SOCIETY OF FEDERAL LABOR & EMPLOYMENT RELATIONS PROFESSIONALS
43RD ANNUAL SYMPOSIUM ON FEDERAL LABOR & EMPLOYEE RELATIONS

FLRA Case Law Update, April 29, 2016
Anna Molpus & Fred B. Jacob, FLRA

I. Negotiability Cases

A. *AFGE, ICE, Nat'l Council 118 and U.S. DHS, U.S. ICE*, 68 FLRA 910 (Sept. 11, 2015) (Unanimous), *reconsideration denied,* 69 FLRA 248 (Mar. 17, 2016) (Member Pizzella concurring)

- The Union's proposal would "prevent law-enforcement officers . . . from suffering any loss in the amount of [their] administratively uncontrollable overtime (AUO) pay, . . . as a result of their participation in negotiations" on the Union's behalf, by requiring the Agency "to grant administrative leave . . . for time spent . . . in negotiations, rather than granting or coding this time as official time."

- The Agency argued that the proposal was: (1) contrary to § 7131 of the Statute; (2) contrary to the Federal Personnel Manual (FPM) and 5 C.F.R. § 550.162; (3) inconsistent with an agency regulation; and (4) covered by the parties' tentative ground rules, so outside the duty to bargain.

- The Authority found in 68 FLRA 910 that: (1) § 7131 required granting official time – but did not *prohibit* granting administrative leave – for negotiations; (2) the pertinent FPM provisions, and decisions relying on them, were no longer binding; and § 550.162 did not require calculating AUO in a manner inconsistent with the proposal; (3) the Agency neither specified an agency regulation in conflict with the proposal, nor showed that a "compelling need" supported such a regulation, as § 2424.50 of the Authority's Regulations required; and (4) the proposal was not "covered by" the ground rules because those rules were merely *tentative*, not an executed agreement.

- The Authority denied the Agency's motion for reconsideration in 69 FLRA 248, rejecting the Agency's arguments that: (1) a change in the Agency's policies warranted reconsidering the earlier decision; (2) the Authority had addressed OPM guidance on 5 C.F.R. § 550.162 without the Agency raising that issue; and (3) the Authority had incorrectly interpreted relevant statutes and regulations.

- Concurring in the denial of reconsideration, Member Pizzella noted that although the Union had successfully "crafted a proposal that is legally negotiable," he found the

Agency's "concerns . . . valid . . . [because the] proposal gives employees an overtime premium even when they are engaged *only in official time* for long periods."

B. *AFGE, Local 1547 and U.S. Dep't of the Air Force, Luke Air Force Base, Az.*, 67 FLRA 523 (July 29, 2014), *reconsideration denied,* 68 FLRA 557 (May 13, 2015) (Member Pizzella dissenting), *pet. for review pending*, No. 15-1208 (D.C. Cir. July 8, 2015)

- Union provision to extend to civilian employees access to Luke AFB military exchange; Agency-head disapproval.

- In 67 FLRA 523 (Member Pizzella dissenting), Authority found that the provision concerned bargaining-unit employees' conditions of employment and that there was no conflict between provision and Title 10 because the Agency did not demonstrate that Title 10 either gives the SOD "sole and exclusive discretion" to determine who has access to the exchange, or prohibits the Agency from granting civilian employees such access; ordered Agency to rescind disapproval.

- On motion for reconsideration, Authority again found provision "not inconsistent" with Title 10, and that the Agency's DOD Instruction 1330.21 claim was barred because it had not been raised in the original proceeding. But even assuming that the Agency had properly raised the DOD Instruction 1330.21, the Authority found the Agency's claim unpersuasive and a mere attempt to relitigate conclusions reached in 67 FLRA 523.

- Member Pizzella stated, in dissent, that Title 10 and DOD Instruction 1330.21 leave question of access solely to discretion of the DOD.

- The Agency filed a petition for review in the D.C. Circuit, challenging the Authority's finding that exchange access was a condition of employment under the Statute, as well as the Authority's holding that the Secretary of Defense did not enjoy sole and exclusive discretion over exchange access. The parties have briefed the case, and it is awaiting oral argument.

II. Representation Cases

***U.S. Dep't of State, Bureau of Consular Affairs, Passport Svcs. and NFFE, Local 1098*, 68 FLRA 657 (Jan. 30, 2015) (Member Pizzella concurring, in part, dissenting, in part)**

- Authority held Passport Acceptance Facilities analysts, who perform quality control checks to "ensure that acceptance facilities [do] not deviate from Agency standards," but whose positions are not designed to "uncover waste, fraud, abuse, or wrongdoing" committed *by* Agency employees, are not excluded from

bargaining unit by § 7112(b)(7)'s internal security exemption; similarly, analysts who do not "exercise independent judgment with regard to personnel actions" are not excluded by § 7112(b)(3).

- Member Pizzella noted, in partial dissent, that even "oversight duties performed (on behalf of the Agency, by contractors or other non-Agency employees) 'ensure that the duties are discharged honestly and with integrity'" and therefore may exclude employees under § 7112(b)(7).

