23rd ANNUAL REPORT

FEDERAL LABOR RELATIONS AUTHORITY

FISCAL YEAR 2001

UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

WASHINGTON, D. C. 20424

CHAIRMAN

January 15, 2003

The President
The White House
Washington, D.C. 20500

RE: Transmission of Annual Report (Fiscal Year 2001)

Dear Mr. President:

The Federal Labor Relations Authority is pleased to submit its Twenty-third Annual Report, covering the period from October 21, 2000 through September 30, 2001, in accordance with section 701 of the Civil Service Reform Act of 1978 (P.L. 95-454).

The Annual Report covers all components of the Federal Labor Relations Authority, including information about decisions of the Authority (decisional) component and the Office of Administrative Law Judges; court activity of the Office of Solicitor; cases processed by the Office of the General Counsel and the Federal Service Impasses Panel; and agency-wide activities related to Federal sector labor-management relations.

Respectfully,

Dale Cabaniss
Chairman

Tony Armendariz
Member

Becky Norton Dunlop
Chairman
Federal Service Impasses Panel

Carol Waller Pope
Member

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INTRODUCTION

The Federal Labor Relations Authority (FLRA) is an independent agency responsible for directing the labor-management relations program for 1.9 million non-postal Federal employees world-wide, nearly 1.1 million of whom are exclusively represented in approximately 2,200 bargaining units. The FLRA is charged by the Federal Service Labor-Management Relations Statute (the Statute) with: providing leadership in establishing policies and guidance relating to Federal sector labor-management relations; resolving disputes arising among Federal agencies and unions representing Federal employees; and ensuring compliance with the Statute.

The FLRA fulfills its statutory responsibilities through its three primary operational components -- the Authority, the Office of the General Counsel and the Federal Service Impasses Panel. It also provides full staff support to two other organizations -- the Foreign Service Impasse Disputes Panel and the Foreign Service Labor Relations Board.

The FLRA *Twenty-third Annual Report* covers the agency's operations and activities from October 1, 2000 to September 30, 2001.

PRESIDENTIAL APPOINTEES OF THE FLRA

MEMBERS OF THE AUTHORITY

CHAIRMAN

Dale Cabaniss was designated Chairman by President Bush on March 8, 2001. Ms. Cabaniss was nominated by President Clinton and confirmed by the United States Senate as a Member of the Authority to a 5-year term in December 1997. Before joining the FLRA, Ms. Cabaniss was a professional staff member on the Senate Appropriations Subcommittee for Labor and Health and Human Services, serving as the principal legal advisor to the Chairman, Ted Stevens of Alaska. Member Cabaniss also served as the Chief Counsel for the Senate Governmental Affairs Subcommittee on Post Office and Civil Service. In addition, she worked for Senator Frank Murkowski of Alaska as his Legislative Director and Legislative Assistant. Ms. Cabaniss received a B.A. from the University of Georgia and a J.D. from Columbus School of Law at the Catholic University in Washington, D.C.

MEMBERS

Tony Armendariz[1/] was nominated by President Bush and confirmed by the United States Senate as a Member of the Authority in July 2001 to a 5-year term. Mr. Armendariz had previously been a Member of the Authority from December 1989 to March 1997. Prior to joining the Authority, Mr. Armendariz was General Counsel of the University System of South Texas, which comprised Corpus Christi State, Texas A & I, and Loredo State Universities. After the University System merged with Texas A & M University System in 1989, Mr. Armendariz became Assistant General Counsel in charge of litigation for the second largest university system in the State of Texas. For four years, he was a member of the staff of the Texas Attorney General's Office. While living in Caracas, Venezuela, Mr. Armendariz was associated with a law firm and also represented U.S. companies in that country. Mr. Armendariz holds a B.S. degree from Trinity University in San Antonio, a J.D. degree from St. Mary's University School of Law, and a Master's degree in Comparative Law from Southern Methodist University. He also studied law at the School of Law of the Universidad Catolica Andres Bello in Caracas.

Carol Waller Pope was nominated by President Clinton and confirmed by the United States Senate as a Member of the Authority in October 2000 to a 5-year term. Ms. Pope, a career Federal employee, had been the Assistant General Counsel for Appeals, for the FLRA Office of the General Counsel. Prior to that, Ms. Pope served as Executive Assistant to the General Counsel, and before that as an Attorney in the FLRA's Boston Regional Office. Before joining the FLRA, Ms. Pope was employed with the U.S. Department of Labor, Office of the Solicitor, Employee Benefits Division, Washington, DC. Ms. Pope has a B.A. degree from Simmons College, and a J.D. degree from Northeastern University School of Law, both of which are located in Boston, Massachusetts.

1/ Donald S. Wasserman served as Authority Member until July 2001.

THE GENERAL COUNSEL

Joseph Swerdzewski served as General Counsel until March 2001. David Feder served as Acting General Counsel for the remainder of the Fiscal Year, in accordance with the provisions of the Federal Vacancies Reform Act of 1998.[2/]

FEDERAL SERVICE IMPASSES PANEL

MEMBERS OF THE PANEL

CHAIR

Bonnie Prouty Castrey was appointed to the Panel by President Clinton in January 1995. She was reappointed in January 2000, at which time she was designated Panel Chair. Ms. Castrey served on the Panel until January 7, 2002.

Stanley M. Fisher was appointed to the Panel by President Clinton in December 1994, and reappointed January 1997. Mr. Fisher served on the Panel until January 7, 2002.

Edward F. Hartfield was appointed to the Panel by President Clinton in October 1994, and reappointed in January 1999. Mr. Hartfield served on the Panel until January 7, 2002.

Mary E. Jacksteit was appointed to the Panel by President Clinton on January 23, 1995, and reappointed in January 1999. Ms. Jacksteit served on the Panel until January 7, 2002.

Marvin E. Johnson was appointed to the Panel by President Clinton in October 1999. He served on the Panel until January 7, 2002.

David J. Leland was appointed to the Panel by President Clinton in January 2000. He served on the Panel until January 7, 2002.

John G. Wofford was appointed to the Panel by President Clinton in October 1999. He served on the Panel until January 7, 2002.

2/ 5 U.S.C. §§3345-49d.

FLRA: AN ORGANIZATIONAL OVERVIEW

THE AUTHORITY

The Authority is a quasi-judicial entity with three full-time Members who are appointed for 5-year terms by the President with the advice and consent of the Senate. The President designates one Member to serve as Chairman of the Authority and as the Chief Executive and Administrative Officer of the FLRA. The Chairman of the Authority also serves as Chairman of the Foreign Service Labor Relations Board.

The Authority adjudicates disputes arising under 5 U.S.C. §7101 *et. seq.* (the Statute) deciding cases concerning the negotiability of collective bargaining agreement proposals, unfair labor practice (ULP) allegations, representation petitions, and exceptions to grievance arbitration awards. In addition, consistent with its statutory responsibility to provide leadership in establishing policies and guidance to participants in the Federal labor-management relations program, and as part of the Collaboration and Alternative Dispute Resolution (CADR) Program, the Authority assists Federal agencies and unions in understanding their rights and responsibilities under the Statute and resolving their disputes through interest-based problem-solving rather than adjudication.

In addition to the three Member Offices, the Authority component of the FLRA houses the Office of Administrative Law Judges, the Collaboration and Alternative Dispute Resolution Office, the Office of the Solicitor, the Office of the Executive Director, and the Office of the Inspector General.

Offices of the Chairman and Members: The Offices of the Chairman and Members each consist of a Chief Counsel who supervises a staff of attorney-advisors, labor relations professionals, and administrative staff responsible for preparing predecisional memoranda and assisting in the preparation of case decisions that are reviewed and approved by each Member. Staff members in the offices of the Chairman and Members also provide training on behalf of the FLRA and participate in intervention activities carried out through the CADR Program. The Office of the Chairman serves as the Agency contact for congressional and media affairs. The Case Control Office, within the Office of the Chairman, manages the Authority's docket and is the official custodian of the Authority's case records.

Office of Administrative Law Judges: The FLRA Administrative Law Judges are appointed by the Authority to conduct hearings and render recommended decisions in cases involving alleged unfair labor practices. In addition, the Judges render decisions involving applications for attorney fees filed pursuant to the Back Pay Act or the Equal Access to Justice Act, and other matters as directed by the Authority. The decisions of the Judges may be affirmed, modified, or reversed in whole or in part by the Authority. If no exceptions are filed to a Judge's decision, the Authority adopts the decision, which becomes final and binding on the parties.

***Collaboration and Alternative Dispute Resolution Office*:** The CADR Program uses a variety of collaboration and alternative dispute resolution techniques at all steps of processing the labor-management dispute process -- from investigation and prosecution to the adjudication of cases and resolution of bargaining impasses. In addition, CADR coordinates facilitation and training activities to assist labor and management in developing constructive approaches to conducting their relationship. As a unified program, CADR activities are carried out in all components of the FLRA. The CADR Office oversees and coordinates the FLRA efforts in this area.

***Office of the Solicitor*:** The Office of the Solicitor represents the FLRA in court proceedings before all United States Courts, including the U.S. Supreme Court, U.S. Courts of Appeals, and Federal District Courts. The Office also serves as the agency in-house counsel, providing legal advice to all FLRA components. And, the Solicitor serves as the agency's Designated Agency Ethics Officer.

***Office of the Executive Director*:** The Office of the Executive Director has overall managerial responsibility for the FLRA administrative programs, including budget, finance and accounting, personnel, procurement, administrative services, automated data processing, technical and research assistance, and library services. The Information Resources Management Division, within the Office of the Executive Director, serves as the contact point for most public inquiries and is responsible for the production of FLRA publications and research materials, the development and maintenance of FLRA computer systems, and oversight of library services.

***Office of the Inspector General*:** The Office of the Inspector General is mandated by Public Law 100-504 of 1978 and the Inspector General Act Amendment of 1988. The Office of the Inspector General is responsible for directing and carrying out audits, investigations, and internal reviews relating to the FLRA programs and operations to ensure efficiency and effectiveness. In addition, the Office of the Inspector General provides management consultation and recommends policies and practices that promote the cost effective use of agency resources and prevent fraud, waste, abuse, and mismanagement. The Inspector General provides independent and objective evaluations of FLRA operations and is responsible for keeping the FLRA Chairman and Congress fully informed of vulnerabilities and deficiencies, as well as the need for and progress of corrective actions.

OFFICE OF THE GENERAL COUNSEL

The Office of the General Counsel (OGC) is the independent investigative and prosecutorial component of the FLRA. The General Counsel, who is appointed by the President with the advice and consent of the Senate for a 5-year term, is responsible for the management of the Office of the General Counsel, including the management of the FLRA's seven Regional Offices. The OGC investigates and settles or prosecutes all ULP complaints filed with the FLRA, actively encouraging the use of alternative dispute resolution at every step. The OGC reviews all appeals of a Regional Director's decision not to issue a ULP complaint and establishes policies and procedures for processing unfair labor practice charges. The General Counsel

also manages and directs all OGC employee activities, including the Regional Directors' performance of their delegated responsibilities to process representation petitions and supervise representation elections.

Regional Offices: The FLRA Regional Offices are located in Atlanta, Boston, Chicago, Dallas, Denver, San Francisco and Washington, D.C. The Regional Offices investigate and settle or prosecute unfair labor practice complaints; ensure compliance with all unfair labor practice orders issued by the Authority; receive and process representation petitions; and provide facilitation, intervention, training, and education services to the parties.

FEDERAL SERVICE IMPASSES PANEL

The Federal Service Impasses Panel (the Panel) has seven Presidential appointees who serve on a part-time basis, one of whom serves as Chairman. The Panel resolves impasses between Federal agencies and unions representing Federal employees arising from negotiations over conditions of employment under the Statute, and the Federal Employees Flexible and Compressed Work Schedules Act of 1982. If bargaining between the parties, followed by mediation assistance, proves unsuccessful, the Panel has the authority to recommend procedures and to take whatever action it deems necessary to resolve the impasse. The Panel staff also supports the Foreign Service Impasse Disputes Panel in resolving impasses arising under the Foreign Service Act of 1980.

FOREIGN SERVICE LABOR RELATIONS BOARD

The Foreign Service Labor Relations Board (the Board), which is composed of a Chairman and two Members, was created by the Foreign Service Act of 1980 to administer the labor-management relations program for Foreign Service employees in the U.S. Information Agency, the Agency for International Development, and the Departments of State, Agriculture, and Commerce. The Board is supported by FLRA staff. The FLRA Chairman serves as Chairman of the Board and appoints the other two Members, who serve part-time. The FLRA General Counsel serves as General Counsel for the Board.

There were no cases filed, decided, or pending before the Board at the end of FY 2001.

CHAIRMAN	MEMBER	MEMBER	GENERAL COUNSEL
Dale Cabaniss FLRA Chairman Washington, D.C.	Tia S. Denenberg Arbitrator Red Hook, New York	Richard I. Bloch Arbitrator Washington, D.C.	Joseph Swerdzewski/ David Feder FLRA General Counsel Washington, D.C.

FOREIGN SERVICE IMPASSE DISPUTES PANEL

The Foreign Service Impasse Disputes Panel (the Disputes Panel) was created by the Foreign Service Act of 1980. It consists of five part-time Members appointed by the Chairman of the Foreign Service Labor Relations Board (the FLRA Chairman). The Disputes Panel resolves impasses between Federal agencies and Foreign Service personnel in the U.S. Information Agency, the Agency for International Development and the Departments of State, Agriculture, and Commerce over conditions of employment under the Foreign Service Act of 1980. The staff of the Federal Service Impasses Panel supports the Disputes Panel.

There were no cases filed, decided, or pending before the Disputes Panel at the end of FY 2001.

CHAIRMAN	MEMBER	MEMBER	MEMBER	MEMBER
Thomas R. Colosi Public Member Vienna, VA	Marvin E. Johnson FSIP Member Washington, D.C.	Allen L. Keiswetter Department of State Washington, D.C.	Vacant[3/] Department of State Washington, D.C.	David W. Geiss Department of Labor Washington, D.C.

