.C. § 4324(c)(4), the fee-shifting provision of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). Citing *Farrar v. Hobby,* 506 U.S. 103 (1992), the Board held that attorney fees were properly denied in this case based upon the appellant's "limited" degree of overall success on the merits of his claim and his failure to utilize the agency's administrative process. The Court observed that, unlike other attorney fees provisions administered by the Board, section 4324(c)(4) merely requires the Board to issue an "order" and that Congress left the decision whether to award reasonable attorney fees to the Board's discretion. The Court stated the narrow issue on appeal was whether the factors the Board considered are permissible and lawful. The Court examined two factors. Regarding the first factor, the Court held that because the appellant's claim was reasonably construed as claiming the agency improperly charged him military leave for each of the seven years of military service and the agency only improperly charged him military leave in one of those years, the Board did not err in finding that the appellant's success in relation to the relief he sought was nominal. Further, because the appellant did not contend that the Board's reliance on *Farrar* is in error, the Court held for purposes of this opinion that the appellant's degree of success was an appropriate consideration within the Board's discretion. Concerning the second factor, the Court held the Board was in error because USERRA contains no requirement that a petitioner pursue, much less exhaust, his or her administrative remedies prior to bringing an appeal before the Board. The Court held this was harmless error since the Board had properly ruled regarding the first factor.

Fed. Cir. No.
2006-3181
October 16, 2007

Lowder v. Department of Homeland Security The Court affirmed the Board's determination that the appellant's service with the United States Secret Service Uniformed Division (Uniformed Division) did not qualify as "law enforcement officer" service. In order to qualify for law enforcement officer retirement -- which may provide more favorable retirement benefits than those of most federal employees, provides earlier retirement, and a higher annuity -- an employee must contribute a slightly higher portion of their pay toward those benefits and have a specified period of service in a "primary" law enforcement officer position where the employee directly performs law enforcement officer duties. The law enforcement officer may combine that service with "secondary" service to attain law enforcement officer status by transferring directly from a primary to a secondary service position. The appellant's Uniformed Division duties included both the White House and the Foreign Mission Division. At the White House, his regular duties involved the protection of life and property, with particular focus on the President of the United States and his family, including patrolling, enforcing traffic laws, acting as a first responder with

regard to public disturbances and incidents, and conducting preliminary investigations. The Board affirmed these duties did not meet the statutory definition of a "law enforcement officer" as "an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States . . ." The governing statute is 5 U.S.C. §§ 8331(20), 8401(17). The Court uses a "position-oriented approach" that emphasizes "the official documentation of the position." Under these standards, the Court held it had no basis for rejecting the Board's conclusion. The Court held that the record of the appellant's duties and the classification of his position in the 083 Police Series supported those findings. In response to the appellant's additional claims, the Court found the AJ wrote a detailed opinion that required no more detailed discussion and that determining his status under the later-enacted Federal Employees' Retirement System would not have been helpful to him.