

# National Council Digest

National Council of SSA Field Operations Locals

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## FLRA ruling could help expand bargaining

*By Rich Couture*  
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The Federal Labor Relations Authority (FLRA) has posted a new decision which states that staffing levels may be considered a negotiable appropriate arrangement and affirmed a legal standard for determining what constitutes an appropriate arrangement. If this decision stands (if appealed to court), then it represents a potentially huge expansion of bargaining rights which could help us immensely at Social Security.

In *NWSEO and National Weather Service, Anchorage* (O-NG-2782), the Union proposed increasing staff by five in one position, four in another position, and one in another position in order to address the adverse impact of increased workloads caused by the implementation of a new forecasting system.

The NWS considered it non-negotiable under 5 USC 7106(a) and (b)(1). The Union argued, in part, that it was an appropriate arrangement under 7106(b)(3).

The FLRA sided with the agency and the Union appealed to the DC Circuit Court of Appeals. The Court remanded the case back to the FLRA after finding that the FLRA failed to address the Union's 7106(b)(3) argument. The Court held that a proposal is determined to be a negotiable appropriate arrangement if "it does not significantly hamper the ability of an agency to get its job done," even if it directly interferes with management rights, citing *AFGE Local 1923 v. FLRA*, 819 F.2d 306 (1987).

On remand, the FLRA adopted the DC Circuit's standard for arrangements and held that the Union's proposal to increase staffing to certain mini-

mal levels was negotiable under 7106(b)(3). The FLRA cited several factors in making that decision, including the Agency's own statement of staffing needs. The FLRA stated, basically, that the agency failed to show how increased staffing would hamper, "let alone 'significantly hamper'", the ability of the agency to get its job done.

The impact for us in SSA is obvious. New workgroups, pilots, projects, and programs are created all the time, often pulling staffing out of existing installations which are already overburdened or "piling on" duties in existing installations. We can argue that minimal staffing is necessary not only for new programs, etc., but also for existing ones if we can show a connection. There may be budgetary concerns we would have to address, as it seems that the budget may be the agency's main negotiability defense.

Of course, the general principle that an appropriate arrangement is negotiable if it doesn't "significantly hamper" an agency's ability to do its job has far broader implications beyond just staffing. Since the FLRA has effectively "dusted off" the standard in *AFGE Local 1923 v. FLRA*, we should also cite that case when arguing that any arrangement is negotiable- from matters like office relocation floor plans at the local level to entire contract proposals at the national level.

This legal standard extends to every kind of arrangement we can imagine if we can show the arrangement won't hamper (or if it will actually help) the agency do its job. Since we often know better than management what works best for employees and the public, this legal standard could give us significantly more bargaining power. Let's use it!

For more on this case, go to: [http://www.flra.gov/system/files/decisions/64\\_098ab\\_bb.pdf](http://www.flra.gov/system/files/decisions/64_098ab_bb.pdf)

## *Sanctions suspension reduced from 14 to 2 days*

AFGE Local 3239 has successfully defended a bargaining unit employee and had her 14-day suspension reduced to just two days.

The case involved a Title II Claims Representative (CR) from Michigan who received a phone call from her elderly father in February, 2008. He was inquiring about a Social Security Number he had just found and was wondering if it belonged to a deceased relative. The CR (who will not be identified in this article) accessed the agency's computer system and discovered the SSN belonged to her brother. She then called her father and gave him that information.

A month later, the employee's supervisor was conducting an integrity review and realized the CR had obtained a Numident query for a person who shared her maiden name. Eight days after that, the supervisor met with the employee and the Claims Rep acknowledged what she had done.

Management then proposed a 14-day suspension, which was reaffirmed by Assistant Regional Commissioner Mary Mahler. She stated that "no less severe penalty would effectively deter such conduct in the future."

During an arbitration hearing, Local 3239 President Michael Guerriero argued the discipline being imposed was punitive and "draconian."

In her decision, Arbitrator Margaret Nancy Johnson wrote "the Sanctions are intended to be applied with regard to the circumstances of the particular case, taking into account factors such as intent, purpose, prior penalties, risk and consequences.

"It is inappropriate to apply discipline without consideration of those elements traditionally used to determine proper penalties and which the parties have incorporated in their Article 23 (of the AFGE/SSA contract) requirement for just cause."

Johnson also noted the CR had 25 years of federal service, but management used that experience against her when doling out punishment.

"In the opinion of the Arbitrator, this adverse use of twenty-five years of service without discipline is a misapplication of the concept of just cause. A generally accepted principle is that a

lengthy work record unmarred by prior discipline constitutes grounds for *reducing rather than maximizing a penalty* (emphasis added)...