THE AUTHORITY

PROGRAM HIGHLIGHTS

***Authority Decisional Activity*:** In FY 2001, the Authority continued its focus on the strategic planning goal of providing high quality services that timely resolve disputes in the Federal labor-management community. Previously, in FY 1999, the Authority concentrated on reducing the number of cases awaiting merits decision for more than one year. In FY 2000, the Authority set a goal of ensuring that no more than 10 % of cases pending merits review was over nine months old. In FY 2001, the Authority set an even more stringent goal of reducing the number of cases awaiting merits decision for more than six months. As of September 30, 2001, nine percent of the pending Authority inventory was overage. The Authority also reduced the period of time for all parties awaiting decisions. The average age of all pending cases as of September 30, 2001 was significantly lower than at the end of recent prior fiscal years.

In addition to targeting overage cases, the Authority maintained its focus on resolving complex issues, and establishing comprehensive legal doctrine to help guide parties. In FY 2001, the Authority utilized several tools to improve the decision making process, including: a case screening mechanism to identify cases for streamlined processing; techniques to identify relevant case law, issues, and potential problems prior to decision drafting; and forums in which Authority staff discuss recent case precedent and other issues of relevance to the Authority's ongoing work. In order to provide staff with a greater understanding of

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3/ Frank Coulter's term expired during FY 2001. At the time of publication, this position was vacant.

parties' perspectives and the role of other agency components, the Authority also detailed Authority staff to Regional Offices and the Federal Services Impasses Panel. In addition, the Authority continued to emphasize the quality of its decisions. Authority decisions issued during the most recent five-year period were the subject of favorable appellate opinions in approximately 87 % of the cases, as compared with an overall favorable rate of only 53 % for Authority decisions reviewed in the preceding 17 years.

Collaboration and Alternative Dispute Resolution Activities: Wherever possible, the Authority encouraged parties to resolve their disputes by means other than litigation. Authority CADR services were offered in 100% of pending negotiability appeals that were not dismissed as procedurally deficient. In particular, the Authority established procedures to have an Authority CADR service provider present during post-petition conferences in negotiability appeals to facilitate parties' understanding and use of CADR services. Authority staff also participated in cross-component CADR activities to assist parties in resolving pending disputes. As of September 30, 2001, parties utilized alternative dispute resolution services in 13 negotiability appeals cases, as well as in one arbitration appeal and one ULP that were related to pending negotiability appeals. Of these, 60% (9 cases) were fully resolved. Two additional cases were partially resolved and one other was pending intervention.

Outreach and Training: Throughout FY 2001, the Authority provided significant training and outreach to the labor-relations community. The Authority established a training initiative to increase the parties' understanding of the Statute and Authority regulations and procedures with an emphasis on arbitration and negotiability case law. The training was intended for those who were new to Federal sector labor-management relations or who wished to update their skills and knowledge in this area. The Authority set a goal of conducting at least 30 training sessions in FY 2001. As of September 30, 2001, the Authority exceeded that goal, providing 50 training sessions to approximately 2000 participants. In addition to taking part in the FLRA National Training Conference, staff provided training sessions to groups representing agencies, unions, and practitioners.

SIGNIFICANT AUTHORITY DECISIONS

Representation Cases

In *Dep't of the Army, United States Army Corps of Engineers, Los Angeles Dist., Los Angeles, Cal.*, 56 FLRA No. 163, (2000), Local 777 held an election to change its affiliation from the National Federation of Federal Employees (NFFE) to the International Federation of Professional and Technical Engineers (IFPTE), and filed a petition requesting that its certificates of representation be amended to reflect this change. The Regional Director (RD) found that Local 777 was recognized as the exclusive representative of separate professional and nonprofessional units of employees. The RD further determined that both units were not afforded due process in the change of affiliation to IFPTE, because of the inadequacy of the ballot. Additionally, the RD found that because separate elections were not conducted, the RD could not determine the wishes of the professional unit with respect to the change in affiliation. Accordingly, the RD dismissed the petition. The Authority denied the application for review noting that, contrary to the petition's claim, the RD did not fail to apply established law, and that the RD's decision was not based on clear and prejudicial error concerning a substantial factual matter.

In *United States Dep't of the Navy, Naval Air Warfare Command, Aircraft Div., Patuxent River, Md.*, 56 FLRA No. 174 (2000) (Chairman Wasserman concurring), the Authority granted in part, and denied in part, the Union's application for review of the Regional Director's (RD) decision denying the Union's petition to clarify its existing unit to include a group of unrepresented employees that were relocated. The Authority found that the RD failed to apply established law in concluding that accretion principles were not applicable when the RD found that there was no change in Agency operations. The Authority concluded that because the employees sought in the petition were physically relocated to the same location where employees in the existing unit were located, there was a change in Agency operations affecting the appropriate unit criteria of the existing unit. Applying accretion principles to the facts presented, the Authority found that the employees at issue had not accreted because they were not sufficiently integrated with the employees in the existing unit so as to share a community of interest for the purposes of accretion.

In *United States Dep't of the Army, United States Army Reserve Command, Fort McPherson, Ga.*, 57 FLRA No. 26 (2001), the Authority granted the Agency's application for review of a Regional Director's (RD) determination in a representation case concerning the RD's application of established law in ordering clarification of a bargaining unit based upon accretion. The Authority remanded the case to the RD for further consideration regarding the application of the two elements relevant to a finding of accretion. Among other things, the Authority instructed the RD concerning the need to determine whether there had been any change in Agency operations or organization affecting the appropriate unit criteria concerning the existing bargaining unit. In addition, the Authority's decision set forth guidance to the RD concerning the RD's determination that the petitioned-for unit was appropriate. In that regard, the Authority discussed the need for the RD to give further consideration to the factors relevant to finding a community of interest and to finding that the accreted unit would promote effective dealings and efficiency of Agency operations.

Unfair Labor Practice Cases

In *United States Dep't of the Air Force, 437th Airlift Wing, Air Mobility Command, Charleston Air Force Base, Charleston, SC*, 56 FLRA No. 160 (2000), the Authority adopted, without precedential significance, an Administrative Law Judge's (ALJ's) finding that an agency's conduct in reprimanding a union official and making certain remarks to him violated the Statute. The Authority also adopted the ALJ's finding that the Agency did not commit an unfair labor practice (ULP) by detailing the official to another work area and ordering the individual to undergo a drug test and psychiatric evaluation, as these actions were taken to protect the Agency's employees following threatening remarks made by the official concerning a supervisor. The Authority held that the General Counsel had not established a *prima facie* case of discrimination because the preponderance of the evidence failed to show that the official's union activity was a motivating factor behind the Agency's actions.

In *AFGE, Local 3137*, 56 FLRA No. 178 (2000), the Authority adopted the decision of an Administrative Law Judge (ALJ) dismissing an unfair labor practice complaint filed by the Agency against the Union. The complaint alleged that the Union failed to comply with the terms of the collective bargaining agreement by refusing to pay its share of arbitration expenses for a grievance involving a bargaining unit employee. The agreement provision required the Agency and the Union to bear the fees equally. However, the Union and the grievant had entered into a side agreement in which the grievant would be held responsible for the fees

associated with arbitrating the grievance. The ALJ found, and the Authority agreed, that the Union had not repudiated the parties' collective bargaining agreement, as claimed by the General Counsel, because the Union's actions were consistent with a reasonable interpretation of the side agreement. The Authority also determined that the General Counsel's reliance on the First Restatement of Contracts, even if properly raised, did not establish that the union's actions constituted a clear and patent breach of the collective bargaining agreement.

In *Dep't of the Air Force, 315th Airlift Wing, Charleston Air Force Base, Charleston, S.C.*, 57 FLRA No. 25 (2001) (Chairman Cabaniss dissenting), the Authority adopted an Administrative Law Judge's (ALJ) decision finding that an Agency's suspension of a Union representative for union activity violated § 7116(a)(1) and (2) of the Statute. The Agency had suspended the representative because, during a dispute as to whether a bargaining unit employee was entitled to representation at a meeting, the representative had assumed an intimidating posture so close to a supervisor that there had been some touching. The Authority rejected a *per se* rule that any touching constitutes "flagrant misconduct," and based upon its consideration of the facts, concluded that no "flagrant misconduct" occurred. In so concluding, the Authority adopted the ALJ's findings that the incident occurred outside the presence of nonsupervisory employees, was impulsive, and was somewhat provoked by the supervisor. Chairman Cabaniss, in dissent, would have found that the representative's conduct constituted "flagrant misconduct" or, as an assault and battery, was otherwise outside the boundaries of protected activity, and was thus unprotected by the Statute. (Judicial review pending in the D.C. Circuit.)

In *United States Patent and Trademark Office*, 57 FLRA No. 45 (2001), in a decision consolidating two unfair labor practice complaints, the Authority held that the Agency violated § 7116(a)(1) and (5) of the Statute by, among other things, refusing to bargain over union-initiated proposals concerning performance appraisals and compensation. The Authority noted that the parties were in dispute concerning whether a term agreement was in effect at relevant times. The Authority agreed with the Agency's contention that no term agreement was in effect, but rejected the Agency's argument that it was under no obligation to bargain over union-initiated proposals. The Agency had argued that without an agreement it would be obligated to bargain over union-initiated proposals only in the context of negotiations for a term agreement or in response to management-initiated changes. Citing *AFGE v. FLRA*, 114 F.3d 1214 (D.C. Cir. 1997), the Authority held the obligation to bargain is not so limited and that, under the circumstances presented, an agency is obligated to bargain over any negotiable union-initiated proposals submitted outside the term of an existing collective bargaining agreement. Finding that the Agency illegally refused to bargain, the Authority ordered the Agency to bargain and to give any agreement reached retroactive effect. (Judicial review pending in the D.C. Circuit.)

In *United States Dep't of the Air Force, 436th Airlift Wing, Dover Air Force Base, Dover, Del.*, 57 FLRA No. 65 (2001) (Chairman Cabaniss dissenting), the Authority held that an EEO mediation session was a formal discussion within the meaning of § 7114(a)(2)(A) of the Statute and that the Agency violated the Statute by failing to provide the Union with an opportunity to be represented at the mediation session. The Authority first found that the meeting satisfied all of the requirements of § 7114(a)(2)(A). Next, the Authority held that the presence of a Union representative at the mediation of an EEO complaint would not violate the EEOC's regulations or the Alternate Dispute Resolution Act, 5 U.S.C. § 571. Chairman Cabaniss would have adopted the holding of *Luke Air Force Base v. FLRA*, 208 F.3d 221 (9th Cir. 1999), in which the Court found that exclusive representatives do not have the right to attend EEO

mediation sessions. In her view, permitting exclusive representatives to attend such meetings would violate EEO regulations and the Alternate Dispute Resolution Act. Additionally, she would have found that the discussion at issue in this case did not qualify as a grievance within the meaning of § 7114(a)(2)(A). (Judicial review pending in the D.C. Circuit.)

In *United States Dep't of the Treasury, United States Customs Serv., Customs Mgt. Ctr., Tucson, Ariz.*, 57 FLRA No. 66 (2001) (Member Wasserman dissenting), a consolidated unfair labor practice case, the Authority first addressed a charge that the Agency violated the Statute by denying the Union the right to designate the person of its choice to represent a bargaining unit employee under § 7114(a)(2) of the Statute. The Authority noted that the presumptive right to designate a particular representative may be overcome if the agency establishes special circumstances that warrant precluding a particular individual from serving. The Authority concluded that the Judge did not err in finding special circumstances because the Union's designated representative was also a subject of the investigation. Member Wasserman, dissenting as to this part of the decision, would have found that the Agency did not establish special circumstances because the employee could have been questioned about the allegations which also involved the Union representative separately from the other allegations. The Authority next addressed a charge that the Agency violated the Statute by beginning an investigation into conversations between the Union representative and a bargaining unit employee she was representing. The Agency questioned the unit employee, and a second employee who was also a Union steward, concerning whether the Union representative had advised the employee to lie during the course of an earlier investigation. The Authority stated that an agency may not interfere with the confidentiality of communications between a union representative and an employee unless the right to maintain the confidentiality of the conversations has been waived or some overriding need for the information was established. The Authority concluded that in the circumstances of this case, the Judge did not err in finding that the Agency established a sufficient need to justify the two questions asked by the special agent.

In *United States Dep't of Energy, Oak Ridge, Tenn.*, 57 FLRA No. 69 (2001) (Chairman Cabaniss dissenting), an unfair labor practice involving the suspension of a Union official for conduct during the course of representational activities, the Judge found that, with the exception of one incident, the Respondent violated the Statute as alleged. With respect to that incident, the Judge found that the suspension was based on flagrant misconduct because the Union representative had knowingly filed a false incident report against a manager. The Authority reversed, finding that although the record supported the Judge's conclusion that the report was false and made with the intent to injure the manager's reputation, based on the totality of the circumstances, the Union official's action did not constitute flagrant misconduct. Chairman Cabaniss would have found, in agreement with the Judge, that the Union official's conduct with respect to this incident constituted flagrant misconduct.

Negotiability Cases

In *NAGE, Local R7-51*, 56 FLRA No. 157 (2000), the Authority addressed the negotiability of a proposal that would require the Agency to deduct $2.00 for use by the Union from each paycheck of bargaining unit employees who had not joined the Union. The Authority found that the proposal was contrary to law and dismissed the petition for review. Under government-wide regulations, an employee may make an allotment from his or her paycheck for various specific purposes, as well as ay legal purpose

deemed appropriate by the head of the agency. However, an employee may only make an allotment if he or she specifically designates the allottee and the amount of the allotment. Because the deduction would be made without specific designation by the employee of the allottee and the amount to be deducted, the deduction would be inconsistent with 5 C.F.R. § 550.312(a).

In *I.F.P.T.E., Local 96*, 56 FLRA No. 181 (2000), the Authority addressed and applied portions of the Authority's Regulations regarding the sequence, purpose, and content of filings in negotiability appeals. At issue in the case was a multi-part proposal concerning the relocation of an agency's organizational unit. The Agency claimed, among other things, that the proposal was outside the duty to bargain because it affected management's right to determine its organization. The Union did not file a response to the Agency's statement of position and nothing in the petition for review or its attachments disputed the management rights claim. The Authority found that the Union's failure to meet its burden of responding to the Agency's claim was a concession that the proposal affected management's right to determine its organization. Noting Authority precedent holding that proposals pertaining to geographical location where employees or organizational units will conduct an agency's operations concern the exercise of the right to determine organization, the Authority found that the proposal in the case was outside the duty to bargain. Consequently, the Authority dismissed the petition for review.