III. Unfair Labor Practice Cases

A. *U.S. Dep't of VA, VA Med. Ctr., Richmond, Va. and AFGE, Local 2145*, 68 FLRA 882 (Jan. 30, 2015) (Member Pizzella concurring)

- Authority found that Agency bypassed the Union and committed an unfair labor practice (ULP) in violation of § 7116(a)(1) and (5) of the Statute when it "sought to arrange directly with the employee a 'consensual settlement of complaints [(grievance bypass)] made against' him" by asking the employee to move floors (working conditions bypass).

- Member Pizzella stated, concurring, that Agency had an obligation to bargain over procedures and arrangements "related to the relocation" (grievance bypass) but not as to the "move itself" because that decision is a "management right" and therefore not a "condition of employment."

B. *U.S. Dep't of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah and AFGE, Local 1592*, 68 FLRA 460 (April 16, 2015) (Member DuBester dissenting), *appeal filed*, No. 15-9542 (10th Cir., argued Mar. 9, 2016)

- General Counsel issued a complaint alleging the Agency committed ULP in violation of § 7114(a)(2)(B) of the Statute when an investigator employed by the Air Force Office of Special Investigations (AFOSI) denied a bargaining unit employee's request for a Union representative to be present during an interview.

- The Administrative Law Judge (ALJ), following a hearing, recommended dismissing the complaint. The ALJ found that the bargaining-unit employee did request Union representation be present during the interview; however, the AFOSI agent could not be a "representative of the agency" under §7114(a)(2)(B) because AFOSI had been "excluded from coverage" under the Statute by Executive Order 12171 (1979). As the AFOSI agent could not be a representative of the agency, the Agency was not liable for the alleged violation of the Statute.

- The Authority found that the plain wording of §7103(b)(1) provide that the President may issue an order excluding any agency or subdivision from all coverage under "this Chapter," and so, per Executive Order 12171, the AFOSI agent did not act as the Agency's representative when he interviewed the bargaining-unit employee and the Agency could not be held responsible for his conduct during the interview. The Authority dismissed the complaint.

- Member DuBester noted, in dissent, that §7103(b)(1)'s plain language does not make clear whether an "excluded" agency is excluded from the Statute's coverage in every respect, or only with respect to its own functions and employees. For this and other reasons, Member DuBester would find that "AFOSI, though not itself covered by the Statute, was acting as the agency's representative when its investigator interviewed the employee" and "the employee was therefore entitled to the rights under §7114(a)(2)(B) that the Authority and the courts have for so long recognized as fundamental and important."

- The Union filed a petition for review of the Authority's decision in the Tenth Circuit, which heard oral argument on March 9, 2016. A decision is expected this spring or summer.

C. *U.S. DHS, U.S. ICE, Wash., D.C. and AFGE, Local 1917*, 69 FLRA 72 (Nov. 13, 2015) (Member Pizzella concurring, in part, and dissenting, in part)

- The General Counsel issued complaints alleging that the Agency violated § 7116(a)(1) and (8) of the Statute by refusing to arbitrate two grievances filed by the Union at the local level.

- The Agency refused to arbitrate these grievances because another AFGE organization, the national-level agent for the employees in the local bargaining unit, filed national-level grievances challenging the same Agency actions. The Agency argued that: (1) the Union did not have authority or standing to grieve or arbitrate matters of national importance; (2) an arbitrator would not have jurisdiction to decide the disputed grievances; (3) the parties' agreement did not permit duplicate grievances; and (4) it would be inefficient to arbitrate the Union's local-level grievances in addition to the national-level grievances.

- With regard to the first three arguments, the ALJ found that these were arbitrability questions, and that § 7121 of the Statute required the Agency to present such arguments at arbitration. Concerning the fourth argument, the Judge noted that the Authority has previously held that alleged "inefficiencies" do not justify refusing to arbitrate an unsettled grievance. Thus, the ALJ concluded the

Agency violated § 7116(a)(1) and (8) for refusing to arbitrate the disputed grievances, and as a remedy, ordered the Agency to make a nationwide posting signed by the Agency's Director.

- The Authority agreed with the ALJ. The Authority found it "well-established that questions of arbitrability are solely for an arbitrator to decide." Citing Authority precedent, the Authority further found "that questions of mootness, standing, arbitral jurisdiction, and res judicata are questions of arbitrability." The Authority therefore ordered the parties to proceed to arbitration concerning the two grievances filed by the Union, and for the Agency to make a nationwide posting.

- Member Pizzella concurred that the Agency violated § 7121 by refusing to arbitrate the grievances, but stated, in dissent, that forcing the Agency to proceed to arbitration on matters that were already resolved by the national-level grievances was an unwise use of government resources, and undermined the Authority's responsibility to promote the effective conduct of government business. He thus noted that he would only require a notice posting of the violation, and would not have allowed the Union to proceed to arbitration.

