

FLRA Update

Recent, Significant Authority Decisions

Negotiability Case (1):

AFGE Local 1547 and U.S. Dep't of the Air Force, Luke Air Force Base, Az., 68 FLRA 557 (May 13, 2015) (Member Pizzella dissenting), *appeal filed*, No. 15-1208 (D.C. Cir. July 8, 2015):

- Union provision to extend to civilian employees access to Luke AFB military exchange; Agency-head disapproval.
- In 67 FLRA 523 (Member Pizzella dissenting), Authority found that the provision concerned bargaining-unit employees' conditions of employment and that there was no conflict between provision and Title 10 because the Agency did not demonstrate that Title 10 either gives the SOD "sole and exclusive discretion" to determine who has access to the exchange, or prohibits the Agency from granting civilian employees such access; ordered Agency to rescind disapproval.
- On motion for reconsideration, Authority again found provision "not inconsistent" with Title 10, and that the Agency's DOD Instruction 1330.21 claim was barred because it had not been raised in the original proceeding. But even assuming that the Agency had properly raised the DOD Instruction 1330.21, the Authority found the Agency's claim unpersuasive and a mere attempt to relitigate conclusions reached in 67 FLRA 523.
- Member Pizzella noted, in dissent, that Title 10 and DOD Instruction 1330.21 leave question of access solely to discretion of the SOD.

Representation Cases (2):

State Dep't, Consular Affairs Passport Svcs. and NFFE Local 1098, 68 FLRA 657 (January 30, 2015) (Member Pizzella concurring, in part, dissenting, in part):

- Authority held Passport Acceptance Facilities analysts, who perform quality control checks to "ensure that acceptance facilities [do] not deviate from Agency standards," but whose positions are not designed to "uncover waste, fraud, abuse, or wrongdoing" committed by Agency employees, are not excluded from bargaining unit by § 7112(b)(7)'s internal security exemption; similarly, analysts who do not "exercise independent judgment with regard to personnel actions" are not excluded by § 7112(b)(3).
- Member Pizzella noted, in partial dissent, that even "oversight duties performed (on behalf of the Agency, by contractors or other non-Agency employees) 'ensure that the duties are discharged honestly and with integrity'" and therefore may exclude under § 7112(b)(7).

FDIC and NTEU, 68 FLRA 260 (January 28, 2015)(Unanimous):

- In 2012, Union had petitioned the Regional Director (RD) to clarify an existing bargaining unit to include certain interns through accretion. The RD dismissed the petition.

- In February 2013 the Union timely filed a petition with the Authority, seeking review of the RD's dismissal. The Authority lacked a quorum, and so, could not issue decisions until November 12, 2013.
- The Authority issued its decision in *FDIC*, 67 FLRA 430 (2014) (Member Pizzella dissenting), in May 2013 and found the RD failed to apply well-established law, warranting a remand of the petition.
- The Authority granted the Agency's motion for reconsideration of *FDIC*, and vacated *FDIC*. The Authority held that, because 60 days had passed after Authority regained its quorum, RD's decision had become "the action of the Authority" under § 7105(f) of the Statute – so Authority did not have the authority to reverse the RD in 67 FLRA 430.
- See also *U.S. Dep't of Agric., U.S. Forest Serv. and NFFE, IAMAW, AFL-CIO*, 68 FLRA 267 (2015) (notifying parties that, because no action had been taken on application for review within 60 days of Authority regaining quorum, Regional Director's decision had become the action of the Authority); *U.S. Dept. of the Air Force, Fairchild Air Force Base and Fairchild Fed. Employees Union*, 68 FLRA 268 (2015) (same), reconsideration denied, 68 FLRA 366 (2015); *U.S. DOD Pentagon Force Protection Agency and AFGE*, 68 FLRA 371 (2015) (same).