In *AFGE, Local 3529 and United States Dep't of Defense, Defense Contract Audit Agency, Cent. Region, Irving, Texas,* 56 FLRA No. 186 (2001), the Authority addressed the negotiability of a proposal (Proposal 3) that would require team assignments, assigned work to supervisors, and mandated consideration of certain data in conducting appraisals. The petition also involved a proposal (Proposal 5) that would require management to modify the wording of a particular memorandum to reflect the changes caused by Proposal 3. As a preliminary matter, the Authority found not dispositive an earlier Authority Regional Director (RD) statement that similar proposals were not negotiable. The Authority stated that reasons given by an RD not to issue a ULP complaint do not preclude the Authority from addressing the merits of negotiability proposals. Addressing the merits, the Authority held that each of the requirements imposed by Proposal 3 affected management's right to assign work under section 7106(a)(2)(B) of the Statute and that the proposal did not constitute a negotiable procedure or appropriate arrangement. Accordingly, the Authority concluded that Proposal 3 was outside the Agency's duty to bargain. Noting the Union's assertion that it would be unnecessary to address Proposal 5 if Proposal 3 were found nonnegotiable, the Authority declined to address the merits of Proposal 5 and dismissed the petition as to both proposals.

In *AFGE, Local 1858*, 56 FLRA No. 198 (2001), the Authority considered the negotiability of three proposals offered during negotiations over changes to the Agency's performance evaluation system. The first proposal would prescribe formulas for calculating the appropriate summary ratings for employees based upon the employees' performance. The Authority held that the proposal affected management's rights to direct employees and assign work. These rights include the determination of the quantity, quality, and timeliness of work products, and the establishment of work priorities. Because the Union did not demonstrate that the proposal constituted a procedure or an appropriate arrangement, the Authority concluded that the proposal was outside the Agency's duty to bargain. The second proposal would require the Agency to retain its practice of preparing and distributing to all employees a profile of the rater's performance ratings of employees. The Union had failed to respond to the Agency's assertion that the

proposal was inconsistent with the Privacy Act. Furthermore, the Authority held that the Agency's position was supported by relevant precedent. In these circumstances, the Authority held under § 2424.32 of its regulations that the Union had conceded that the proposal was inconsistent with the Privacy Act and dismissed the Union's petition as to that proposal. The third proposal would require the Agency to delete from its performance evaluation form a section that allowed raters to comment on an employee's performance with respect to established Agency values. The Authority noted that the establishment of performance standards and elements is an exercise of management's right to direct employees and assign work. Therefore, because the proposal would restrict the Agency's ability to determine the content of its performance standards, and as the Union had not asserted that any of the exceptions to § 7106(a) set forth in § 7106(b) applied, the Authority concluded that the proposal was outside the Agency's duty to bargain.

In *NFFE, Local 1904*, 57 FLRA No. 9 (2001), the Authority held that a proposal concerning "patient accountability" was negotiable as an appropriate arrangement under § 7106(b)(3) of the Statute. In response to management's decision to hold nurses responsible for verifying the location of patients admitted to the nurses' assigned wards, the Union proposed that patients with a high risk of wandering be given "wander guard bracelets." The parties agreed that the proposal interfered with the Agency's right to determine internal security practices. The Authority first held that the increased potential for lowered performance appraisals resulting from additional responsibilities constituted an adverse effect within the meaning of § 7106(b)(3), and that the use of wander guard bracelets was intended as an arrangement to compensate for that effect. In addition, the Authority held that the arrangement was sufficiently tailored because it would benefit only those nurses assigned high risk patients. Applying the framework established in *NAGE, Local R14-87*, 27 FLRA 24 (1986), the Authority held that the proposal would not excessively interfere with management's internal security right. In that regard, the Authority held that the affected employees would benefit significantly from the proposal and that the burden on the Agency was slight.

In *Ass'n of Civilian Technicians, Mont. Air Chapter 29*, 57 FLRA No. 19 (2001) (Chairman Cabaniss concurring in part and dissenting in part), the Authority ordered the Agency to rescind its disapproval of a contract provision relieving civilian technicians of the Montana National Guard of the requirement to wear the military uniform when appearing as grievants or witnesses in any third-party proceedings. The parties agreed that the phrase "third-party proceeding" refers to a proceeding before the Authority, the Federal Service Impasses Panel, or an arbitrator, and that the provision applies to witnesses testifying on behalf of the Union or the Agency. The Authority held that the provision was consistent with § 709(b)(4) of the National Guard Technicians Act, 32 U.S.C. § 709(b)(4), and that the provision did not interfere with the Agency's right to assign work under § 7106(a)(2)(B) of the Statute. Section 709(b)(4) requires National Guard civilian technicians to wear the appropriate military uniform "while performing duties as a technician." The Authority held that participating in third-party proceedings was not performing "duties as a technician." Regarding the assignment of work, the Authority held that the provision did not relate to the determination of the duties to be assigned, when work assignments will occur, or to what positions work will be assigned. In partial dissent, Chairman Cabaniss would have found that when appearing as a witness for the Agency, the employee would be performing duties as a technician, and that accordingly the provision was nonnegotiable.

In *AFGE, Local 3529*, 57 FLRA No. 43 (2001) (Member Wasserman concurring in part and dissenting in part), the Authority considered four proposals related to the Agency's Audit Performance Planning System (APPS), an electronic paperwork process. The Agency was attempting through implementation of the APPS to convert auditor working papers from hard copy to electronic files. The Authority determined that two of the proposals permitted auditors to decide whether to use APPS in performing audits and, as such, affected management's rights to assign and direct work under § 7106(a) of the Statute. The Authority also held that these proposals were not procedures under §7106(b)(2) but were bargainable at the election of the Agency under § 7106(b)(1). Citing § 2424.30 of its regulations, the Authority declined to consider the Union's contractual claim that the Agency had a bargaining obligation as to those proposals under the parties' collective bargaining agreement. Disagreeing, Member Wasserman would have viewed the contractual dispute as concerning a *statutory* bargaining obligation, which he would have enforced. The Authority held that a third proposal, that precluded the Agency from lowering an employee's performance evaluation for not using APPS, was outside the duty to bargain because it affected management's rights to assign and direct work, did not constitute a procedure, and was not negotiable at the election of the Agency. Member Wasserman, in dissent, would have held the proposal negotiable, in part because the proposal was "inextricably related" to another proposal the Authority had determined to be negotiable. Finally, the Authority concluded that a fourth proposal, that prevented auditors from being held responsible for certain files, was outside the duty to bargain because it affected management's rights to assign and direct work and did not constitute a procedure or an appropriate arrangement.

In *Hawaii Federal Employees Metal Trades Council*, 57 FLRA No. 82 (2001), the proposal would have required the Agency to schedule a group of employees involved in the maneuvering of submarines in and out of dry dock to work at certain times. The Authority found that the proposal was not negotiable because it was contrary to 5 C.F.R. § 610.121(a), in that it did not permit the Agency to change employees' work schedules even if the Agency would be handicapped in carrying out its mission or if its costs would be substantially increased.

In *AFGE, Local 3529*, 57 FLRA No. 84 (2001), the disputed proposal concerned the standard governing determinations of employee financial liability for lost, stolen, damaged, or destroyed property. The proposal would have replaced the "simple negligence" standard with a standard of "gross negligence." Based on long-standing precedent, *e.g., NAGE, Local R7-23*, 23 FLRA 753, 758-59 (1986); *United States Air Force, Washington, D.C. and United States Air Force, Electronic Systems Division, Hanscom AFB, Bedford, Mass.*, 21 FLRA 957, 960 (1986), the Authority found that the proposal affected management's right to determine its internal security policies and practices under § 7106(a)(1) of the Statute. The Union relied on *United States Dep't of the Army, Fort Campbell Dist., Third Region, Fort Campbell, Ky.*, 37 FLRA 186, 194 (1990) for the proposition that an agency regulation does not necessarily preclude bargaining on a conflicting proposal. The Authority distinguished that case on the ground that the Agency did not rely on its regulation as a bar to negotiation, but on management's rights. The Authority rejected the Union's claims that the proposal constituted a procedure under § 7106(b)(2) and/or an appropriate arrangement under § 7106(b)(3) because the Union provided no support for its positions.

In *ACT, Evergreen and Ranier Chapters*, 57 FLRA No. 89 (2001)(Chairman Cabaniss dissenting in part), the Authority considered three proposals. The first proposal established a crediting plan, but allowed

the Agency to consider information other than that contained in the crediting plan. Based on its decision as to a similar proposal in *ACT, Inc., Heartland Chapter*, 56 FLRA 236 (2000), the Authority found that the proposal was not barred by a conflicting Agency regulation and did not affect management's right to select candidates for appointment under § 7106(a)(2)(C) of the Statute. The second proposal established a process governing selection of candidates for filling a vacant position. The process required the selecting official to interview unit candidates first and, if none of those candidates was selected, mandated certain management actions before nonunit candidates could be considered or unit candidates reconsidered and selected. A majority of the Authority found that the proposal was negotiable based on precedent holding that proposals requiring priority consideration for unit employees, which do not preclude the concurrent solicitation and ranking of nonunit candidates, do not affect management's right to select. The Authority cited *ACT, Volunteer Chpt. 103*, 55 FLRA 562, 565 (1999) and *Laurel Bay Teachers Ass'n, OEA/NEA*, 49 FLRA 679, 687 (1994). Chairman Cabaniss dissented as to this proposal, relying on the court's decision in *Dep't of the Treasury, Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 857 F.2d 819 (D.C. Cir. 1988) (*BATF*). As with the proposal in *BATF*, Chairman Cabaniss concluded that the lengthy process involved in reaching and considering nonunit candidates had the practical consequence of pressuring the selecting official to choose from the initial list of unit candidates and, thus, it affected management's right to select. The third proposal concerned uniforms, safety shoes, a uniform allowance, and cleaning services for uniforms. Based on existing precedent, *e.g.*, *ACT, Inc., Rhode Island Chapter*, 55 FLRA 63 (1999), the Authority rejected the Agency's argument that the proposal concerned matters relating to the military aspects of unit employees' employment. The Authority also rejected the Agency's contention that the proposal was inconsistent with 37 U.S.C. §§ 415-18, and the Anti-Deficiency Act, 31 U.S.C. § 1341, finding that the Agency had discretion, under law, to pay for cleaning services for employee uniforms.

Arbitration Cases

In *United States DOJ, Fed. BOP, Mgmt. and Spec. Trng. Ctr.*, 56 FLRA No. 158 (2000), the Authority reviewed exceptions to an arbitration award finding that the Agency violated the parties' agreement by unilaterally changing work schedules to require instructors to take a 1-hour lunch period rather than a 30-minute lunch period and ordering the Agency to pay all affected employees retroactive overtime or compensatory time. The Authority denied the Agency's exception claiming that the award was deficient because the Arbitrator failed to give effect to the parties' established past practice of allowing the 1-hour lunch period. The Authority found that whether there was a past practice of requiring instructors to take 1-hour lunch periods was an issue of contract interpretation, and the Agency did not establish that the award failed to draw its essence from the parties' agreement. The Authority also denied the Agency's claim that the award violated management's right to assign work, finding that the provision requiring 30-minute lunch periods was properly negotiated in accordance with § 7106(b)(1) of the Statute. The Authority found, however, that the remedy of overtime or compensatory time was deficient under 5 C.F.R. § 551.411(c), because it awarded overtime or compensatory time for bona fide meal periods. Accordingly, the Authority remanded the case to the parties for resubmission to the Arbitrator to determine an appropriate remedy, if any.

In *GSA, Region 9, L.A., Cal.*, 56 FLRA No. 164 (2000), the Authority reviewed an arbitration award in which the Arbitrator mitigated a proposed ten-day suspension to a five-day suspension, and ordered the

Agency to grant the grievant certain official time. The Authority construed the Agency's only exception -- that the award of official time was deficient because the Agency was not afforded an opportunity to be heard on the official time issue -- as an argument that the Arbitrator failed to conduct a fair hearing. The Authority concluded that the Arbitrator failed to conduct a fair hearing. The Authority found that the stipulated issues in the case did not include the official time issue, and that the issue was raised only in the Union's post-hearing brief, which was filed contemporaneous with the Agency's post-hearing brief. The Authority determined that by failing to provide the Agency with an opportunity to respond to the official time issue raised by the Union's post-hearing brief, the Arbitrator prejudiced the Agency in a manner that affected the fairness of the proceeding as to that issue.

In *United States Department of the Army, Corpus Christi Army Depot, Corpus Christi, TX*, 56 FLRA No. 189 (2001), the Authority rejected exceptions to an original award in which the Arbitrator ordered that employees who were exposed to asbestos be given environmental differential pay (EDP), with interest, for 6 years prior to the time the union filed the grievance. The Authority rejected the Agency's claims that: the award failed to draw its essence from the agreement; the Arbitrator exceeded his authority; the award was contrary to the Statute, which allows parties to exclude matters from negotiated grievance procedures; the Arbitrator's interpretation and application of EDP regulations was contrary to law or raised constitutional and other legal concerns; the award was contrary to the Back Pay Act by failing to limit the period of backpay recovery; the Agency's decision to deny EDP should be granted deference; the award was based on nonfact; the Agency was denied a fair hearing; and the award was incomplete, ambiguous or contradictory. The Authority also found that an exception relating to the union's application for payment of expert witness fees was premature because the Arbitrator had not ordered the Agency to pay the cost of expert witnesses. However, the Authority found that part of the Arbitrator's supplemental award, directing a particular agency official to deduct 33 1/3 percent from the employees' EDP award and pay that amount to the unions' attorneys, in accordance with a contractual arrangement between the unions and bargaining unit employees, was contrary to law. The Arbitrator's alternative order, that the Agency take whatever actions are necessary to provide for and ensure the payment of the contractual fees, was modified by the Authority in a number of respects outlined in the decision.

In *Police Ass'n of the Dist. of Columbia*, 56 FLRA No. 195 (2001), the Authority denied the Union's exceptions to an arbitration award holding that injuries sustained by the grievant, a U.S. Park Police officer, while commuting to work did not entitle him to workers compensation. The Authority noted that as a general rule, an employee can only recover benefits for injuries that occur "in the performance of duty" and agreed with the Arbitrator that commuting to work is not "performance of duty." Relying on Employees Compensation Appeals Board case law, the Authority rejected the Union's reliance on the "premises doctrine," which allows an employee to recover benefits if the injury occurred on the employer's property. The Authority also agreed with the Arbitrator that the "police exception" to the general rule of non-recovery for injuries sustained while commuting did not apply to the grievant's claim. Finally, the Authority held that the Arbitrator did not exceed his authority by failing to reach the Union's procedural due process claim because that claim was not mentioned in the issue presented to the Arbitrator.