D. ***U.S. Dep't of the Interior, U.S. Geological Survey, Great Lakes Science Ctr., Ann Arbor, Mich. and AFGE, Local 723, AFL-CIO*, 68 FLRA 734 (June 30, 2015) (Unanimous), *pet. for review voluntarily dismissed*, No. 15-1292 (D.C. Cir., dismissed Feb. 4, 2016)**

- The Agency operates survey vessels on each of the five Great Lakes. Before 2012, it paid unit employees the maximum M&IE rates authorized by GSA when they were on a survey, which employees would typically use to eat at restaurants near the port where their ship was docked. In April 2012, however, the Agency informed employees that it was reducing M&IE rates for employees traveling on vessels equipped with a kitchen to a "camp rate" that would allow employees to purchase groceries. The Agency explained that it was taking this action for budgetary reasons, in compliance with an Executive Order that required agencies to establish plans for reducing travel costs. In response, the Union contended that the reduction of per diem rates was a change in a binding past practice that required bargaining, and, ultimately filed an unfair labor practice charge over the change.

- In its decision, the Authority held that the Agency violated § 7116(a)(1) and (5) by reducing MI&E per diem rates without bargaining. In agreement with the ALJ, the Authority held that the parties' past practice was the payment of specific M&IE rates, not merely to follow the Federal Travel Regulation. As the Authority observed, the evidence did "not establish that the parties had expressly or implicitly agreed to an overarching practice whereby the Agency was permitted to take any actions that the FTR authorized." The Authority similarly rejected the Agency's

claims that the change was covered by the contract, privileged by the FTR, and was generally non-negotiable as a management right.

- The Authority, however, agreed with the judge that per diem reimbursements are not "pay" under the Back Pay Act, and, consequently, employees were not eligible for reimbursement for the reduced per diem.

- The Authority ordered the Agency to cease and desist from making unilateral changes without bargaining; rescind the reduction in MI&E rates; upon request, bargain with the Union over the proposed reduction; and post a remedial notice.

IV. Arbitration Cases:

A. *Indep. Union of Pension Emps. for Democracy & Justice and Pension Benefit Guaranty Corp.*, 68 FLRA 999 (Sept. 29, 2015), *reconsideration denied,* 69 FLRA 164 (Jan. 15, 2016) (Unanimous)

- Before the Union was certified as the exclusive representative, the Agency and the previous union negotiated and executed a CBA with a grievance/arbitration procedure.

- The Agency filed a grievance against the Union, alleging the Union both violated the CBA and committed a ULP (§7116(b)(1), (3), & (8)) by publishing a newsletter containing a coercive and intimidating article that identified by name an employee who testified on behalf of the Agency in a separate arbitration.

- The Arbitrator sustained the grievance, finding that: the most current negotiated grievance procedures continued to bind the parties; that he had been properly appointed and selected to hear "this" arbitration; and that the newsletter article threatened other employees, clearly sought to dissuade other employees, and strayed beyond the boundaries of the Union's constitutionally protected speech.

- The Authority held that, even if the then-existing CBA had expired, the policies, practices, and matters encompassing the negotiated grievance and arbitration procedures continued, survived, and remained in full effect, even following the decertification of one exclusive representative and the installation of a new one. Therefore, the current exclusive representative, the Union here, was bound by the arbitration procedures included in the collective-bargaining agreement that had been negotiated by the previous, later decertified, union, until the parties negotiated a new agreement.

- The Authority partially overruled its 2006 precedent, *U.S. DHS, U.S. Immigration & Customs Enforcement and AFGE, Nat'l INS Council, Local 1917*, 61 FLRA 503, while considering the Union's exception, which it denied, alleging the Arbitrator had exceeded his authority by determining his own "long-term" appointment.

- The Authority held that the award was not contrary to 5 U.S.C. §§ 7102, 7116(e) or the First Amendment.

B. *NTEU, Chapter 83 and Dep't. of the Treasury, IRS*, 68 FLRA 945 (Sept. 16, 2015) (Member Pizzella dissenting)

- Union grieved that the Agency's use of "interview panels" (rather than sole evaluation by selecting official) violated parties' CBA.

- Arbitrator determined that the Agency violated the CBA and committed a prohibited personnel practice by conducting interviews of best-qualified candidates by "a panel" rather than the "selecting official." As a remedy, the Arbitrator awarded priority consideration to any best-qualified candidate who was interviewed by a panel which selected an "internal" candidate. The remedy applied to "all applicants for vacancies where the Agency announced [that] it hired employee(s) . . . [fifteen] workdays prior to the grievance being filed." For those applicants, the Arbitrator determined that priority consideration would remain in effect for two years.

- Authority found that the remedy was not contrary to law, regulation, or internal Agency rule and draws its essence from the CBA.

- Member Pizzella stated, in dissent, that the Arbitrator's award did not draw its essence from the CBA because the award relied upon a provision that addressed the "rating and ranking" of applicants, not the interview process.