ULP Cases (4):

VAMC Richmond and AFGE Local 2145, 68 FLRA 882 (January 30, 2015) (Member Pizzella concurring):

- Authority found that Agency bypassed the Union and committed an unfair labor practice (ULP) in violation of § 7116(a)(1) and (5) of the Statute when it "sought to arrange directly with the employee a 'consensual settlement of complaints [(grievance bypass)] made against' him" by asking the employee to move floors (working conditions bypass).
- Member Pizzella noted, concurring, that Agency had an obligation to bargain over procedures and arrangements "related to the relocation" (grievance bypass) but not as to the "move itself" because that decision is a "management right" and therefore not a "condition of employment."

U. S. Dep't of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah and AFGE Local 1592, 68 FLRA 460 (April 16, 2015) (Member DuBester dissenting), *appeal filed*, No. 15-9541 (10th Cir. June 15, 2015):

- General Counsel issued a complaint alleging the Agency committed ULP in violation of § 7114(a)(2)(B) of the Statute when an investigator employed by the Air Force Office of Special Investigations (AFOSI) denied a BUE's request for a Union representative to be present during an interview.
- The Administrative Law Judge, following a hearing, dismissed the complaint. The ALJ found that the bargaining-unit employee did request Union representation be present during the interview; however, the AFOSI agent could not be a "representative of the agency" under §7114(a)(2)(B) because AFOSI had been "excluded from coverage" under the Statute by Executive Order 12171 (1979). As the AFOSI agent could not be a

representative of the agency, the Agency was not liable for the alleged violation of the Statute.

- The Authority found that the plain wording of §7103(b)(1) provided that the President may issue an order excluding any agency or subdivision from all coverage under “this Chapter,” and so, per Executive Order 12171, the AFOSI agent did not act as the Agency’s representative when he interviewed the bargaining-unit employee and the Agency could not be held responsible for his conduct during the interview. The Authority dismissed the complaint.
- Member DuBester noted, in dissent, that §7103(b)(1)’s plain language does not make clear whether an “excluded” agency is excluded from the Statute’s coverage in every respect, or only with respect to its own functions and employees. For this and other reasons, Member DuBester would find that “AFOSI, though not itself covered by the Statute, was acting as the agency’s representative when its investigator interviewed the employee” and “the employee was therefore entitled to the rights under §7114(a)(2)(B) that the Authority and the courts have for so long recognized as fundamental and important.”

NFFE, Local 2189 and Jonathan Jarman, 68 FLRA 374 (March 24, 2015) (Member Pizzella, concurring):

- Before becoming part of the bargaining unit that the Respondent Union represents, the employee was a member, and the president, of a different union (the guards’ union). While he was the president of the guards’ union, his employing agency proposed a change in its work schedules. The employee and the guards’ union had a disagreement with the Union in this case over how to respond to the proposed scheduling change. During this time, the employee made comments on his personal Facebook page regarding Union membership and decertification. Several months later, the employee accepted a different position which was within the bargaining unit represented by the Union. The employee submitted the standard form to begin dues withholding. The Union held a membership meeting and denied the employee membership.
- The General Counsel issued a complaint, alleging the Union violated 5 U.S.C. § 7116(c), concerning granting and denying union membership. The ALJ found that the Union had violated § 7116(c) because the employee’s comments on social media were insufficient to deny membership as the employee was not a member of the Union or represented by the Union when the comments were made, the employee never pursued decertification against the Union, and the employee discussed the Union only once. The ALJ ordered the Union to unconditionally offer to retroactively admit the employee to membership.
- The Authority held that the Union violated §7116(c) by denying the employee initial membership, noting the Statute provides that initial membership may only be denied for failure to meet occupational standards uniformly required for admission or for failure to tender dues, neither of which were alleged here. Further, following judicial precedent, the Authority considered the Union’s First Amendment argument. Citing the Supreme Court precedent, the Authority rejected the Union’s argument that admitting

the employee as a remedy for the Union's violation of § 7116(c) would violate the Union's freedom of association under the First Amendment.

- Member Pizzella noted, concurring, that the Authority should not have considered the Union's constitution-based exceptions as this argument was beyond the Authority's ULP jurisdiction.