In *United States Dep't of Agric., Animal & Plant Health Inspection Serv., Plant Prot. and Quarantine*, 57 FLRA No. 4 (2001) (Chairman Cabaniss concurring), the Arbitrator sustained the grievances of four employees who claimed that they were entitled to temporary promotions. The Authority

concluded that the Agency failed to establish that the award was deficient. In a concurring opinion, Chairman Cabaniss reaffirmed the need to examine whether the record establishes the implicit predicate to entitlement to temporary promotions, *i.e.*, whether the duties involved are temporarily assigned to the employee seeking the temporary promotion.

In *United States Dep't of Def. Educ. Activity, Arlington, Va.*, 57 FLRA No. 8 (2001) (Chairman Cabaniss concurring in part and dissenting in part), the Authority reviewed the Agency's exceptions to an arbitration Award granting the Union's request for attorney fees under the Back Pay Act. In an initial award, the Arbitrator had found that the Agency violated a Memorandum of Understanding between the parties relating to living-quarters allowances for employees. The Union requested attorney fees. In a supplemental award, the Arbitrator granted the Union's request for attorney fees and found that the number of hours and hourly rates for the requested fees were reasonable. The Authority reviewed *de novo* the Agency's claim that the attorney fee award violated the Back Pay Act. The Authority first considered whether the Back Pay Act's requirement, that the unjustified or unwarranted personnel action must have resulted in a withdrawal or reduction of the grievants' pay, allowances, or differentials, had been satisfied. The Authority determined that it was not clear whether the Agency's action resulted in a such a withdrawal or reduction. The Authority also determined that the remaining Back Pay Act requirements for attorney fees were satisfied. In that regard, the Authority held that the attorney fees were incurred by the grievants, conceded to be the prevailing parties. A majority of the Authority also held that the number of hours and hourly rates were reasonable. As a result, the Authority remanded the issue to the parties for resubmission to the Arbitrator. Chairman Cabaniss concurred with the remand but dissented from the part of the decision regarding the reasonableness of the award. She expressed the view that because there had been no finding with regard to whether the employees lost pay, allowances, or differentials under the Back Pay Act, a prerequisite to any finding regarding reasonableness of fees had not been met. Thus, in her opinion, it was premature for the Authority to reach the reasonableness issue at this stage of the proceeding.

In *United States Dep't of Veterans Affairs, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 57 FLRA No. 23 (2001), the Authority denied the Agency's exceptions to an award on remand that held that the grievant was qualified for a temporary promotion to the GS-12 level. In the initial award, the Arbitrator had concluded that the grievant's performance of Windows New Technology work entitled him to a temporary promotion from a WG-8 Computer Mechanic to a GS-12 Computer Specialist. In its review of the initial award, the Authority ruled that the record was insufficient to determine whether the grievant met the Office of Personnel Management (OPM) specialized experience requirements at the beginning of the temporary promotion period. On remand, the Arbitrator found that the grievant had at least one year experience at the GS-11 level and performed GS-12 level work prior to the temporary promotion period. On review, the Authority first held that the Agency did not demonstrate that the Arbitrator was biased and/or failed to conduct a fair hearing. Next, the Authority held that the award on remand was not contrary to OPM's regulations concerning specialized experience or to management's right to assign work. Finally, the Authority determined that the Agency failed to establish that the Arbitrator exceeded his authority or that the award on remand either did not draw its essence from the contract or was based on nonfacts.

In *United States Dep't of Justice, Fed. Bureau of Prisons, Fed. Transfer Ctr., Okla. City, Okla.*, 57 FLRA No. 40 (2001) (Chairman Cabaniss dissenting), the Authority rejected the Agency's argument

that the Arbitrator's award contravened the Agency's rights to assign work under § 7106(a)(2)(B) of the Statute and to determine its internal security practices under § 7106(a)(1). The Arbitrator held that the Agency violated a contract provision establishing quarterly rotations of certain work assignments when the Agency made work assignments with durations of 6 or 9 months. Applying the framework established in *United States Customs Service,* 37 FLRA 309 (1990) (*Customs Service*), the Authority held that, although the provision affected the exercise of the rights to assign work and determine internal security practices, the provision was negotiated as an arrangement under § 7106(b)(3) of the Statute and the provision did not abrogate the exercise of those rights. Accordingly, the Authority denied the Agency's exceptions. In dissent, Chairman Cabaniss stated that she would overturn the abrogation test established in *Customs Service* as being inconsistent with the Statute and instead apply the Authority's negotiability precedent in evaluating awards alleged to contravene § 7106; that is, examine whether the provision excessively interferes with a management right. In that regard, Chairman Cabaniss would find that the provision excessively interfered with the Agency's right to determine its internal security practices. Further, and citing the special security needs of a federal correctional facility, Chairman Cabaniss stated that, even applying *Customs Service*, she would find that the provision abrogated the internal security right.

In *NAGE, Local R5-136*, 57 FLRA No. 47 (2001), the Authority considered the Union's exceptions to an arbitration award denying overtime pay to employees for a minimum of two hours of overtime pay for work performed at their residences. In the past, overtime work had to be performed at the place of duty and, pursuant to the collective bargaining agreement, the employees were entitled to a minimum of two hours call-back pay when called to perform overtime. In 1994, the Agency agreed to allow work to be done from the employees' homes. The employees were not paid the two-hour minimum for overtime performed at home. The Union filed the grievance in 1998 seeking the two-hour minimum payment. The Arbitrator concluded that the Agency had not violated the collective bargaining agreement because the call-back payment of two hours overtime applied only when the employees physically returned to the Agency's premises. The Union's exceptions alleged that the Arbitrator's Award failed to draw its essence from the contract and was contrary to 5 U.S.C. § 5542(b)(1), a statutory provision regarding two-hour overtime minimum payments. The Authority denied the exceptions. The Authority first concluded that the Arbitrator's Award did not fail to draw its essence from the agreement since it flowed directly from the language of the contract and was not an irrational, unfounded, or implausible reading of the agreement. The Authority next ruled, based upon its review of the language and legislative history of 5 U.S.C. § 5542(b)(1) and Comptroller General precedent, that § 5542(b)(1) provides for a minimum of two hours overtime only when an employee is physically called back into the workplace to perform overtime. Thus, the Authority denied the Union's exceptions.

In *United States Dep't of the Navy, Naval Explosive Ordnance, Disposal Technology Div., Indian Head, Md.*, 57 FLRA No. 60 (2001) (Chairman Cabaniss dissenting), the Authority denied the Agency's exceptions to a class action arbitration award which held that the Agency had wrongfully exempted ten of eleven employees from overtime pay under the Fair Labor Standards Act (FLSA) and awarded statutory liquidated damages along with back pay. The Authority found that contrary to the Agency's first argument, § 216(b) of the FLSA, which requires employees encompassed within a FLSA class action to first opt-in to the class by filing written consents, is a procedural rather than a substantive requirement. As such, the Authority determined that the requirement was not binding in grievance and arbitration procedures. The Authority also determined that the Arbitrator applied the proper standard in determining whether employees

were FLSA exempt by looking at the day to day duties of those employees. Chairman Cabaniss, in dissent, found that § 216(b) incorporates a binding substantive requirement rather than a procedural one, and that § 216 is not limited in applicability to only matters pending before a court.

In *AFGE, Local 1709*, 57 FLRA No. 83 (2001), the Arbitrator determined that the Agency had violated the parties' collective bargaining agreement pertaining to alternative work schedules (AWS), but had not violated the Work Schedules Act, 5 U.S.C. § 6101, *et seq.*, because the parties' agreement did not specifically incorporate the Work Schedules Act pursuant to § 6130(a)(2). The Authority found that the Work Schedules Act is applicable to AWS affecting employees represented by an exclusive representative and does not need to be expressly incorporated into a contract, and that § 6130(a)(2) is intended only to prohibit an agency from placing employees in a flexible or compressed work schedule without bargaining with an exclusive representative. As such, the Authority held that the parties' AWS program was subject to the Work Schedules Act, and that pursuant to § 6131(b) of the Work Schedules Act, the Agency may only refuse to establish or terminate an AWS program upon finding that the program would have an adverse agency impact. The Authority concluded that since the parties did not contend that this grievance pertained to anything other than the termination or establishment of the AWS program, and the Arbitrator did not apply the adverse impact standard, a remand was necessary.

In *AFGE, Local 987*, 57 FLRA No. 97 (2001) (Chairman Cabaniss dissenting), the Arbitrator determined that the Agency had violated the Privacy Act, 5 U.S.C. § 552a, with respect to the custody of the grievant's personnel file. The Arbitrator ordered the Agency to take certain remedial action, but rejected the Union's request for damages to the grievant under the Privacy Act on the basis that he had no authority to award such damages. The Authority determined that an arbitrator does have authority to award damages under the Privacy Act and remanded that portion of the award to the parties, absent settlement, for resubmission to the Arbitrator. Chairman Cabaniss dissented, in reliance on *United States Customs Service v. FLRA*, 43 F.3d 682 (D.C.Cir. 1994), concluding that the Privacy Act was not enacted for the very purpose of affecting the working conditions of employees, and therefore, that the Authority has no jurisdiction over the case because the Privacy Act is not a "law, rule, or regulation affecting conditions of employment" under § 7103(a)(9) of the Statute. Chairman Cabaniss noted that subject matter jurisdiction is an issue that may be raised at any stage of the Authority's proceedings, and that the Authority could review jurisdictional questions *sua sponte*.

In *United States Dep't of Commerce, Nat'l Oceanic and Atmospheric Admin., Office of Marine and Aviation Operations, Marine Operations Ctr., Norfolk, Va.*, 57 FLRA No. 98 (2001), both the Agency and the Union filed exceptions to the Arbitrator's award on remand. The Authority issued its original decision in the case at 55 FLRA 816 (1999), and denied reconsideration at 55 FLRA 1107 (1999). On remand, the Arbitrator determined that the Agency's violation of the Fair Labor Standards Act (FLSA) was not willful and, therefore that a two-year statute of limitations was applicable. The Arbitrator also found that liquidated damages from the date of the grievance or from the date of the initial arbitration award were not warranted. However, the Arbitrator determined that the Agency had not established a good faith basis for the delay in implementing the arbitration award after the Authority's decision. Accordingly, the Arbitrator ordered the Agency to pay a 20 percent annualized addition to the computed backpay amount after a specified date as a form of liquidated damages. The Authority concluded that the Arbitrator did not err when he determined that a two-year statute of limitations in computing the award of backpay was

applicable. In addition, the Authority found that the Arbitrator exceeded his authority when his award provided backpay and liquidated damages to non-grievants, and when his award included non-grievants in the determination of the statute of limitations for standby pay, and set aside those portions of the award. The Authority also found that the Arbitrator's percentage award of backpay as liquidated damages was contrary to the FLSA and set it aside. Finally, the Authority denied the Union's request for interest.

OFFICE OF THE ADMINISTRATIVE LAW JUDGES

During FY 2001, the Office of Administrative Law Judges (OALJ) continued to offer its Unfair Labor Practice Settlement Judge Program (Program), which is designed to promote voluntary settlement of unfair labor practice complaints and reduce costs associated with litigation. Under this Program, which began in FY 1996, the OALJ, on request of any party to a case, assigns a representative of the OALJ other than the trail judge, to conduct a conference prior to the trial for the purpose of settlement negotiations. During FY 2001, there were requests for settlement assistance under the Program in 278 cases. This represented a 52 percent increase over the previous fiscal year. Under the Program, of 225 cases closed during FY 2001, 170 were successfully resolved prior to trial. By comparison, of 183 cases closed under the Program in FY 2000, 149 were successfully resolved prior to trial. Significantly, there was only one last minute, costly, "court house steps" settlement during FY 2001 as compared with 5 in FY 2000 and 70 in FY 1995, the year before the Program began. At the end of the fiscal year, requests for settlement assistance were pending in 88 cases.

In FY 2001, the OALJ realized a 17 percent increase in the number of cases received and an 11 percent increase in the number of cases closed, compared to FY 2000. The OALJ received 486 cases, closed 413 cases, and ended the year with 200 cases pending. Of the cases closed, 343 were either settled, withdrawn, or stipulated directly to the Authority. In FY 2001, the OALJ completed 66 hearings, representing an increase of 65 percent over FY 2000. In FY 2001, the OALJ issued 62 decisions, representing an increase of 9 percent over FY 2000. The OALJ ended FY 2001 with 166 cases pending without a hearing, an increase of 41 percent over the 118 cases pending at the end of FY 2000.

OFFICE OF THE GENERAL COUNSEL

PROGRAM HIGHLIGHTS

***Revision and Publication of Case Handling Manuals*:** During FY 2001 the FLRA's Office of General Counsel(OGC) completed the development and/or revision of five case handling manuals to provide comprehensive guidance and information to OGC employees, the parties and the public. These manuals include:

(1) The Unfair Labor Practice (ULP) Case Handling Manual, which provides procedural and operational guidance on the processing of ULP charges, was revised. This Manual addresses issues that arise in the processing of a ULP from pre-charge through post-investigation. The Manual also provides information

on OGC policies with respect to: facilitation, intervention, training and education; quality of investigations; scope of investigations; injunctions; prosecutorial discretion; settlements; and appeals. The Manual references relevant case law, provides for best practices, and includes model and sample forms and letters. (2) The Litigation Manual was revised in order to provide current guidance on each aspect of the trial process -- from the Regional Director's issuance of a complaint and notice of hearing to the Authority's decision and order. This Manual contains references to relevant case law and OGC policy, and provides examples of litigation techniques. (3) The Representation Case Handling Manual was revised to provide current procedural and operational guidance in the processing of representation petitions. This Manual provides information on pre-filing assistance available to the parties, the filing of petitions, and the investigation and resolution of representation case matters. (4) The Hearing Officer's Guide was revised to provide current procedural and operational guidance on conducting hearings in FLRA representation proceedings. In this Manual, information is provided on preparing for and conducting hearings, evidentiary and procedural issues, and employee categories. (5) The Representation Case Law Guide was developed to provide information on relevant substantive representation issues that arise in the processing of representation petitions, and representation issues that arise in unfair labor practice cases.

The FLRA has placed each of these manuals on the FLRA website (www.flra.gov) for the public use. The manuals are also available for sale to the public through the Government Printing Office.