C. *U.S. Dep't of HHS, Nat'l Inst. of Envtl. Health Scis. and AFGE, Local 2923*, 68 FLRA 1049 (Sept. 30, 2015) (Member Pizzella dissenting)

- By memorandum of agreement (MOA), the Agency agreed, and allocated funds, to pay performance awards for FY 2012 out of FY 2013 funds. After Congress imposed sequestration, and before the Agency distributed the FY 2012 awards, OMB issued memoranda on "discretionary spending." OMB advised agencies that employee monetary awards "should occur 'only if legally required.'" OMB made it clear that "legally required" included compliance with collective-bargaining agreements. The Agency, however, determined it could not pay performance awards.

- Arbitrator determined once Agency decided to allocate funds in budget for awards (prior to sequestration), it was obligated to distribute awards as set forth in MOA. Arbitrator also determined that OMB's memoranda did not prohibit Agency from doing so.

- Authority agreed with Arbitrator that Agency's agreement under MOA and CBA made awards "legally required" and OMB memoranda did not interfere with "legally[-]required" obligations.

- Member Pizzella stated, in dissent, that award interferes with Agency's right to budget and that payment of bonuses is "discretionary" and runs counter to "sequester" restriction of "discretionary" spending.

D. *AFGE, Local 919 and U.S. DOJ, Fed. BOP, Leavenworth, Kan.*, 68 FLRA 573 (May 14, 2015) (Member Pizzella dissenting)

- After Agency implemented new software program for distributing overtime, Union filed ULP charge alleging Agency violated the Statute by failing to negotiate over impact and implementation of the software. RD dismissed charge, finding no evidence of any change in employees' conditions of employment. Union then filed grievance alleging that Agency violated a provision of CBA concerning equitable distribution of overtime.

- Arbitrator determined that grievance was barred by 7116(d) because "earlier[-]filed ULP charge raise[d] the same issue over the same subject matter" as the grievance.

- Authority set aside Arbitrator's award. Authority noted that the ULP charge did not mention the parties' agreement at all. Authority also pointed out that the "later-filed grievance [was] based on a contractual claim," and that because contractual violations are not ULPs, they cannot be litigated in the ULP process. Authority therefore concluded that the grievance relied "on a different legal theory" than the alleged ULP, and was not barred by 7116(d).

- Member Pizzella noted, in dissent, that 7116(d) only provides "*an option* of using [either] the [NGP] *or* [the ULP process]" not both.

E. ***AFGE, Nat'l Council 118 and U.S. DHS, U.S. ICE, Enforcement & Removal Operation, Wash., D.C.*, 69 FLRA 183 (Jan. 29, 2016) (Member Pizzella dissenting in part)**

- The Union filed a grievance arguing that the Agency failed to notify and provide an opportunity to bargain over the impact and implementation of two sets of changes, one in 2011 and one in 2012, made to an Agency form issued by bargaining-unit employees to federal, state, and local law-enforcement agencies. The form was used as notification that the Agency intends to take custody of individuals who are being detained by those law-enforcement agencies.

- The Arbitrator, considering the changes' actual effects, found that those effects were not more than de minimis, and denied the grievance.

- The Authority remanded the portion of the award concerning the 2011 changes because the Arbitrator did not consider whether, at the time of the changes, they had "reasonably foreseeable" effects on the grievants' working conditions that were more than de minimis. The Authority stated: "In assessing whether the effect of a change is more than de minimis, the Authority 'looks to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change on bargaining[-]unit employees' conditions of employment.'" The Authority added: "'[A]n analysis of whether a change is de minimis does not focus primarily on the actual effects of the change,' but on reasonably foreseeable effects."

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

F. ***U.S. Dep't of the Treasury, IRS and NTEU,*** 68 FLRA 1027 **(Sept. 30, 2015),** ***petition for review pending*****, No. 15-1433 (D.C. Cir.)**

- The Agency employs a bargaining unit of IT support employees, who work at 35 locations around the country providing "desk-side" service to agency employees who experience computer problems. Since 2001, the Agency contracted with ABBTECH, a private contractor, to provide IT support services to remote locations and for special projects. In 2011, the Agency entered into a contract with ABBTECH to provide installation services at any agency location. The Agency did not provide the Union with notice of the contract or its intent to enter into it.

- The Union filed a grievance over the Agency's failure to provide notice and an opportunity to bargain. Specifically, the Union alleged that the Agency's actions

violated provisions in their CBA requiring bargaining over contracting out if it could result in a loss of work for bargaining-unit employees, and committed a ULP under § 7116(a)(1) and (5) of the Statute by refusing to satisfy that bargaining obligation. The Arbitrator agreed.

- The Authority held that the Arbitrator properly found that the Agency violated its CBA and the Statute. On the merits, the Authority rejected the Agency's arguments that (1) the grievance was untimely; (2) the award was based on nonfacts; (3) the covered-by doctrine relieved the Agency of any bargaining obligation; and (4) a status-quo-ante remedy was contrary to law. The Authority also found that the Agency failed to argue, at arbitration, that its management right to contract out and determine its budget precluded a status-quo-ante remedy, and, therefore, refused to consider those claims.