U.S. DHS, U.S. Immigration & Customs Enforcement, Wash., D.C. and AFGE Local 1917, 69 FLRA 72 (November 13, 2015) (Member Pizzella concurring, in part, and dissenting, in part):

- The General Counsel issued complaints alleging that the Agency violated § 7116(a)(1) and (8) of the Statute by refusing to arbitrate two grievances filed by the Union at the local level.
- The Agency refused to arbitrate these grievances because another AFGE organization, the national-level agent for the employees in the local bargaining unit, filed national-level grievances challenging the same Agency actions. The Agency argued that: (1) the Union did not have authority or standing to grieve or arbitrate matters of national importance; (2) an arbitrator wouldn't have jurisdiction to decide the disputed grievances; (3) the parties' agreement did not permit duplicate grievances; and (4) it would be inefficient to arbitrate the Union's local-level grievances in addition to the national-level grievances.
- With regard to the first three arguments, the Administrative Law Judge (ALJ) found that these were arbitrability questions, and that § 7121 of the Statute required the Agency to present such arguments at arbitration. Concerning the fourth argument, the Judge noted that the Authority has previously held that alleged "inefficiencies" do not justify refusing to arbitrate an unsettled grievance. Thus, the ALJ concluded the Agency violated § 7116(a)(1) and (8) for refusing to arbitrate the disputed grievances, and as a remedy, ordered the Agency to make a nationwide posting signed by the Agency's Director.
- The Authority agreed with the ALJ. The Authority found it "well-established that questions of arbitrability are solely for an arbitrator to decide." Citing Authority precedent, the Authority further found "that questions of mootness, standing, arbitral jurisdiction, and res judicata are questions of arbitrability." The Authority therefore ordered the parties to proceed to arbitration concerning the two grievances filed by the Union, and for the Agency to make a nationwide posting.
- Member Pizzella concurred that the Agency violated § 7121 by refusing to arbitrate the grievances, but noted, in dissent, that forcing the Agency to proceed to arbitration on matters that were already resolved by the national-level grievances was an unwise use of government resources, and undermined the Authority's responsibility to promote the effective conduct of government business. He thus noted that he would only require a notice posting of the violation, and would not have allowed the Union to proceed to arbitration.

Arbitration Cases (11):

U.S. Dep't of VA, Med. Ctr., Richmond, Va., and AFGE Local 2145, 68 FLRA 231 (January 26, 2015)(Member Pizzella dissenting):

- Union grieved on behalf of an employee who did not receive “on call” overtime while serving on a detail as an acting supervisor.
- The Arbitrator found the grievance within the scope of the negotiated grievance procedure and found that the Agency had violated the parties’ agreement.
- The Agency filed exceptions more than 30 days after the Arbitrator served his award. The thirty-day period for filing exceptions expired during the 2013 government shutdown.
- The Authority, considering a recent Supreme Court decision, reversed its longstanding precedent and held that the 30-day period for filing exceptions to arbitration awards is not jurisdictional in nature. The Authority noted that neither the Statute’s language nor its legislative history establishes that § 7122(b)’s filing period is jurisdictional. Rather, the Authority held, § 7122(b)’s filing period resembles a “filing deadline[,],” which the Supreme Court has characterized as a “quintessential claim-processing rule [],” rather than a jurisdictional requirement. The Authority therefore found that § 7122(b)’s filing period is subject to equitable tolling.
- Applying the Supreme Court’s requirements for permitting equitable tolling, the Authority found that equitable tolling was warranted because of the government shutdown. On the merits, the Authority denied the Agency’s nonfact exceptions.
- Member Pizzella, in dissent, challenged how an acting supervisor would remain part of the bargaining unit and the need to overrule precedent in order to apply equitable tolling for exceptions filed after the October 2013 federal government shutdown.

AFGE, Local 3961, and U. S. Dep't of the Air Force, 502nd Force Support Squadron, Joint Base San Antonio-Fort Sam Houston, Texas, 68 FLRA 443 (April 10, 2015)(Member DuBester dissenting):

- The Union attempted to file its exceptions via the Authority’s electronic “eFiling” system. However, the Union claimed it encountered error messages and only successfully submitted its exceptions six (6) minutes after midnight on the 31st day. The Union requested a waiver of the time limit for filing exceptions.
- The Authority noted that “waiver” and “equitable tolling” are distinct concepts. As the Union only requested waiver of the time limits, and as the Authority’s regulation (5 C.F.R. § 2429.23(d)) had no provision allowing waiver, the Authority dismissed the exceptions. Moreover, the Authority found that even if it were to apply the test for equitable tolling here, it would find that those requirements were not met.
- Member DuBester noted, in dissent, recent Authority precedent permitting equitable tolling of the time limit for filing exceptions, and would have found, for a variety of reasons, that equitable tolling applied and that the Union’s exceptions were timely.