***Guidance Memoranda*:** In order to improve the quantity, quality, and timeliness of the work performed and services provided, and to provide leadership in promoting productive labor-management relations in the Federal sector, the OGC issued guidance and policy memoranda to the Regional Directors (which are also made available to FLRA customers).

During FY 2001, the OGC issued guidance on meetings under the Statute, focusing on rights and obligations, and strategies to avoid conflict. The guidance advised the Regions on how to assist the parties to better understand when there is an employee right to be represented and a union right to representation when management meets with a unit employee. Checklists were developed and provided for supervisors, union stewards, and employees to use to determine whether a particular situation gives rise to a right to representation. In addition, appendices were provided regarding the most significant Authority and court decisions on the legal issues that arise when exercising the right to representation.

***Management Initiatives*:** The OGC conducted a major training conference on leadership development for its most senior non-managerial employees in order to develop their skills to become more effective leaders in the future. Additionally, training was provided to this group on coach/mentoring skills and tools for dealing with difficult people.

The OGC issued management memoranda on a number of topics to provide policy and procedural guidance to Regional Office management and employees, including information on time and attendance processing requirements and Certification Database processing requirements.

***Collaboration and Alternative Dispute Resolution Activities*:** As part of the CADR Program, the OGC continued to use innovative approaches to resolve labor-management disputes in the Federal sector.

The approaches include: facilitation, intervention, training, and education services delivered jointly to management and union representatives.

During FY 2001, the OGC conducted 177 facilitation, training, intervention, and education activities. The OGC developed training materials to assist employees in the delivery of these services. The OGC also has provided 1,944 alternative dispute resolution initiatives. For example, at one military installation, OGC representatives assisted management and labor in the resolution of 23 ULP cases and in the development of practical approaches to avoiding future disputes. Finally, in FY 2001, the OGC handled 2,270 requests for technical assistance from agencies, private individuals, and unions.

CASE HIGHLIGHTS

Unfair Labor Practice(ULP) Cases

***Cases Received*:** The OGC continued to make significant strides in the processing of ULP cases. In FY 2001 the parties filed 6,167 ULP cases with the OGC. In FY 2001, the OGC exceeded its goal of no more than 15 percent of its pending ULP caseload being no more than 90 days old without initial dispositive action, by reducing that caseload to 6 percent.

***Initial Dispositive Actions*:** After a charge is filed, the OGC staff seeks to resolve the dispute. During FY 2001, the OGC took 6,111 initial dispositive actions. Of these actions, 25 percent were pre-complaint settlements achieved by OGC and the parties; 23 percent of the charges were dismissed; 45 percent of the charges were withdrawn; and 7 percent of the charges resulted in the issuance of a ULP complaint.

Unfair Labor Practice Appeals: The OGC's streamlined Appeals process continued to result in quality and timely decision-making. The OGC was successful in closing 476 Appeals cases, while receiving 453 new Appeals cases, during FY 2001.

***Post-Complaint Actions*:** For cases in which the OGC is unable to resolve a ULP charge, the OGC issues a ULP complaint. In FY 2001, the OGC issued 472 such complaints. The OGC was successful in working with the parties to resolve approximately 85 percent of the complaints scheduled for hearing, without resorting to litigation. The OGC litigated 68 cases before the FLRA's Administrative Law Judges, when settlement was not achieved.

REPRESENTATION PETITIONS

In FY 2001, the OGC received 376 new representation petitions and closed 356 cases. As with ULP processing, the OGC continued to emphasize timely Representation case processing. The OGC ended FY 2001 with no Representation cases overage. This exceeded the OGC's goal of no more than 15 percent of pending cases more than 90 days old. In addition, during FY 2001, the OGC conducted 55 representation case hearings and 85 elections.

FEDERAL SERVICE IMPASSES PANEL

PROGRAM HIGHLIGHTS

Voluntary Resolution of Disputes

In FY 2001, the Federal Service Impasses Panel (the Panel) provided settlement assistance in 54 cases and achieved 25 complete settlements. Overall, voluntary settlements occurred in 59 cases, representing nearly 29 percent of the cases closed in FY 2001.

During FY 2001, the Panel continued to collaborate with the Federal Mediation and Conciliation Service (FMCS) in cases where parties left issues unresolved despite the initial involvement of FMCS. In addition to the more traditional option of directing the parties to return to the bargaining table for concentrated efforts with FMCS assistance, the Panel also sought to include mediators in selected cases in its prejurisdictional investigative process. The Panel also provided guidance to FMCS and parties in a few instances prior to the filing of a formal request for Panel assistance.

The Panel continued its collaboration with the FLRA's CADR Office. Although no cases were referred to the CADR Program in FY 2001, the Panel participated in discussions facilitated by CADR with the FLRA's other components where related cases existed.

Formal Panel Action

While voluntary settlement is the Panel's preferred dispute resolution outcome, there are impasses that require the Panel to impose terms on the parties. During FY 2001, the Panel or its representatives resolved 42 cases through written decisions, which provided finality to the collective bargaining process.

Education Efforts

Panel Members and staff participated extensively in the FLRA's National Training Conference in April 2001, in Washington, D.C. In addition, in FY 2001, Panel Members and staff participated in 17 training events, as well as several in-house training sessions. As in previous years, the Panel published its decisions and those of Panel-appointed arbitrator's throughout FY 2001, and compiled a Subject-Matter Index and Table of Cases covering cases closed in calendar year 2000. Finally, on December 11, 2000, current Panel Members and Staff hosted a joint FLRA-FSIP training session to commemorate the 30th Anniversary of the Panel, which included former Panel Members, Chairs, and Executive Directors.

ISSUES

In FY 2001, the predominant issues presented to the Panel for impasse resolution included: (1) personnel matters such as reassignments, reductions in force, merit promotion, reorganizations, and details; (2) facilities, including office equipment, office design, and parking; (3) hours of work, particularly compressed work schedule, flexitime, shifts, and work at home programs; (4) institutional matters, such as union and management rights, union facilities, and the payment of travel and per diem for negotiations; (5) official time for representation and preparation for negotiations, official time recording procedures; and (6) ground rules for negotiations.

CASE HIGHLIGHTS

Decision and Order Following Written Submissions and Rebuttals

Department of Defense, National Guard Bureau, Iowa Army National Guard, Johnston, Iowa and Heartland Chapter, Association of Civilian Technicians, Case No. 00 FSIP 148 (December 22, 2000), Panel Release No. 437. The Panel determined that the dispute, which concerned the procedure for filling vacancies, should be resolved on the basis of written submissions. The employer proposed that when six or more applicants are qualified for vacancies, the field would be narrowed by rating and ranking then in accordance with National Guard regulations; the rankings ultimately would be considered, but would not be binding upon the employer. The union proposed that, after considering but not selecting bargaining unit candidates, the employer would prepare a "written reasonable justification" for non-selection which would include a statement of areas where such candidates could improve. If a non-bargaining unit candidate were selected after bargaining unit candidates had been considered, the union also proposed that the employer, as part of a written justification of non-selection of the candidates, explain and/or revise, in the context of its decision, the relative significance of various areas for suggested improvement identified in its previous justification. The Panel, noting there were aspects of both parties' proposals that conflicted with wording they had previously agreed-to, ordered adoption of a compromise which (1) eliminated from the proposals the potential conflicts, and (2) preserved the employer's right under 5 U.S.C. § 7106(a)(2)(C) to select employees for positions.

Decision and Order Following Single Written Submissions

Department of Justice, Office of the U.S. Attorney for the District of Columbia, Washington, D.C. and Local 3620, American Federation of State, County and Municipal Employees, Council 26, AFL-CIO, Case No. 00 FSIP 142 (December 20, 2000), Panel Release No. 437. The Panel determined that the dispute, concerning casual Fridays under the dress code policy, should be resolved on the basis of single written submissions from the parties. The union proposed that employees continue to be permitted to wear jeans and sneakers on "casual Friday." The employer proposed that certain attire, such as sweat suits, blue jeans, and sneakers, not be permitted on casual Fridays. It also asserted in its submission, for the first time, that the Panel lacked jurisdiction over the dispute because dress code policy involved a "methods and means" of performing work, a permissive subject of bargaining under § 7106(b)(1) of the Statute, over which it elected not to bargain. Because no substantively identical proposal was identified for the Panel to apply in accordance with the FLRA's decision in *Commander, Carswell Air Force Base, Texas and American Federation of Government Employees, Local 1364*, 31 FLRA 620 (1988), the Panel declined to retain jurisdiction over the dispute, but ordered the employer to maintain the *status quo*

regarding the dress code policy while the union appealed the employer's nonnegotiability allegation to the FLRA.

Decision and Order Following Order to Show Cause

Department of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio and Local F-88, International Association of Fire Fighters, AFL-CIO, Case No. 01 FSIP 69 (May 24, 2001), Panel Release No 440. The Panel determined the dispute, concerning the local smoking policy covering firefighters, should be resolved through the issuance of an Order to Show Cause why wording previously adopted by the Panel – prohibiting indoor smoking and requiring the employer to designate reasonably accessible outdoor smoking areas that provide a measure of protection – should not also be imposed to settle this dispute. The union proposed that the employer maintain the *status quo* by allowing employees to smoke indoors in designated smoking areas until a new Command Level Agreement (CLA) was implemented. The employer proposed to implement the wording in Article 25, § 3, of the current CLA that smoking would be prohibited in all fire stations, thus, requiring employees to smoke outside. The Panel ordered the adoption of the wording in the Order to Show Cause which complies with Executive Order 13058, *Protecting Federal Employees and the Public from Exposure to Smoke in the Federal Workplace*. In its view, nonsmokers would be protected from exposure to cigarette smoke, and smokers would be accorded a measure of protection from the elements. The Panel was not persuaded that the firehouse should be treated differently from other Federal workplaces.

Decision and Order Following Informal Conference (Face-to-Face)

Social Security Administration, Baltimore, Maryland and SSA General Committee, American Federation of Government Employees, AFL-CIO, Case No. 01 FSIP 130 (August 13, 2001), Panel Release No. 442. The Panel determined that the dispute, arising from negotiations over the employer's decision to test an initiative called the Model Multimedia Customer Contact Centers (MC3) Call Transfer and Internet Inquiry (E-mail) Project, should be resolved through an informal conference. Nine of 11 issues were resolved during the informal conference. Of the two remaining issues, with respect to participation by SSA Field Offices, the union proposed an e-mail pilot program through a virtual office in each of the employer's eight regions. The employer asserted in a written statement submitted following the informal conference that it had no duty to bargain over the union's proposal because it affected a management right under section 7106(a)(1) of the Statute. The Panel determined that "the employer's belated duty-to-bargain allegation should not prejudice the union from exercising its statutory rights before the MC3 program is implemented." Therefore, the Panel ordered the employer to maintain the *status quo* regarding the MC3 program to give the union an opportunity to file a negotiability appeal. However, the Panel stated that if the union did not file an appeal within 60 days following the issuance of the Panel's order, the order to maintain the *status quo* would lapse. As to the issue of position upgrades, the union proposed that no later than 1 year from the beginning of the pilots, a joint workgroup of an equal number of union and employer participants should be established to review the possibility for upgrading positions as a result of the MC3 program. The employer proposed that the union withdraw its proposal because it concerned employees' grades, a permissive subject of bargaining under section 7106(b)(1) of the Statute. The Panel,

noting that the FLRA had found negotiable a proposal substantively identical to the union's, rejected the employer's argument that the proposal concerns a permissive subject of bargaining. The Panel adopted a compromise proposal under which the parties would have one discussion about position upgrades at their already planned "second 5-month meeting." The Panel explained that this would provide an appropriate vehicle for evaluating the possibility of position upgrades while still maintaining the employer's ultimate authority to determine whether or not to upgrade positions.

Decision and Order Following Informal Conference (Telephone)

Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Milan, Michigan and Local 1741, American Federation of Government Employees, AFL-CIO, Case No. 01 FSIP 82 (September 24, 2001), Panel Release No. 443. After the parties reached an impasse during negotiations concerning safety-toed footwear, and overtime and annual leave scheduling, the Panel determined that the dispute should be resolved through an informal conference. When the teleconference did not yield a settlement, the Panel issued a decision: (1) declining to retain jurisdiction over the union's proposal regarding safety-toed footwear, as the employer had raised a duty-to-bargain question more appropriately resolved in another forum; (2) ordering compromise wording on the issue of overtime scheduling which generally adopted the overtime selection procedure proposed by the employer, but on the key point of how overtime assignments are distributed, required the parties to maintain a separate log or list containing employees' cumulative overtime credit, and mandated that employees with the least amount of overtime credit be the first ones selected for overtime assignments for which they have volunteered; and (3) ordering a compromise procedure on the issue of annual leave scheduling, based on seniority, which permitted employees to bid twice on annual leave slots, the first round for up to 3 weeks of annual leave, the second for up to 2 weeks. With respect to the last issue, the Panel concluded that its compromise would meet the interests of both parties: the union's in protecting the seniority rights of bargaining-unit employees, and the employer's in enhancing employee morale, and in recruiting and retaining employees to effectively carry out its mission.

Decision and Order Following Formal Fact Finding Hearing and Issuance of Fact Finder's Report with Recommendations

General Services Administration, Washington, D.C. and Council 236, American Federation of Government Employees, AFL-CIO, Case No. 00 FSIP 120 (February 20, 2001), Panel Release No. 438. The Panel determined that the dispute, concerning negotiations over a proposed reorganization of the GSA's Federal Supply Service (FSS) stock distribution program, should be resolved through factfinding, with recommendations to the parties for settlement of the impasse. Accordingly, a factfinding hearing was held on October 3 and 4, 2000, and issued a report with recommendations for settlement was issued on December 4, 2000. The report recommended adoption of the employer's position that distribution centers in Fort Worth, Texas, and Palmetto, Georgia, as well as forward supply points in Auburn, Washington; Franconia, Virginia; Denver, Colorado; and Chicago, Illinois, be closed by April 2001. The report further recommended that the employer seek extension of, or new buy-out authority, at least through July 31, 2001. Finally, the report recommended that the parties take other measures to ameliorate the adverse impact on employees consistent with their contract, using their partnership agreement's framework as a guide. The employer accepted and the union rejected the recommendations.

After the parties were unable to use the factfinder's recommendations as the basis for settling the matter, the Panel adopted a modified version of the factfinder's recommendations, amended to lessen the impact of any RIF upon affected employees, by providing that the closings would occur no sooner than October 1, 2001.