- Member Pizzella dissented. He would have found the Agency's management rights arguments were encompassed in the arguments it presented to the Arbitrator, and were properly before the Authority. He therefore would have reached the issue and concluded that the change fell within the Agency's management rights to contract out and determine its budget. He also would have found the grievance untimely.

G. *AFGE, Local 3955 and U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Tucson, Ariz.*, 69 FLRA 133 (Dec. 8, 2015) (Unanimous)

- The Union grieved on behalf of all bargaining-unit employees alleging that the Agency failed on multiple occasions to pay them in a timely fashion for overtime worked, in violation of the Fair Labor Standards Act (FLSA).

- The Arbitrator found that Agency had committed multiple FLSA violations and ordered the Agency to pay the grievants liquidated damages equal to all overtime compensation not timely paid. However, the Arbitrator restricted the backpay recovery time period to slightly over a year before the issuance date of the award.

- The Authority held that the recovery period ordered by the Arbitrator was contrary to law because the FLSA allows grievants to collect backpay, including liquidated damages, for a recovery period of two years if the FLSA violations are not willful, or three years if the FLSA violations are willful. The Authority remanded the award for the Arbitrator to determine whether or not the Agency's FLSA violations were willful.

H. ***AFGE, Local 3828 and U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Bastrop, Tex.*, 69 FLRA 66 (Nov. 13, 2015) (Unanimous)**

- The Union grieved on behalf of prison officers, alleging that the officers were not compensated for time spent traveling to hospitals to guard inmates undergoing treatment, in violation of FLSA.

- The Arbitrator found that Agency violated parties' CBA and the FLSA for failing to compensate officers for travel time to hospitals. But the Arbitrator did not find that the Agency's violation was willful, so she limited the recovery period to two years instead of three years. The Arbitrator also declined to award liquidated damages or attorney fees under the FLSA.

- The Authority found that the award was contrary to law, in part, because: (1) liquidated damages were mandatory under the FLSA in the circumstances of this case, since the Agency failed to prove the affirmative defense that it acted in good faith and had a reasonable basis for believing that it was not violating the FLSA; and (2) the Union, as the prevailing party, was entitled to attorney fees under the FLSA.

I. ***U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv. and Nat'l Weather Serv. Emps. Org.*, 68 FLRA 976 (Sept. 24, 2015) (Unanimous), *reconsideration denied*, 69 FLRA 256 (Mar. 24, 2016)**

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

- The Arbitrator, relying on decisions from the Comptroller General of the Government Accountability Office (Comptroller General), found that (1) the Agency violated the MOU, and (2) that the Agency's repudiation of the MOU was in violation of the Statute. As a remedy, the Arbitrator ordered the Agency to resume providing disposable dining ware to bargaining-unit employees.

- The Agency filed exceptions with the Authority, and also filed a request with the Comptroller General for a formal opinion on the issue. The Comptroller General issued an opinion that appropriated funds are not available to pay for the disputed items. The Union subsequently, unsuccessfully, sought reconsideration of the Comptroller General's opinion.

- The Authority held in 68 FLRA 976 that the award was contrary to law. The Authority noted that Comptroller General opinions are not binding on the Authority, but that they do serve as expert opinions that "should be prudently

considered." Noting that the parties and the Arbitrator had relied upon Comptroller General decisions to address the legal question raised by the grievance, and that both parties had an opportunity to make submissions to the Comptroller General, the Authority applied the Comptroller General's opinion in this matter, found that the expenses the Arbitrator ordered were not authorized, and set aside the award.

- The Authority denied the Union's motion for reconsideration in 69 FLRA 256, rejecting the Union's arguments that the Authority: (1) misstated the Union's position on the applicability of Comptroller General decisions; (2) erred in denying the Union's request to file supplemental arguments concerning the Comptroller General's opinion about the disputed expenditure; and (3) unlawfully permitted the Comptroller General to overturn an arbitrator's award.

J. *AFGE, Local 342 and U.S. Dep't of VA, Med. Ctr., Wilmington, Del.*, 69 FLRA 278 (Mar. 28, 2016) (Member DuBester concurring)

- The Arbitrator found that the Agency's refusal to reimburse the grievant's per diem and mileage expenses for his required attendance at an orientation eighty-six miles from the worksite violated the parties' agreement. The Arbitrator directed the Agency to reimburse the grievant, but he denied the Union attorney fees, and the Union filed an exception to the denial of fees.

- The Authority noted the "threshold requirement" for entitlement to attorney fees under the Back Pay Act (BPA) is a finding that an employee (1) has been "affected by an unjustified or unwarranted personnel action" (2) "which [has] resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials."

