



Policy Directions in Labor Relations and Employee Relations

Working for America

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT



Message from the President

“Government likes to begin things - to declare grand new programs and causes. But good beginnings are not the measure of success. What matters in the end is completion. Performance. Results. Not just making promises, but making good on promises”.

- President George W. Bush



Message from the Director



“Our most difficult and demanding challenge is achieving the delicate but essential balance between our core Merit Principles on one hand, and agency flexibilities on the other. It is a challenge we must meet if we are to maintain our tradition of excellence in the public service. And we will”

Kay Coles James

Director

U.S. Office of Personnel Management

Differences and Similarities in Legal Authorities

- ✓ Homeland Security Act
- ✓ National Security Personnel System



Labor Relations and Employee Relations

- What is changing?
- What is not?



Legal Status of Properly Implemented Final Offers

Dept. of Labor and AFGC Local 12, 60 FLRA No. 18 (CA case)

- Properly implemented final offers, like FSIP orders, are enforceable parts of the collective bargaining agreement.
- When a union fails to timely invoke the services of the Impasses Panel, it is deemed to have consented to proposed changes in conditions of employment.



Retroactive Temporary Promotions for more than 120 Days Violate 5 CFR 335.103(c)

Dept. of Veterans Affairs and NAGE Local R5-3593, 60 FLRA No. 13 (AR case)

- Relying on an OPM advisory opinion, FLRA held that "a retroactive temporary promotion for more than 120 days cannot be awarded in the absence of competitive procedures," and therefore limited an award directing a temporary promotion of more than 2 years to a temporary promotion of no more than 120 days.
- Authority precedent inconsistent with 5 C.F.R. 335.103(c) will no longer be followed.



Sole and Exclusive Discretion Conferred by Governmentwide Regulations

Patent Office Professional Association and Patent and Trademark Office, 59 FLRA No. 50 (NG case)

- Deferring to Office of Government Ethics' (OGE) interpretation of its regulations on financial disclosure as giving agencies *sole and exclusive* discretion to make the determinations required by OGE's regulations, FLRA holds that attempts to negotiate over the exercise of such discretion are outside the scope of bargaining.



Waiver of 2nd Prong of “Covered By” Doctrine is a Permissive Subject of Bargaining

NTEU and Customs Service, 59 FLRA No. 35 (NG case)

- This case involves an NTEU attempt to broaden, by contract, the scope of midterm bargaining by limiting the application of the "covered by" doctrine to matters specifically addressed in existing agreements. The Authority, in a split decision, holds that since the "covered by" doctrine is a statutory right (and a party can't be forced to waive a statutory right), proposals having the effect of limiting its application are permissive, not mandatory, subjects of bargaining.



Adverse Actions – Charges

James v Dale - 355 F.3rd 1375 (2004)

- On appeal by OPM, Federal Circuit reverses arbitrator, upholds removal of Border Patrol Agent charged with associating with a known or suspected law violator.



Adverse Actions – Penalty

James v Tablerion - #03-3029 (April 13, 2004)

- Upon appeal by OPM, Federal Circuit reverses arbitrator, upholds removal of IRS employee for threatening to audit her former spouse – a violation of one of IRS’ “ten deadly sins.”



Adverse Actions – Refusal to Accept a Directed Reassignment

Frey v Labor - 359 F.3rd 1359 (2004)

- Federal Circuit affirms MSPB in case involving removal of employee for refusal to accept a directed reassignment.



Performance Based Actions

Guillebeau v Navy - 362 F.3rd 1349 (2004)

- Federal Circuit holds that absolute performance standards are not automatically prohibited but also states that such standards must be reasonable, based on objective criteria, and communicated to the employee in advance.



Settlement

Gilbert v Justice - 334 F.3d 1065 (2003)

- Federal Circuit holds that minor technical breach of a last chance agreement is not sufficient to trigger removal of employee and waiver of appeal rights.



Settlement

Spahn v Justice - 93 MSPR 195 (2003)

- MSPB rejects arguments in sanctity of settlements in face of claim of discrimination where facts show disparate penalty imposed on females.
- Removal is mitigated only to extent necessary to cure discrimination.



Settlement

Parker v OPM - 93 MSPR 529 (2003)

- MSPB holds that a settlement involving an employee and an agency is invalid where the agreement seeks to impose finding by OPM regarding retirement service credit and OPM not a party.



Constitutional 4th Amendment

Wiley v Justice - 328 F.3rd 1346 (2003)

- Federal Circuit holds that agency search of employee's car on agency parking lot is unreasonable and unlawful, violating his 4th Amendment rights.



Due Process/ Indefinite Suspension

Rawls v USPS - 94 MSPR 614 (2003)

- Despite agency's failure to provide advance notice, MSPB upholds indefinite suspension of employee - finding no denial of due process.



Reduction in Force

Wolf v DVA - 317 F.3rd 1395 (2003)

- Federal Circuit holds that reduction in hours of a part time employee is not a reduction in force where employee is reassigned to position at same grade and *rate* of pay.



Board Jurisdiction

Krawchuk v DVA - 94 MSPR 641 (2003)

- MSPB reaffirms that it has jurisdiction to review otherwise voluntary retirement when preceded by agency issue of removal decision – in this case for failure to accept directed reassignment.



Board Jurisdiction

Ramos v Justice - 94 MSPR 623 (2003)

- MSPB appears to hold that an employee may be subject to a new probationary period if they agree to such a new period upon appointment.



Compliance

Marcotrigiano v Justice - 95 MSPR 198 (2003)

- MSPB holds that the agency not required to restore employee to former position despite criminal indictment being reversed, because two US Attorney's offices state they cannot use him as witness.



Adverse Action Coverage

Illich v. MSPB - # 04-3140 (July 13, 2004)

- Federal Circuit holds that to be covered under Chapter 75, a preference eligible excepted service employee's one year of current continuous service in the same or similar position must be in a single agency.



Contact Information

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