Arbitrator's Opinion and Decision Following Telephone Mediation-Arbitration Procedure

Department of Defense, National Guard Bureau, Kansas National Guard, Topeka, Kansas and Jayhawk Chapter #104, Association of Civilian Technicians, Case No. 01 FSIP 25 (May 15, 2001), Panel Release No. 440. The Panel determined that the dispute, regarding ground rules for an initial collective bargaining agreement, should be handled through mediation-arbitration. During mediation, no settlement was reached on the employer's proposal that union negotiators wear military uniforms during contract negotiations. The employer also contended that the union's proposal that union negotiators not be required to wear their military uniforms while engaged in collective bargaining, including travel to and preparation for the sessions, was outside its duty to bargain. The arbitrator ordered adoption of the union's proposal because: (1) the employer failed to provide a compelling rationale that warranted reconsideration of a well-established line of FLRA cases finding the union's proposal negotiable; (2) the employer's reliance on the 1999 Amendments to the Technicians Act, 32 U.S.C. § 709, as a basis for its position on negotiability represented a misinterpretation of the law; and (3) requiring the union negotiators to wear the military uniform during collective bargaining would place union representatives at a disadvantage in relation to their management counterparts.

Settlement During Prejurisdictional Cooperative Effort with FMCS and Panel Representative

Department of the Army, Corps of Engineers, Kansas City District, Kansas City, MO and Federal Employees Union No. 29, Case No. 01 FSIP 123 (closed August 29, 2001). Initially, the parties disagreed over parts of 16 articles for a successor collective bargaining agreement. The dispute concerned a range of subjects including exceptions to the negotiated grievance procedure; witnesses, costs, and the precedential value of arbitrations; training; awards; the scope and union role in equal employment opportunity matters; merit promotions and placement; meal periods and non-duty travel; compensatory time; leave use related to the Employee Assistance Program; time frames for filing adverse action appeals; contracting out; use of telephones, privately-owned vehicles, and scheduling duty-related travel; smoking policy; parking; and partnership. The parties agreed to meet with a Panel representative and an FMCS mediator in a pre-jurisdictional setting to attempt to narrow the issues. All issues were resolved voluntarily.

Settlement During Informal Conference

Department of the Army, 94th Regional Support Command, Fort Devens, Massachusetts and Local 1900, American Federation of Government Employees, AFL-CIO, Case No. 00 FSIP 161 (closed January 31, 2001). The parties reached an impasse over various proposals relating to the implementation of the National Defense Authorization Act, 10 U.S.C. § 10218, enacted on October 5, 1999, which required the separation or mandatory retirement of non-dual status technicians, regardless of their age; FY 2001 amendments relaxed these provisions so that affected technicians would be allowed to remain on the rolls until age 60. As the result of an informal conference, the dispute was resolved.

Settlement During Face-to-Face Mediation-Arbitration with a Panel Representative

Social Security Administration, National City Field Office, National City, California and Local 2879, American Federation of Government Employees, AFL-CIO, Case No. 01 FSIP 30, (closed January 19, 2001). The parties reached impasse over whether the employer should install plexiglass in window openings in a newly-constructed reception area. As the result of a mediation-arbitration proceeding, the dispute was voluntarily settled.

Decline to Assert Jurisdiction

Usually, a declination of jurisdiction by the Panel is based on one of the following three reasons: (1) the parties have not exhausted voluntary efforts to reach agreement, (2) threshold questions exist concerning a party's obligation to bargain over a proposal, or (3) other good cause is shown.

Department of Health and Human Services, Health Care Financing Administration, Baltimore, Maryland and Local 1923, American Federation of Government Employees, AFL-CIO, Case No. 01 FSIP 57 (closed on March 20, 2001), the Panel declined to assert jurisdiction over the parties' dispute about whether supervisors or employees should determine, for reimbursement purposes, the necessity of Sunday travel for employees who begin contractor reviews on Monday mornings, and a reopener to revisit the matter in 3 months. The Panel concluded that no impasse existed because the record demonstrated that the parties had engaged in limited negotiations, held no sessions with a mediator and, therefore, had not exhausted voluntary efforts to resolve the dispute. In its letter declining jurisdiction, as guidance, the Panel referred the parties to a decision by the FLRA addressing Sunday travel.

Department of Labor, Washington, DC and Local 12, American Federation of Government Employees, AFL-CIO, Case No. 01 FSIP 58, (closed on April 30, 2001) the Panel declined to assert jurisdiction because of threshold questions concerning the employer's obligation to bargain over the union's proposal on the size of bargaining-unit employees' work stations. The Panel's investigation revealed that the employer believed that the union's proposal was covered by Article 29 of the parties' collective bargaining agreement. In addition, the employer contended that the parties had not exhausted voluntary efforts over other floor plan proposals that the union had not raised during negotiations or during mediation. The union countered that Article 29 "expressly contemplates further negotiations over space issues," and as to the other floor plan proposals, it contended they could be raised because the issues were still open. In light of its determination to decline to assert jurisdiction because of preliminary jurisdictional questions the employer raised, the Panel also denied the union's related request that it order the employer to maintain the *status quo*.

In *Department of the Treasury, U.S. Customs Service, San Francisco, California and Chapter 165, National Treasury Employees Union*, Case No. 00 FSIP 154, (closed on December 14, 2001), the Panel initially determined to assist the parties in resolving their disagreement over staffing of Saturday tours of duty through mediation-arbitration by a Panel representative. However, when the parties jointly requested a postponement of the procedure to resume bargaining in an effort to resolve the disputed matter,

and indicated that related discussions on the overtime budget were occurring at the national level, the Panel declined to retain jurisdiction for good cause shown. Under such circumstances, the Panel concluded that the national level negotiations were likely to cause a significant delay in resolving the dispute, if not render the dispute moot. The determination to close the case was without prejudice to the right of either party to file another request for assistance should they again believe they were at impasse following the resumption of negotiations, if any.

FLEXIBLE AND COMPRESSED WORK SCHEDULES

Requests for assistance filed under the Federal Employees Flexible and Compressed Work Schedules Act of 1982 (the Act), 5 U.S.C. § 6131, require an agency head to determine that the establishment of a compressed work schedule (CWS) would result in an adverse agency impact, as defined therein. In addition, prior to terminating an existing CWS, an agency head must demonstrate that the schedule has, in fact, caused an adverse agency impact. The Panel issued Decisions and Orders in a number of CWS cases during FY 2001.

Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Lompoc, California and Local 3048, American Federation of Government Employees, AFL-CIO, 00 FSIP 129 (November 13, 2000), Panel Release No. 436. The Panel determined that the parties' dispute, which arose under the Act, should be resolved through an informal conference. The union proposed two different 5-4/9 CWS pilot schedules: (1) UNICOR employees (and inmates working at UNICOR) would have the same Friday off-days every 2 weeks; or (2) UNICOR employees would rotate regular days off. The employer asserted that either CWS schedule, if adopted, would likely cause an adverse agency impact by diminishing the level of service furnished to the public and by reducing productivity. The Panel determined that the employer had met its statutory burden under the Act with respect to the union's first proposal because closing the UNICOR facility an additional 26 times per year, as would be required under that alternative, would have a disruptive effect on inmates and cause a diminished level of service to the public. The Panel also found, however, that the Employer had failed to demonstrate that the Union's second proposal was likely to cause an adverse agency impact, and ordered the parties to return to the bargaining table for additional negotiations on that schedule.

Department of the Interior, Bureau of Reclamation, Boulder City, Nevada and Local 1978, American Federation of Government Employees, AFL-CIO, Case No. 01 FSIP 97 (May 24, 2001), Panel Release No. 440. This dispute, concerning the termination of an existing CWS, also arose under the Act. The Panel determined that the case should be resolved through written submissions. The union proposed that the 4/10 CWS for the tour guides at Boulder Dam be maintained; the employer proposed to terminate the 4/10 CWS because the schedule was causing an adverse agency impact. The record established, among other things, that tour guides remained idle for as much as 40 percent of the workday under the 4/10 schedule, and that a shorter workday could eliminate at least half of this inactivity. After considering the totality of the evidence, the Panel concluded that the employer had met its statutory burden under the Act by showing that continuing the 4/10 CWS would prevent the employer from increasing the agency's productivity and level of services furnished to the public.

Agency-Wide Activity Highlights

FLRA Strategic Plan: The FLRA is implementing a 5-year strategic plan (FY 2000-2005), in accordance with the Government Performance and Results Act (GPRA). The strategic plan includes four goals:

- Provide high quality services that timely resolve disputes in the Federal labor-management relations community.
- Use and promote alternative methods of resolving and avoiding disputes and provide services to enhance labor-management relationships.
- Develop, manage and utilize the FLRA's internal systems and processes to meet program needs.
- Develop, manage and utilize the FLRA's human resources to meet program needs.

The strategic plan is linked to the FLRA's performance management plan, which is designed to improve individual and organizational effectiveness through the integration of planning, monitoring, appraising, and rewarding individual and organizational performance. The performance management plan ties together the FLRA strategic plan, organizational action plans, and individual performance plans, as envisioned by the Government Performance and Results Act.

FY 2001 Program Accomplishments: Consistent with the FLRA Strategic Plan, FLRA implemented its FY 2001 Annual Performance Plan identifying 25 performance goals to implement the four Strategic Plan goals. During FY 2001, FLRA fully met or exceeded 21 of its 25 performance goals.

During 2001, FLRA continued to reduce the number of overage cases, the overall age of the pending inventory, and case processing times. For example, the FLRA's Office of the General Counsel achieved the lowest number of overage representation cases in its history. Similarly, the FLRA's Authority significantly lowered the age of its pending inventory from previous years -- now defining overage as any case over six months old (in FY 1999 overage was defined as over one year old). Finally, the FLRA's Federal Service Impasses Panel continued to reduce the amount of time to issue decisions and orders, thus improving processing times to resolve impasses. At the same time these reductions occurred, FLRA continued to maintain high standards of quality.

Also during FY 2001, FLRA conducted a National Training Conference to provide training on: rights and obligations under the Statute; FLRA regulations and procedures; alternative dispute resolution techniques; practical approaches to bargaining; and new developments in the Federal labor-management relations program. A total of 330 individuals representing Federal agencies, Federal employees, unions, and third party agencies from 37 states, the District of Columbia, Puerto Rico, the Virgin Islands, and Panama attended this two-day conference in Washington, DC.

FLRA continued its efforts to integrate the use of alternative dispute resolution approaches at all stages of case processing – particularly regarding negotiability appeals and unfair labor practice cases. FLRA negotiability regulations include: conferences designed to narrow and clarify issues; procedures to resolve all aspects of a dispute, where appropriate; and clarification of the responsibilities of each party. FLRA pre-complaint ULP regulations facilitate dispute resolution and attempt to simplify, clarify and improve processing of ULP charges. In addition, FLRA post-complaint ULP regulations formalize the Settlement Judge Program and provide for a pre-hearing conference program. Through August 31, 2001, FLRA staff provided training, facilitation and intervention services -- conducting 235 sessions for nearly 10,000 participants.

Finally, in FY 2001, the FLRA received two independent evaluations, one addressing computer security, the other addressing information technology support structure. These reviews reflect the FLRA's commitment to maintain sound, secure internal systems by upgrading computer hardware and software; and to design agency databases, and expand the FLRA web-site to provide the ability to address customer expectations and Federal mandates. Throughout, the FLRA continued its commitment to maintaining a highly skilled work force by supporting employee and leadership development programs.

Collaboration and Alternative Dispute Resolution Program

The CADR Program implements one of the FLRA's primary strategic goals -- to reduce litigation and its attendant costs by helping the parties resolve their own disputes with collaboration and alternative dispute resolution (ADR) and labor-management cooperation activities. The CADR Program offers collaboration and alternative dispute resolution services in pending ULP, representation, negotiability, and bargaining impasse disputes at every step, from investigation and prosecution to the adjudication of cases and resolution of bargaining impasses. The CADR Program also provides facilitation and training to assist management and labor in developing collaborative relationships.

During FY 2001, the FLRA conducted 256 ADR training, facilitation, and education sessions to approximately 10,000 participants to enable the parties to constructively manage their own workplace disputes. Over 2,000 case-related intervention services were provided to successfully resolve pending unfair labor practice, representation, negotiability, and bargaining impasse disputes.

Office of the Solicitor

During FY 2001, the FLRA's Office of the Solicitor filed 20 court proceedings involving the Authority and closed 15 court proceedings involving the Authority. Of the 15 proceedings that were closed, 3 involved merits decisions. The Authority was affirmed, in whole or in prominent part, in all 3 cases. At the close of the year, the Authority was a party to 14 cases under judicial review. Summaries of selected decisions follow.

Negotiability - Terms and Conditions of Military Service: In *Association of Civilian Technicians, Schenectady Chapter v. FLRA*, 230 F.3d 377 (D.C. Cir. 2000), *reviewing* 55 FLRA 925 (1999), the D.C. Circuit denied the union's petition for review of an Authority decision. The Authority determined that a proposal was nonnegotiable because the proposal related to a military assignment and would invite

bargaining over a military decision, in violation of 10 U.S.C. § 976(c). The union's proposal would have governed how the National Guard informs dual-status technicians of their eligibility to volunteer for active duty in a special pay status under 5 U.S.C. § 6323(d). The Court gave the FLRA's interpretation "judicial respect" and also determined that the proposal threatened to interfere with the National Guard's discretion to call technicians into action as it sees fit, pursuant to 10 U.S.C. § 12301. Therefore, in agreement with the Authority, the Court concluded that the proposal was inconsistent with 10 U.S.C. § 976(c), which prohibits bargaining over the terms and conditions of military service.

Negotiability - Military Grade Inversion: In *Association of Civilian Technicians, Texas Lone Star Chapter 100 v. FLRA*, 250 F.3d 778 (D.C. Cir. 2001), *reviewing* 55 FLRA 1226, reconsideration denied, 56 FLRA 432 (2001), the D.C. Circuit denied a union petition for review of an Authority decision holding nonnegotiable proposals that would have prevented the National Guard units involved from enforcing the Guard's policy against military grade inversion. The Authority determined that the proposals were inconsistent with federal law, citing *inter alia* the National Guard Technicians Act of 1968, as amended, 32 U.S.C. § 709(b), and holding that the proposals thus concerned the military aspects of technician employment. The Court agreed with the Authority that the proposals were inconsistent with 32 U.S.C. § 709(b). In the Court's view, by requiring civilian technicians to "hold the military grade specified by the Secretary," § 709(b) directs a technician to occupy a military grade equal to or exceeding that of subordinate personnel. Because the proposals were inconsistent with this principle, the Court upheld the Authority's conclusion that the proposals were outside the duty to bargain.