- The Arbitrator's finding of a contract violation satisfied the first part of the "threshold requirement." But as to the second part, longstanding Authority precedent held that "pay, allowances, and differentials encompassed by the [BPA] . . . do not extend to reimbursement payments[,] such as per diem" or mileage. Relying on that precedent, the Authority found that the Agency's contract violation did not result in the grievant losing "pay, allowances, or differentials" under the BPA, so the Union was not entitled to attorney fees.

- Member DuBester concurred in denying the Union's exception because it did "not discuss or ask the Authority to overrule [its] precedent." But he also noted his "concerns" with the precedent, which he found "largely unexplained." The one Authority decision that offered "any informative rationale" on this point was "questionable" to Member DuBester because it relied on another agency's interpretation of the Travel Expenses Act – *not* the BPA. He concluded that "the Authority should reconsider its precedent in this area in a future, appropriate case,"

by interpreting "pay, allowances, and differentials" with a "focus on the BPA's aim, and its role within the dispute-resolution procedures established by the Federal Service Labor-Management Relations Statute."

K. ***U.S. DHS, U.S. CBP, and NTEU, Local 141*, 69 FLRA 244 (Mar. 15, 2016) (Unanimous)**

- The Agency denied six employees' leave requests, and the Union filed grievances on their behalf, alleging violations of the parties' CBA. The Agency argued that the CBA permitted it to deny these types of leave requests where granting the requests would require the Agency to fill the vacant shifts by assigning overtime. The Arbitrator found that the CBA did not permit the Agency to deny the grievants' leave requests based "upon how they impact the Agency's overtime budget."

- The Arbitrator directed the Agency to grant future leave requests in a manner consistent with his award. Although the parties stipulated that the Arbitrator should resolve only the grievants' leave requests, the Arbitrator stated that his remedy applied to the grievants "as well as other [officers] similarly situated."

- The Authority held that the award drew its essence from the CBA, but that the Arbitrator exceeded his authority to the extent that the awarded remedy applies to non-grievants. The Authority noted that "if a grievance is limited to a particular grievant, then the remedy must be similarly limited."

L. ***U.S. Dep't of the Army, U.S. Army Corps of Eng'rs Nw. Div. and United Power Trades Org.*, 69 FLRA 226 (Mar. 4, 2016) (Member Pizzella dissenting)**

- Agency temporarily assigned grievant to perform the duties of a warehouseman position that was in a different bargaining unit than the grievant's normal position. The Union that represents the unit that includes the warehouseman position grieved the Agency's failure to pay the grievant at the warehouseman pay rate during his temporary assignment.

- Arbitrator acknowledged that the grievant was not a member of the bargaining unit that the Union represents, but found that the Union could pursue the grievance because it concerned the grievant's pay while he was performing the duties of a position in the Union's unit. Arbitrator found that the Agency violated the CBA and awarded the grievant backpay for the period during which he performed warehouseman duties.

- The Authority rejected the Agency's argument that the award was contrary to law because the Arbitrator made a bargaining-unit determination. The parties did not dispute that: (1) the grievant was in another unit; but (2) temporarily performed

the duties of a position in the Union's unit. So the Authority found that the Arbitrator did not determine the bargaining-unit status of any position.

- The Authority also denied the Agency's argument that the Arbitrator exceeded her authority by awarding a remedy to an employee outside the bargaining unit. The Authority stated that the decisions the Agency relied on did not address the particular circumstance of a grievant temporarily assigned to a unit position and a remedy specific to that temporary assignment. The Authority found "no basis for concluding that the Arbitrator exceeded her authority."

- In his dissent, Member Pizzella stated that the Union had no right to seek relief on behalf of a grievant who belonged to a different bargaining unit, represented by a different union. Member Pizzella would find that the Arbitrator exceeded her authority by granting relief to an employee who is outside the Union's bargaining unit.

V. Significant FLRA Decisions in the Federal Courts

A. *U.S. Department of Homeland Security, Customs and Border Protection, Scobey, Montana v. FLRA*, 784 F.3d 821 (D.C. Cir. 2015)

- In *U.S. Department of Homeland Security, U.S. Customs & Border Protection, Scobey, Montana v. FLRA*, 784 F.3d 821 (D.C. Cir. 2015), the D.C. Circuit dismissed the petition for review, finding no jurisdiction to consider the Authority's construction of the Back Pay Act in an arbitration case.

- The Agency sought review of an Authority decision modifying an arbitration award and directing the Agency to make a grievant whole for lost overtime pay under the Back Pay Act. *National Treasury Employees Union, Chapter 231 and U.S. DHS, CBP, Scobey, Montana*, 66 FLRA 1024 (2012) (*NTEU I*), *reconsid. denied*, 67 FLRA 247 (Feb. 11, 2014) (*NTEU III*). The Agency filed a petition for review, claiming that the Court enjoyed jurisdiction despite the Statute's express prohibition on judicial review of the Authority's arbitration decisions in 5 U.S.C. § 7123(a). Specifically, the Agency contended that the Court enjoyed jurisdiction because the Authority misapplied the Back Pay Act, 5 U.S.C. 5596(b); thus, according to the Agency, the Authority's decision implicated the sovereign immunity of the United States, which is a constitutional issue always reviewable.