Independent Union of Pension Employees for Democracy and Justice and Pension Benefit Guaranty Corp., 68 FLRA 999 (September 29, 2015), *reconsideration denied* 69 FLRA 164 (2016)(Unanimous):

- Before the Union was certified as the exclusive representative, the Agency and the previous union negotiated and executed a CBA with a grievance/arbitration procedure.
- The Agency filed a grievance against the Union, alleging the Union both violated the CBA and committed a ULP (§7116(b)(1), (3), & (8)) by publishing a newsletter containing a coercive and intimidating article that identified by name an employee who testified on behalf of the Agency in a separate arbitration.
- The Arbitrator sustained the grievance, finding that: the most current negotiated grievance procedures continued to bind the parties; that he had been properly appointed and selected to hear “this” arbitration; and that the newsletter article threatened other employees, clearly sought to dissuade other employees, and strayed beyond the boundaries of the Union’s constitutionally protected speech.
- The Authority held that, even if the then-existing CBA had expired, the policies, practices, and matters encompassing the negotiated grievance and arbitration procedures continued, survived, and remained in full effect, even following the decertification of one exclusive representative and the installation of a new one. Therefore, the current exclusive representative, the Union here, was bound by the arbitration procedures included in the collective-bargaining agreement that had been negotiated by the previous, later decertified, union, until the parties negotiated a new agreement.
- The Authority partially overruled its 2006 precedent, *U.S. DHS, U.S. Immigration & Customs Enforcement and AFGE, Nat’l INS Council, Local 1917*, 61 FLRA 503, while considering the Union’s exception, which it denied, alleging the Arbitrator had exceeded his authority by determining his own “long-term” appointment.
- The Authority held that the award was not contrary to 5 U.S.C. §§ 7102, 7116(e) or the First Amendment.

NTEU, Chapter 83 and Dep’t. of Treasury, IRS, 68 FLRA 945 (September 16, 2015)
(Member Pizzella dissenting):

- Union grieved that the Agency’s use of “interview panels” (rather than sole evaluation by selecting official) violated parties’ CBA.
- Arbitrator determined that Agency violated the CBA and committed a prohibited personnel practice by conducting interviews of best-qualified candidates by “a panel” rather than the “selecting official.” As a remedy, the Arbitrator awarded priority consideration to any best-qualified candidate who was interviewed by a panel which selected an “internal” candidate. The remedy applied to “all applicants for vacancies where the Agency announced [that] it hired employee(s) . . . [fifteen] workdays prior to the grievance being filed.” For those applicants, the Arbitrator determined that priority consideration would remain in effect for two years.
- Authority found that the remedy was not contrary to law, regulation, or internal Agency rule and draws its essence from the CBA.

- Member Pizzella noted, in dissent, that the Arbitrator’s award did not draw its essence from the CBA because the award relied upon a provision that addressed the “rating and ranking,” not the interview process and would result in giving priority consideration to at least 10,000 employees.

HHS, NIEHS and AFGE Local 2923, 68 FLRA 1049 (September 30, 2015) (Member Pizzella dissenting):

- By memorandum of agreement (MOA), the Agency agreed, and allocated funds, to pay performance awards for FY 2012 out of FY 2013 funds. After Congress imposed sequestration, and before the Agency distributed the FY 2012 awards, OMB issued memoranda on “discretionary spending.” OMB advised agencies that employee monetary awards “should occur ‘only if legally required.’” OMB made it clear that “legally required” included compliance with collective-bargaining agreements. The Agency, however, determined it could not pay performance awards.
- Arbitrator determined once Agency decided to allocate funds in budget for awards (prior to sequestration), it was obligated to distribute awards as set forth in MOA. Arbitrator also determined that OMB’s memoranda did not prohibit Agency from doing so.
- Authority agreed with Arbitrator that Agency’s agreement under MOA and CBA made awards “legally required” and OMB memoranda did not interfere with “legally[-]required” obligations.
- Member Pizzella noted, in dissent, that award interferes with Agency’s right to budget and that payment of bonuses is “discretionary” and runs counter to “sequester” restriction of “discretionary” spending.