Lack of Jurisdiction - National Guard Technicians' Terminations: In *American Federation of Government Employees, Local 3936 v. FLRA*, 239 F.3d 66 (1st Cir. 2001), *reviewing* 56 FLRA 174 (2000), the First Circuit affirmed the Authority's final decision and order holding in part that in an unfair labor practice (ULP) proceeding, the Authority lacked jurisdiction to review the alleged retaliatory termination of a National Guard civilian technician. In its decision, the Authority determined that a particular National Guard unit had committed ULPs in violation of the Statute when it took various actions against technicians in connection with an incident of lawful informational picketing. However, the Authority also concluded that the National Guard Technicians Act of 1968, 32 U.S.C. § 709, precluded the Authority from reviewing the alleged retaliatory termination of a civilian technician because the Technicians Act grants state adjutants general final authority over adverse personnel actions involving technicians. The Court agreed with the Authority "that the plain language of section 709(f)(4) of the Technicians Act categorically precludes review of technician terminations under the [Statute]." 239 F.3d at 70.

Representation Petitions: In *Association of Civilian Technicians, Inc. v. FLRA*, No. 99-2562 (D.D.C. Mar. 31, 2001), *appeal docketed*, No. 01-5170 (D.C. Cir. May 31, 2001), *reviewing* 55 FLRA 657 (1999), the district court granted the Authority's motion to dismiss the complaint for lack of subject matter jurisdiction. The union had sought review of an Authority decision denying the union's petition to consolidate various bargaining units of National Guard civilian technicians into a single unit. The union argued that the Court had jurisdiction to consider its claims under the Administrative Procedure Act, 5 U.S.C. §§ 701-704 (APA), and alternatively, that even if jurisdiction did not exist under the APA, the Court nevertheless had jurisdiction under the doctrine established in *Leedom v. Kyne*, 358 U.S. 184 (1958) (*Leedom*). Finally, the union argued, even if a basis for jurisdiction was not established under the APA or *Leedom*, the Court could still review certain "legal interpretations" included in the final Authority

decision. First, the Court ruled that § 7123 precludes judicial review of appropriate unit determinations, and is the "exclusive statutory scheme" for judicial review of Authority decisions. Accordingly, the Court held, the union could not obtain review of the Authority's final decision in the case pursuant to any statute, including the judicial review provisions of the APA. The Court also held that certain exceptions to the bar raised by § 7123, such as the Supreme Court's decision in *Leedom*, did not apply. Finally, the Court determined that review was not available based on the purported "legal interpretation" within the Authority's decision. The Court concluded that the Authority had simply engaged in the kind of analysis and explanation used in the ordinary course of adjudicating a particular case.

Office of the Executive Director

In FY 2001, the Office of the Executive Director provided operational support to agency program offices including budget and finance, human resources, administrative services, and information technology. In addition, the office managed and/or coordinated a number of agency-wide activities including the National Training Conference, the agency's five-year strategic plan, and a major review of the agency information technology program. In March 2001, FLRA submitted the FY 2000 Annual Program Performance Report to the President and Congress. The Report reflected a successful year for FLRA, which met or exceeded 21 of its 28 performance goals and substantially met the remaining seven goals.

During FY 2001, the FLRA contracted for an independent evaluation of the agency's Information Technology (IT) support structure. Specifically, the contractor review offered recommendations addressing: (1) IT staffing resource levels, including types of skills and appropriate mix of in-house and contractor support; (2) base level funding for hardware, software, systems development, programming, systems integration, and IT training; (3) existing IT strategies including implementation of the Clinger-Cohen Act and Government Paperwork Elimination Act (GPEA); (4) customer service standard benchmarks; and (5) IT governance. In addition, the FLRA Inspector General audited the FLRA computer security program and provided recommendations to improve security and protection of agency systems.

Finally, the agency completed an initial review and analysis to determine what changes were required to its core business processes to become compliant with the requirements of the GPEA. The agency's GPEA plan includes an approach to provide electronic capabilities on six case processing functions, all procurement activities including E-commerce, and recruitment.

Office of the Inspector General

The FLRA Inspector General (IG) continues to maintain an oversight program which focuses heavily on prevention through program and process evaluations, audits, and management consultation. During FY 2001, the FLRA IG issued two Semi-Annual Reports to Congress; completed major audits dealing with FLRA's Travel Program and Simplified Acquisitions and Imprest Fund; conducted internal reviews of The Office of the General Counsel's Unfair Labor Practice Charge Investigation Process; and evaluated the

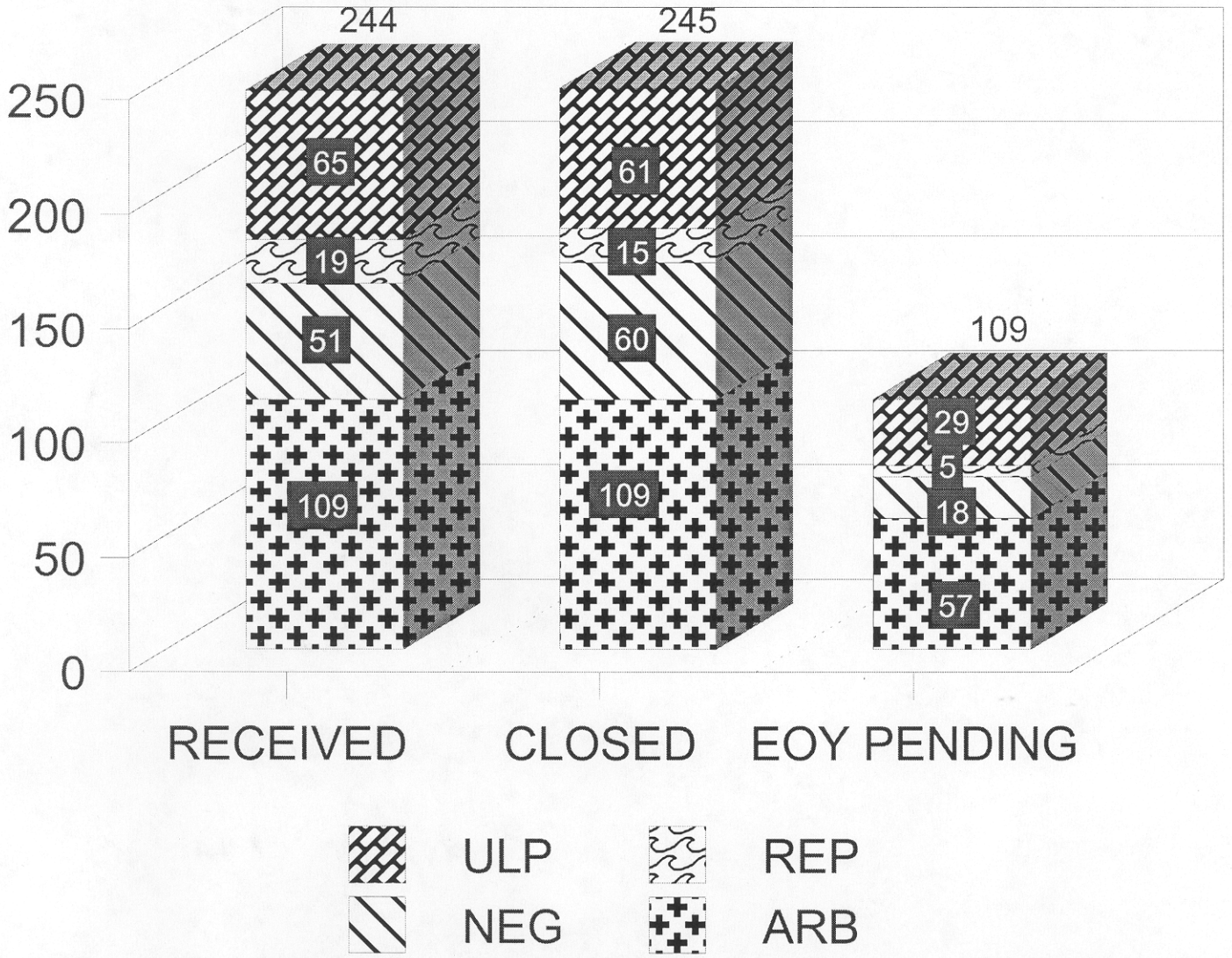
FLRA's FY 2000 Performance Management Submission, the FLRA's Debt Collection Process, and FLRA's compliance with the Government Information Security Act. The FLRA IG also began preparation for an audit of FLRA's Financial Systems (FY 1999 - 2001) and Budget Formulation Process. Finally, during FY 2001, the FLRA IG processed 39 Hotline calls and conducted 3 Investigations.

FLRA CASE STATISTICS
FY 2001

Type of Cases	Pending EOY 2000	Cases Received	Total	Closures/ Dispositions	Pending EOY 2001
Unfair Labor Practice Charges					
Charges Filed w/Regional Directors/OGC	1,434	6,167	7,601	-	1,491
Dispositions	-	-	-	6,111	-
Appeals to General Counsel	78	453	531	476	55
Cases before ALJ's	127	486	613	413	200
Appeals to Authority	25	65	90	61	29
Subtotal	1,664	7,171	8,835	7,061	1,774
Representation Cases					
Petitions/Cases Filed w/OGC	174	376	550	356	194
Appeals to Authority	1	19	20	15	5
Subtotal	175	395	570	371	199
Arbitration Cases					
Appeals to Authority	57	109	166	109	57
Subtotal	57	109	166	109	57
Negotiability Cases					
Appeals to Authority	27	51	78	60	18
Subtotal	27	51	78	60	18
Bargaining Impasses					
Impasses to FSIP	30	215	245	205	40
Subtotal	30	215	245	205	40
TOTALS	**1,961**	**7,941**	**9,894**	**7,806**	**2,088**