- The Court disagreed. As the Court observed, although the case, "according to the government, implicates the august constitutional principle of sovereign immunity . . . our task is easy." The Court first recognized that Congress explicitly denied judicial review of the Authority's arbitration decisions to effectuate interests of speed,

finality, and economy. Then, agreeing with the Authority's position, the Court concluded that the Authority's interpretation of the Back Pay Act below did not implicate sovereign immunity issues that might invoke an exception to the Statute's ban on judicial review:

> Routine statutory and regulatory questions—in this case, the meaning of the "shall not exceed" clause in the Back Pay Act and "administrative error" in Customs' assignment policy—are not transformed into constitutional or jurisdictional issues merely because a statute waives sovereign immunity. Otherwise, Congress's creation of a mostly unreviewable system of arbitration would be eviscerated, as every Authority decision involving an arbitral award arguably in excess of what the Back Pay Act authorizes would be reviewable.

- The Court rebuffed the Agency's warning that failure to exercise judicial review would allow the Authority to make extreme errors in applying the Back Pay Act with no potential for correction. To the contrary, it noted that, "[t]his is exactly what Congress intended . . . . Congress obviously believed that protecting the beneficial 'features' of arbitration was more important than providing for judicial review of every arbitral decision." It reserved for another day whether other avenues of review might exist if the Authority "egregiously misinterprets" the Back Pay Act.

B. *U.S. Department of Health & Human Services v. FLRA* (D.C. Cir., unpublished order, Sept. 10, 2015)

- In *U.S. Department of Health & Human Services v. FLRA*, No. 15-1068 (D.C. Cir. Sept. 10, 2015), the D.C. Circuit granted the Authority's motion to dismiss the Department of Health & Human Services' petition for review, finding that HHS failed to demonstrate that the Authority's order fell into an exception to the express statutory bar on judicial review of the Authority's arbitration decisions.

- HHS had sought review of the Authority's decision upholding an arbitration award in *U.S. Department of Health and Human Services, Washington, D.C.*, Case No. 0-AR-5024, 68 FLRA 239 (Jan. 27, 2015). In its decision, the Authority held that the Arbitrator did not act contrary to law in ordering the Agency to provide retroactive transit benefit reimbursement in concert with the parties' contract, the Incentives Act, and the Back Pay Act.

- The Authority filed a motion to dismiss, contending that the Court had no jurisdiction to pass on an arbitration award under § 7123 of the Statute and that the narrow exceptions to judicial review did not apply. HHS contended that the Authority's order implicitly interpreted the tax code (and did so incorrectly), which

went to the Authority's jurisdiction and was therefore reviewable under *U.S. Department of the Treasury, U.S. Customs Service v. FLRA*, 43 F.3d 682 (D.C. Cir. 1994).

- The Court disagreed. In a short order, the Court found that "[t]his case presents no exception to the statutory bar to judicial review of a decision of the Federal Labor Relations Authority resolving exceptions to an arbitrator's award" and dismissed the petition.

- The Authority reached similar conclusions regarding transit pass retroactivity in *U.S. DHS, U.S CBP and NTEU*, 68 FLRA 276 (2015), and *U.S. Dep't. of Treasury, IRS, and NTEU*, 68 FLRA 810 (2015). The Agencies petitioned for review in both cases, but voluntarily dismissed their appeals following the Court's order in *HHS. See U.S. Dep't of the Treasury, IRS v. FLRA*, No. 15-1341 (D.C. Cir., dismissed Jan. 4, 2016); *U.S. Dep't of Homeland Sec. v. FLRA*, No. 15-1342 (D.C. Cir., dismissed Jan. 4, 2016).

C. *U.S. Department of Homeland Security v. FLRA*, No. 15-1293 (D.C. Cir.), and *U.S. Department of Homeland Security v. FLRA*, No. 15-1351 (D.C. Cir.)

1. *U.S. Department of Homeland Security v. FLRA*, No. 15-1293 (D.C. Cir, filed Aug. 27, 2015)

- In this case, the Agency sought review of the Authority's decision upholding an arbitration award in *U.S. Department of Homeland Security, Customs and Border Protection and NTEU*, 68 FLRA 157, 0-AR-4968 (Jan. 7, 2015), *reconsideration denied*, 68 FLRA 722 (June 20, 2015).