"An employee having considerable years of service ought not to be held to a higher standard of expectation than a less senior employee may be held. Using a good work record over a considerable period of time as a basis for stringent discipline, as the agency apparently did in this instance, contravenes the notion of equitable treatment inherent in just and proper cause..."

Johnson called the employee's action an "inadvertent and spontaneous error" precipitated by a phone call from her father.

"There was no intent in this instance to use agency files to further a private or personal agenda and there were no adverse repercussions from the incident made known to the arbitrator," Johnson wrote.

She also pointed out the incident was "fused with mitigating factors which were not fully or appropriately considered by the agency" and "the two week suspension imposed upon the (employee) was excessively severe."

The arbitrator then reduced the punishment to a two-day suspension. Johnson also ordered the employee be paid for the days when she should have been working and that her personnel record be modified to reflect the hearing decision.

### **Discipline: Just Cause and the Douglas Factors**

For an overview on how to represent an employee facing a disciplinary action, start with Article 23 of the National Agreement. Also, review the Council 220 web site LIBRARY link:

[www.afgec220.org/library](http://www.afgec220.org/library).

The site has a comprehensive "**Dealing with discipline issues**" under the **As you grieve, set up your Arbitration** section.

## ***FLRA rules Union official's speech protected***

By a vote of 2-1, the Federal Labor Relations Authority (FLRA) has reaffirmed the Federal Aviation Administration committed an unfair labor practice when it removed a Union president from one of its worksites in New York State.

The incident occurred on March 5, 2005 and involved Dean Iacopelli, President of Local N90, and Peter Pellicani, an Operations Supervisor for the FAA. The two men were discussing staffing levels and overtime. Iacopelli asked Pellicani what he was planning to do about the situation and Pellicani said he would deal with it later.

During their conversation, Iacopelli apparently said "f--- you, I don't give a f---."

According to Administrative Law Judge Paul Lang, who originally heard the case in 2006, "After Iacopelli had left the area, Pellicani called for a security guard and summoned Iacopelli back to the Operations Room. At that point he informed Iacopelli that he was placing him on administrative leave for the remainder of the shift and that the security guard would escort him off of the premises."

During the original hearing, the FAA claimed Iacopelli was not engaged in protected activity as a Union official because Pellicani had already said he was not prepared to make a decision about overtime until later. Judge Lang rejected that argument, stating "the Respondent (the FAA) has cited no legal authority in support of the far-fetched proposition that a Union representative's activities on behalf of bargaining unit members loses its protected status because an agency representative does not choose to address the Union's concerns at that time or because the efforts of the Union representative may not be prudent or necessary.

"Issues of manning levels and the timely notification of the availability of overtime were of legitimate concern to the Union. As a Union officer, Iacopelli was entitled to raise those issues with... Pellicani."

Lang also addressed Iacopelli's use of profanity:

"Protected activity remains protected unless it is found to be, 'so violent or of such serious character as to render the employee unfit for further ser-

vice.' The Authority has also held that statements made on behalf of a Union do not fall outside the protection of the Statute merely because they are offensive. Such statements are grounds for discipline only when they are blatantly offensive (such as racial epithets) or made with a reckless disregard for the truth..."

"I have concluded that Iacopelli's language and conduct did not amount to flagrant misconduct. Consequently, his actions as a Union officer did not fall outside of the protection of the Statute."

The FAA filed exceptions to the original ruling, elevating the case to the three-member FLRA. Chairwoman Carol Waller Pope and Ernest DuBester agreed with Judge Lang. Thomas Beck issued a dissenting opinion.

In the FLRA's decision, it was noted that "the discussion between the president and the supervisor was conducted in a normal tone, and no other employees overheard the president's profanity... Although the president used profanity, the Authority has held that the use of profanity, standing alone, does not remove conduct or speech from the protection of the Statute..."

"Congress intended, in both the private and federal sectors, to permit uninhibited, robust, and wide-open debate, reaching beyond the strictly civil to encompass even language properly described as 'intemperate, abusive, or insulting.'"

In denying the FAA exceptions, the Authority pointed out that while "we hold the Union representative's intemperate remark in this case protected does not imply we approve of the use of profanity in the workplace as a labor-management relations tactic."

In his dissent, Beck wrote that "when it enacted the Federal Service Labor-Management Relations Statute, Congress did not intend to immunize against discipline federal employees who, in the workplace, during work time, say to their supervisors, 'f--- you.' Consequently, unlike my colleagues I conclude that the Union president's use of profanity, directed at his supervisor, in the workplace, during work time, was misconduct that was not protected by our Statute."