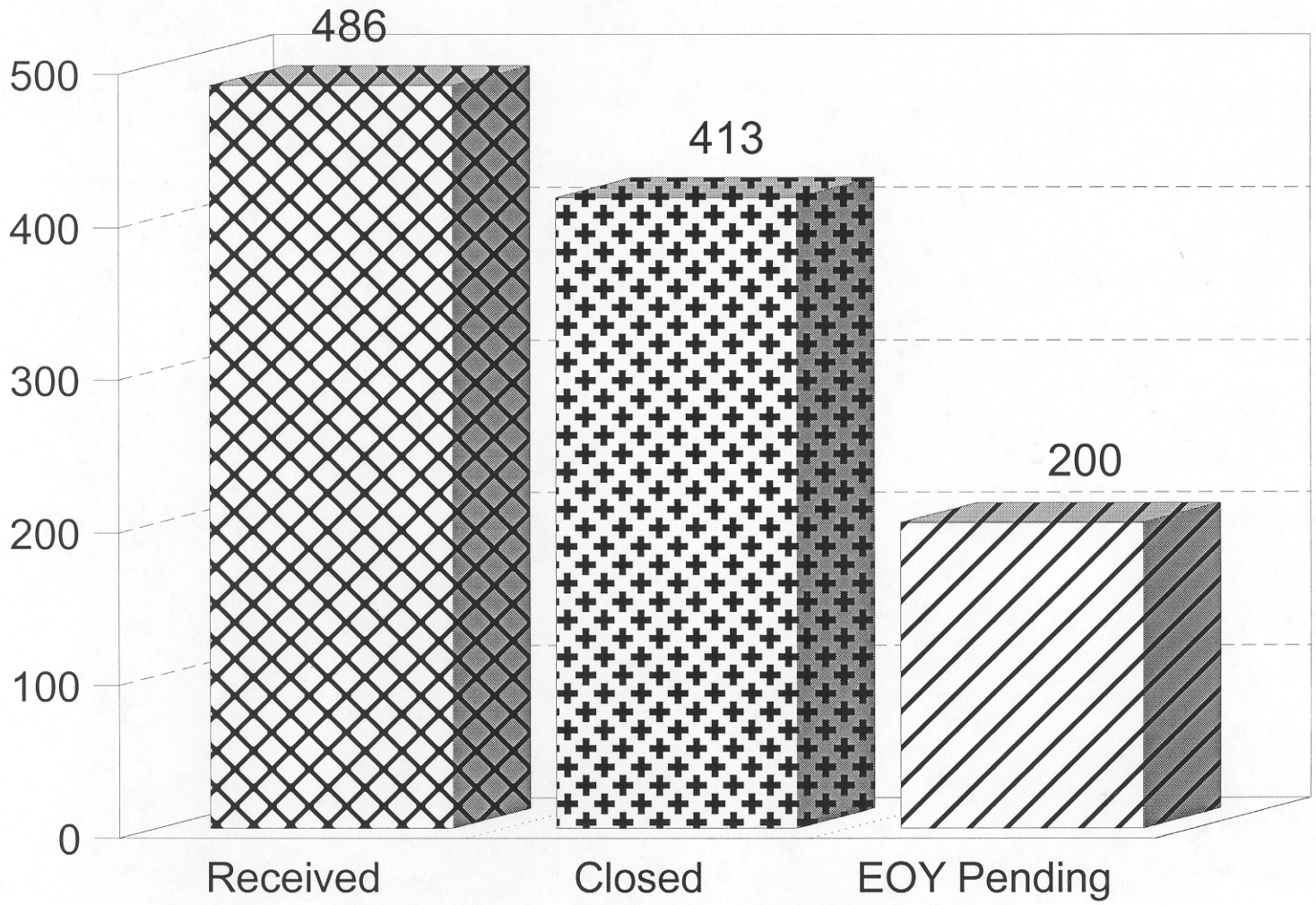
AUTHORITY

CASE STATISTICS FY 2001



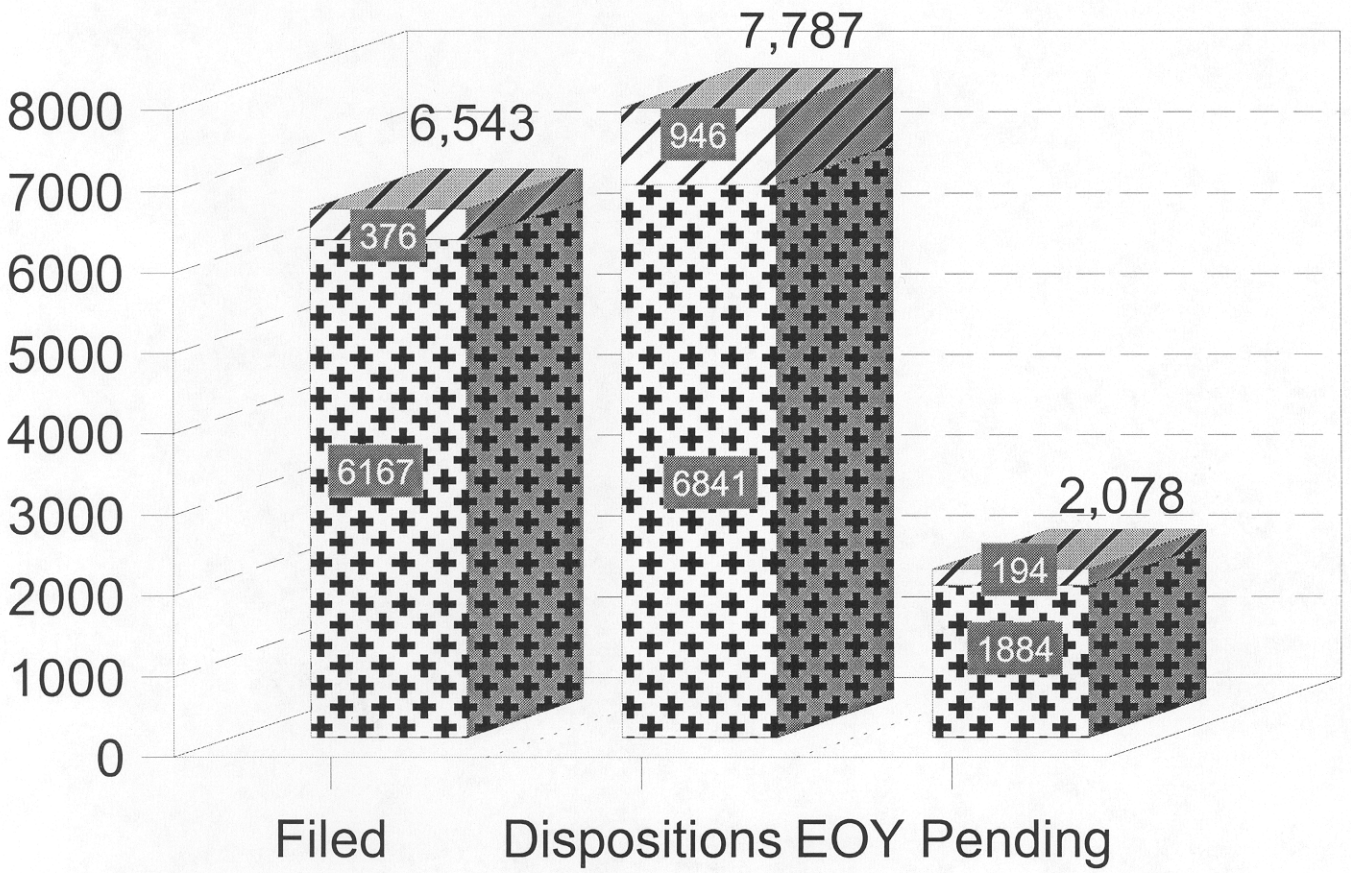
ADMINISTRATIVE LAW JUDGES

Case Statistics FY 2001



OFFICE OF THE GENERAL COUNSEL

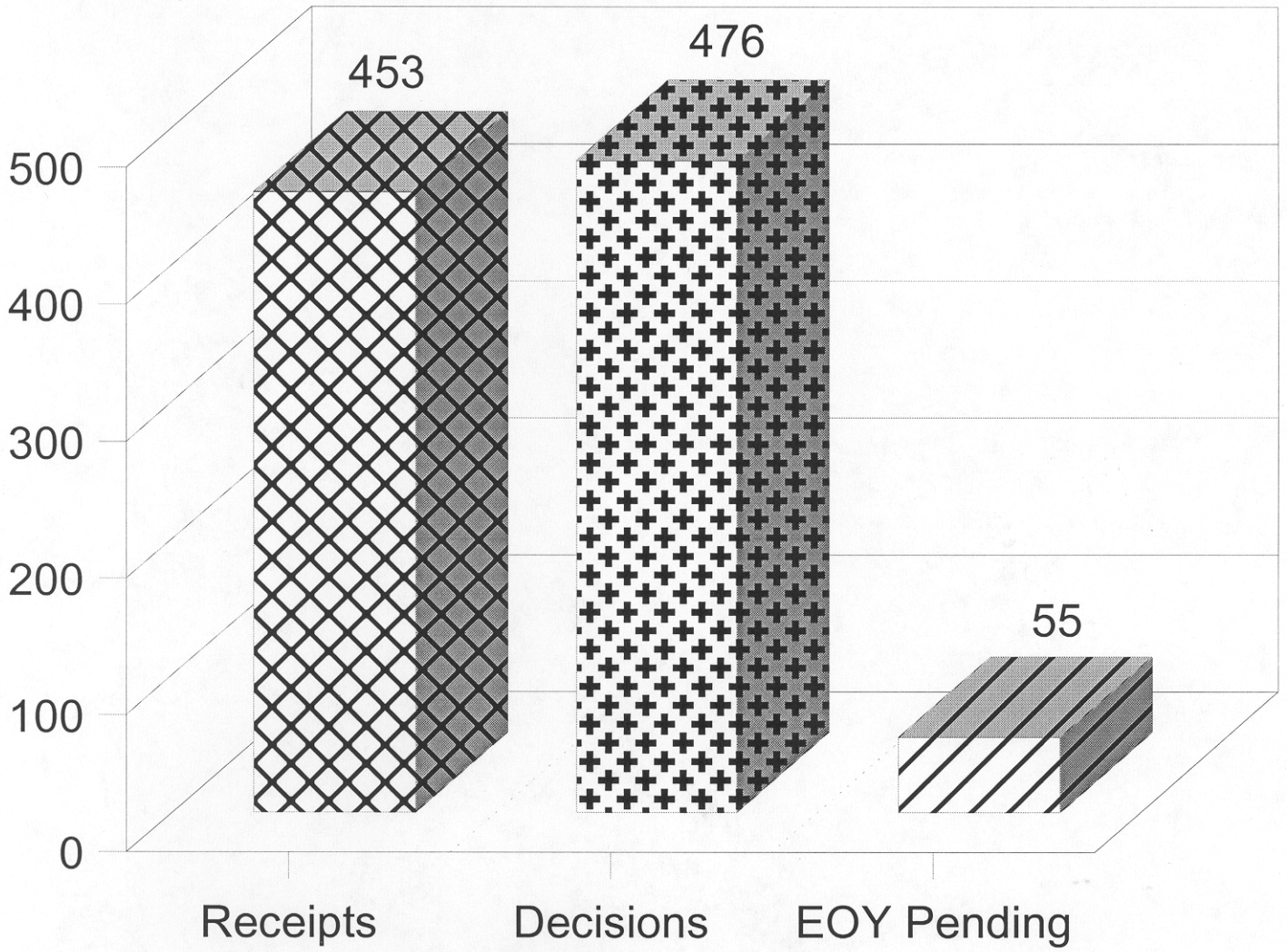
Case Statistics FY 2001



Note: Case dispositions include all actions, initial & secondary, related to the processing and disposition of a case.

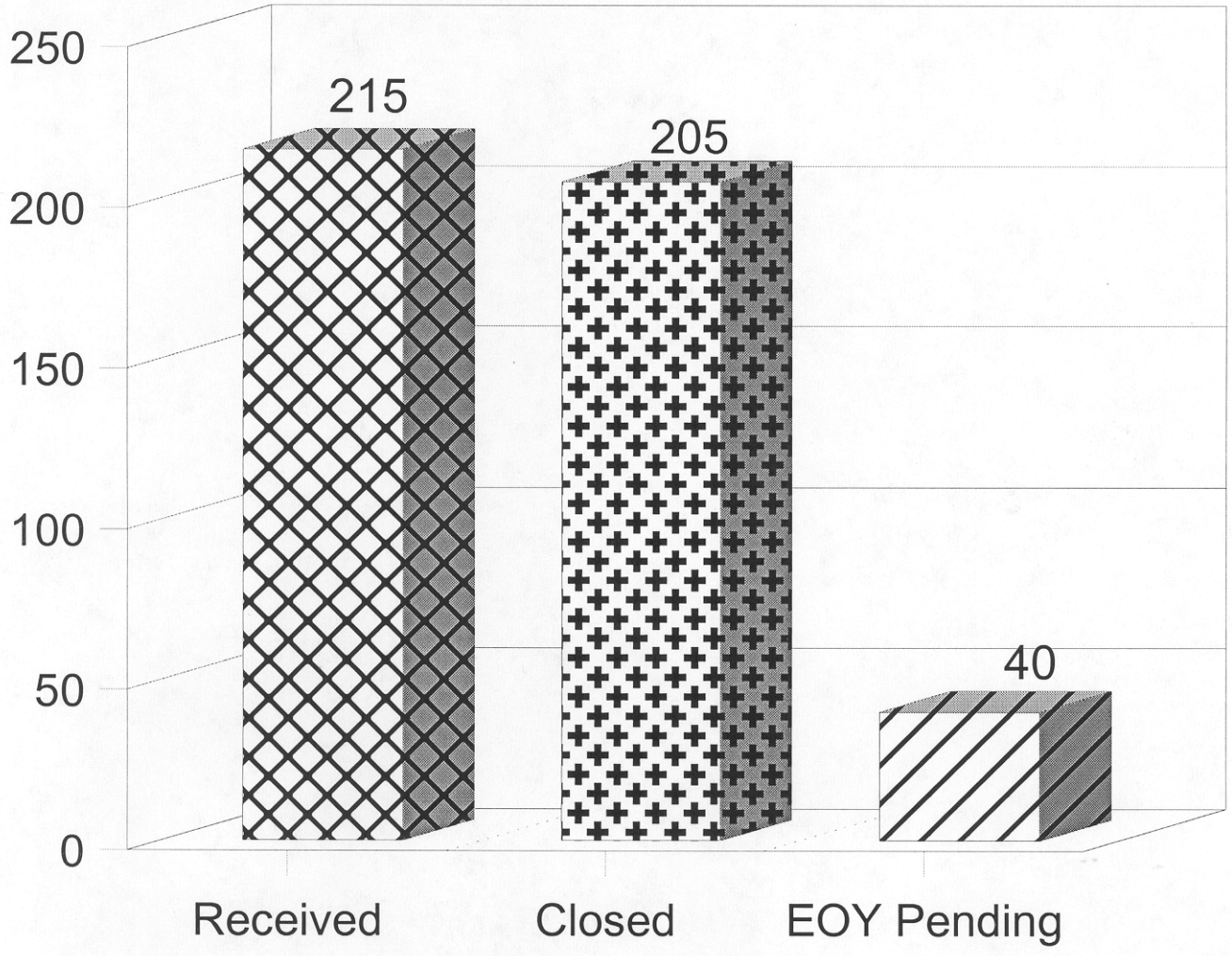
OFFICE OF THE GENERAL COUNSEL

Unfair Labor Practice Appeals FY 2001



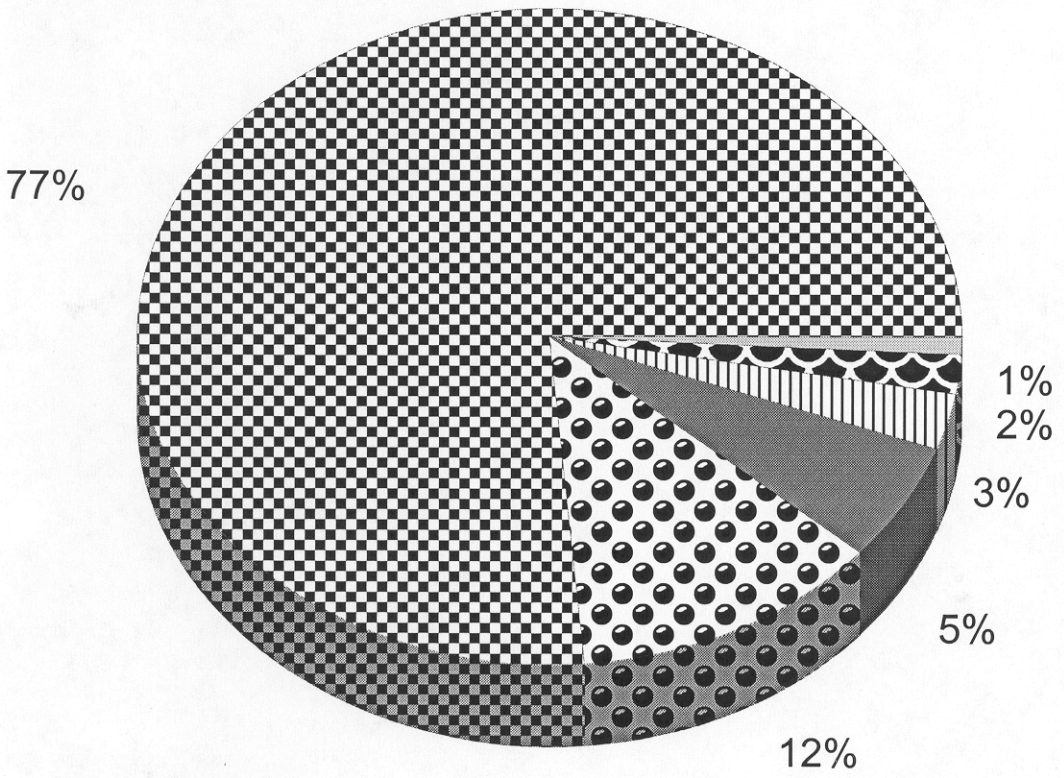
FEDERAL SERVICE IMPASSES PANEL

Case Statistics FY 2001



FLRA FINANCIAL STATEMENT

FY 2001



- Personnel Compensation & Benefits($19,135)
- Rent to GSA, Communication and Utilities ($3,019)
- Other Services($1,466)
- Travel/Transportation($694)
- Supplies, Materials and Equipment($501)
- Printing and Reproduction($144)

Total Obligations $24,959