AFGE, Local 919 and DOJ BOP Leavenworth, Ks., 68 FLRA 573 (May 14, 2015) (Member Pizzella dissenting):

- After Agency implemented new software program for distributing overtime, Union filed ULP charge alleging Agency violated the Statute by failing to negotiate over impact and implementation of the software. RD dismissed charge, finding no evidence of any change in employees’ conditions of employment. Union then filed grievance alleging that Agency violated a provision of CBA concerning equitable distribution of overtime.
- Arbitrator determined that grievance was barred by 7116(d) because “earlier[-]filed ULP charge raise[d] the same issue over the same subject matter” as the grievance.
- Authority set aside Arbitrator’s award. Authority noted that the ULP charge did not mention the parties’ agreement at all. Authority also pointed out that the “later-filed grievance [was] based on a contractual claim,” and that because contractual violations are not ULPs, they cannot be litigated in the ULP process. Authority therefore concluded that the grievance relied “on a different legal theory” than the alleged ULP, and was not barred by 7116(d).
- Member Pizzella noted, in dissent, that 7116(d) only provides “**an option** of using [either] the [NGP] **or** [the ULP process]” not both.

U.S. Dep't of HHS, Wash., D.C. and NTEU, 68 FLRA 239 (January 27, 2015) (Unanimous):

- Union filed a national grievance alleging the Agency violated the collective-bargaining agreement (CBA) and the American Taxpayer Relief Act of 2012 (ATRA) by not paying employees transit subsidies in the amount of their actual commuting costs incurred, up to the maximum non-taxable subsidy amount set in 26 USC § 132(f)(2)(A).
- The Arbitrator found that CBA had bound the Agency to offer a monthly benefit of such a sum. Further, once ATRA retroactively increased the maximum non-taxable subsidy amount, the Agency was obliged to reimburse employees. The Arbitrator also found that cash reimbursements for improperly denied transit subsidies were consistent with and authorized by the Back Pay Act (BPA).
- The Authority denied the Agency's contrary-to-law exception, holding that there was authority for federal agencies to provide employees with retroactive cash reimbursements for transit subsidies. Relying on its 1998 decision, *U.S. Department of Health and Human Services*, 54 FLRA 1210, and considering the expert opinion of Comptroller General decisions, the Authority held the Federal Employees Clean air Incentives Act (Incentives Act), 5 USC § 7905, provided the necessary authorization for retroactive subsidies.
- The Authority also held that the Incentives Act, in conjunction with the BPA, supported the Arbitrator's order that the Agency reimburse affected employees.
- *See also U.S. DHS, U.S. CBP and NTEU*, 68 FLRA 276 (2015) (same); *U.S. Dep't. of Treasury, IRS, and NTEU*, 68 FLRA 810 (2015) (same).

AFGE Nat'l Council 118 and U.S. DHS, U.S. Immigration & Customs Enforcement, Enforcement and Removal Operation, Wash., D.C., 69 FLRA 183 (January 29, 2016) (Member Pizzella dissenting in part):

- The Union filed a grievance arguing that the Agency failed to notify and provide an opportunity to bargain over the impact and implementation of two sets of changes, one in 2011 and one in 2012, made to an Agency form issued by bargaining-unit employees to federal, state, and local law-enforcement agencies. The form was used as notification that the Agency intends to take custody of individuals who are being detained by those law-enforcement agencies.
- The Arbitrator, considering the changes' actual effects, found that those effects were not more than de minimis, and denied the grievance.
- The Authority remanded the portion of the award concerning the 2011 changes because the Arbitrator did not consider whether, at the time of the changes, they had "reasonably foreseeable" effects on the grievants' working conditions that were more than de minimis. The Authority stated: "In assessing whether the effect of a change is more than de minimis, the Authority 'looks to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change on bargaining[-]unit employees' conditions of employment.'" The Authority added: "'[A]n analysis of whether a change is de minimis does not focus primarily on the actual effects of the change,' but on reasonably foreseeable effects."