- The Arbitrator had found that the Agency violated the scheduling requirements of 5 U.S.C. § 6101(a)(3) and 5 C.F.R. § 610.121(a), which require agencies to provide their employees with work schedules that include the same working hours in each regular workday and two consecutive days off outside the basic workweek. Although an agency-head can issue an exemption stating that compliance with those provisions would seriously handicap agency operations, the Arbitrator concluded that a preexisting 1954 agency-head determination did not survive the Agency's issuance of its Revised National Inspectional Assignment Policy ("RNIAP"), which stated that its provisions take "precedence over any and all other . . . policies or . . . practices executed or applied by the parties previously . . . ." Thus, the Arbitrator ordered the Agency to pay backpay under the Back Pay Act, deciding that the failure to comply with the provisions constituted "an unjustified and unwarranted personnel action," which resulted in the "reduction of [unit employees] pay, allowances, or differentials." The arbitrator therefore developed appropriate formulae and a claims process to calculate backpay, at the

proper overtime levels under the Customs Officer Pay Reform Act, for individual employees.

- The Authority held that the award was not contrary to law in requiring the Agency to pay employees backpay under the Back Pay Act pursuant to specific remedial formulas. Specifically, the Authority denied the Agency's claims that the award was based on nonfacts; that the Arbitrator erred in his application of 5 U.S.C. § 6101(a)(3) and 5 C.F.R. § 610.121(a); that the award was punitive and therefore violated public policy; and that the remedy was so ambiguous that implementation was impossible.

- Member Pizzella dissented, reasoning that the Agency was exempt from the scheduling requirements of 5 U.S.C. § 6010(a)(3) and 5 C.F.R. § 610.121(a) because the 1954 agency-head determination survived the RNIAP.

2. *U.S. Department of Homeland Security v. FLRA*, No. 15-1351 (D.C. Cir, filed Oct. 15, 2015)

- Here, the Agency sought review of the Authority's decision upholding an arbitration award in *U.S. Department of Homeland Security, Customs and Border Protection and NTEU*, 68 FLRA 253, 0-AR-4933 (Jan. 28, 2015), *reconsideration denied*, 68 FLRA 829 (Aug. 17, 2015).

- As in *U.S. Department of Homeland Security v. FLRA*, No. 15-1293 (D.C. Cir.), this case involved the Authority's decision that an arbitrator's award was not contrary to law in finding that the Agency violated the scheduling requirements of 5 U.S.C. § 6101(a)(3) and 5 C.F.R. § 610.121 and in ordering the Agency to pay employees backpay under the Back Pay Act pursuant to specific remedial formulas. In its decisions, the Authority determined that the BPA waived sovereign immunity; the arbitrator's award was not incomplete, ambiguous, or contradictory so as to make the implementation of the award impossible; and the award was not based on a nonfact.

3. The D.C. Circuit Dismisses the Petitions for Review for Lack of Jurisdiction

- The Authority filed motions to dismiss in both 15-1293 and 15-1351. In each, the Authority argued that the Statute does not provide for jurisdiction over arbitration decision and that the Court's decision in *Scobey*, 784 F.3d 821 (D.C. Cir. 2015) – finding no exceptions to the jurisdictional bar under similar circumstances – is controlling. On March 9, 2016, in two essentially identical orders, the Court cited *Scobey* and agreed that the Agency "has not shown that this case falls with an exception to the statutory bar to judicial review of a

decision of the Federal Labor Relations Authority involving an arbitrator's award" and dismissed the petitions.

- A case raising similar jurisdictional and factual issues is currently pending in the Fourth Circuit. *U.S. Dep't of Homeland Security v. FLRA*, No. 15-2105 (4th Cir., filed Nov. 30, 2015) (seeking review of *U.S. Dep't of Homeland Security, U.S. Customs and Border Protection*, 68 FLRA 1015 (Sept. 29, 2015)).

D. *National Treasury Employees Union v. FLRA* (D.C. Cir.)

- In *National Treasury Employees Union v. FLRA*, No. 15-1122, -- F. App'x -- (D.C. Cir. 2016), the D.C. Circuit dismissed the Union's petition for review in an unpublished memorandum decision, finding that the Union's failure to raise its arguments to the Authority in the first instance precluded judicial review.

- The Union had sought review of one non-negotiability finding in *National Treasury Employees Union and U.S. Department of Agriculture, Food Nutrition and Consumer Services*, Case No. 0-NG-3214, 68 FLRA 334 (Mar. 6, 2015). In relevant part, the Authority found non-negotiable a Union proposal that would have required the Agency to disclose information regarding crediting plans for merit promotion opportunities, including certain testing material. The Authority concluded that, in the absence of a Union response, the Agency demonstrated the proposal's apparent conflict with 5 C.F.R. § 300.201(c), and, consequently, found the proposal contrary to law.

- On appeal, the Authority contended that the Union's failure to respond to the Agency's reliance on 5 C.F.R. § 300.201(c) deprived the Court of jurisdiction to entertain the Union's arguments under 5 U.S.C. § 7123(c), which precludes courts from considering an "objection that has not been urged before the Authority." The Court agreed. As it explained, "[t]he union's response regarding the proposal – spanning sixteen pages – failed to mention [the regulation the Agency cited], much less to advance arguments concerning its scope and context." Nor did the Union's statement that no "law creates an absolute bar" to its proposal preserve its arguments, as "'fairly' raising an argument requires something more than a universal, conclusory declaration."