- Member Pizzella, dissenting in part, noted that there is no requirement that an arbitrator evaluate both the actual impact *and* the reasonably foreseeable impact of a change in working conditions, and that arbitrators should avoid speculating about reasonably foreseeable impacts when they are able to plainly assess the actual impact from the evidence presented at arbitration.

AFGE Local 3955, and U.S. DOJ, Fed. BOP, Fed. Correctional Complex, Tucson, Ariz., 69 FLRA 133 (December 8, 2015) (Unanimous):

- The Union grieved on behalf of all bargaining-unit employees alleging that the Agency failed on multiple occasions to pay them in a timely fashion for overtime worked, in violation of the Fair Labor Standards Act (FLSA).
- The Arbitrator found that Agency had committed multiple FLSA violations and ordered the Agency to pay the grievant's liquidated damages equal to all overtime compensation not timely paid. However, the Arbitrator restricted the backpay recovery time period to slightly over a year before the issuance date of the award.
- The Authority held that the recovery period ordered by the Arbitrator was contrary to law because the FLSA allows grievants to collect backpay, including liquidated damages, for a recovery period of two years if the FLSA violations are not willful, or three years if the FLSA violations are willful. The Authority remanded the award for the Arbitrator to determine whether or not the Agency's FLSA violations were willful.

AFGE Local 3828 and U.S. DOJ, Fed. BOP, Fed. Correctional Complex, Bastrop, Tex., 69 FLRA 66 (November 13, 2015) (Unanimous):

- The Union grieved on behalf of prison officers, alleging that the officers weren't compensated for time spent traveling to hospitals to guard inmates undergoing treatment, in violation of FLSA.
- The Arbitrator found that Agency violated parties' CBA and the FLSA for failing to compensate officers for travel time to hospitals. But the Arbitrator did not find that the Agency's violation was willful, so she limited the recovery period to two years instead of three years. The Arbitrator also declined to award liquidated damages or attorney fees under the FLSA.
- The Authority found that the award was contrary to law, in part, because: (1) liquidated damages were mandatory under the FLSA in the circumstances of this case, since the Agency failed to prove the affirmative defense that it acted in good faith and had a reasonable basis for believing that it was not violating the FLSA; and (2) the Union, as the prevailing party, was entitled to attorney fees under the FLSA.

U.S. Dep't of Commerce, NOAA, Nat'l Weather Serv. and Nat'l Weather Serv. Emps. Org., 68 FLRA 976 (September 24, 2015) (Unanimous):

- The Union filed a grievance claiming that the Agency violated a memorandum of understanding (MOU) and § 7116(a)(1) and (5) of the Statute by ceasing to provide employees with disposable cups, plates, and utensils.

- The Arbitrator, relying on decisions from the Comptroller General of the Government Accountability Office (Comptroller General), found that (1) the Agency violated the MOU, and (2) that the Agency's repudiation of the MOU was in violation of the Statute. As a remedy, the Arbitrator ordered the Agency to resume providing disposable dining ware to bargaining-unit employees.
- The Agency filed exceptions with the Authority, and also filed a request with the Comptroller General for a formal opinion on the issue. The Comptroller General issued an opinion that appropriated funds are not available to pay for the disputed items. The Union subsequently, unsuccessfully, sought reconsideration of the Comptroller General's opinion.
- The Authority held that the award was contrary to law. The Authority noted that Comptroller General opinions are not binding on the Authority, but that they do serve as expert opinions that "should be prudently considered." Noting that the parties and the Arbitrator had relied upon Comptroller General decisions to address the legal question raised by the grievance, and that both parties had an opportunity to make submissions to the Comptroller General, the Authority applied the Comptroller General's opinion in this matter, found that the expenses the Arbitrator ordered were not authorized, and set aside the award.