*It has been brought to my attention. . .*

## Management often ignores contract when denying leave requests

By Charlie Estudillo  
First Vice President, Council 220

*(Part one of a two-part series)*

It has been brought to my attention that in many offices, management is getting even more restrictive in approving annual leave for the upcoming six-month leave period. In some offices management is using CWS days off as an excuse to deny leave for Fridays and, in some cases, to deny leave for every employee for any entire week during the six-month period.

Be mindful of what the contract says. Per Article 31, Section 2A:

***“Annual leave is provided and used to allow employees an annual vacation period of extended leave for rest and recreation and to provide periods of time off for personal and emergency purposes. The use of accrued annual leave is the right of the employee, subject to the right of the Employer to approve the time at which leave may be taken.”***

*It is the employee’s right to use their leave and any decisions by management to deny that right can and should be challenged. If all leave is denied for a full week, then you are being denied the right to a vacation – which is the stated purpose of annual leave.*

In some offices, management is also totally disregarding the roster procedure articulated in the contract. The first principle is that all leave roster decisions are decided in favor of the employee highest on the roster.

*Management is wrongfully denying employees higher on the roster in favor of employees who request a day or two prior to the contested/desired leave period, thus violating the contract.*

The agency lost this issue in an arbitration in Boston about a year ago and in some offices they are trying it again to cause mayhem in the office.

The applicable threshold for denying annual leave, as shown below (Article 31 Section 2B):

### ***“Section 2. Annual Leave***

***B. Normally, leave requested in advance will be granted except when conflicts of scheduling or undue interference with the work of the Administration would preclude it.***

***The Employer will make every reasonable effort to allow the maximum number of employees to use leave.”***

Leave requested in advance (the leave roster, for example) will be granted except when conflicts of scheduling or “undue interference with the work of the Administration will preclude it.” This means granting of any employee’s leave will cause some interference with the agency’s work – that is to be expected and interference with the work is not a sufficient excuse for management to deny leave. The interference must be so severe that it causes “undue” interference. “Undue” means: “not necessary, excessive, too great; not proper, fitting or right.”

If an employee or the Union challenges the agency’s decisions to deny leave requested pursuant to the roster, the agency would have to prove that to let a single employee go beyond what they have approved on leave would cause “undue interference.”

If a group Section 9 grievance was filed for an office or sub-group within an office -- or if the Union filed a Section 10 grievance -- the Union would have the right to request data to prove the contention that the agency wrongfully denied leave when approving more employees on leave would not have caused undue interference.

*Continued on page 5*

# Leave denied? Do your homework

Continued from page 4

## Filing a Data Request

How would we prove that undue interference would not be caused by approving leave for additional employees? I would request a wealth of data from management.

The statute (5 U.S.C. 7114(b)(4)), requires the agency to provide data requested that is “normally maintained by the agency in the regular course of business” and which is “reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining” (like for a grievance). This is where management gets to work for the Union.

I would ask for data:

- on the number of employees in each position on the days or weeks that leave was denied for during the current leave period, and
- data on the number of employees on duty in each position on the same days/weeks of the prior year,
- data on the employees who were denied leave during the current leave period and the same leave period last year (approved and denied leave slips),
- data on the employees who were approved leave during the current leave period and the same prior leave period last year (approved and denied leave slips),
- data from VIP and other agency systems showing how many walk-in interviews, SSN interviews, phone calls, walk ins, phone and in-office appointments for the prior year,
- this year’s leave roster.
- data on employees’ CWS day off for any week that leave was denied for another employee in the office.

This will give you a good idea of how many employees it took to service a certain number of visitors/callers/claimants the prior year. If they could handle that traffic the prior year and allow more employees to be approved for leave, then allowing the same number of employees on leave (assuming similar traffic) this year should be able to handle the work of the agency. You might be able to think of additional data that would provide a basis for determining how many employees can be approved for leave without causing undue interference.

You can be assured your office’s management staff will get the leave they want on the days they want it. Do you think management’s motive is really “public service”? I don’t. Find out from your employees if their leave was denied or approved much like last year; if not, talk to your Local officers about filing a grievance. This is not the kind of grievance that is very manageable at the national level.

Some local management officials are real human beings and liberal in the granting of leave. It is the selfish, self-interested managers whom we often hear about. Whatever past practice or leave approval percentage they have used in prior years should be good enough for this leave period.

Keep us posted as to what you find out and whether you file a grievance.

**(Editor’s note: in the next Digest, there will be instructions on what a sample data request should include).**

## *House bi-lingual pay bill could benefit SSA employees if passed*

Representative Michael Honda (D-CA), Chairman of the Congressional Asian Pacific American Caucus, has introduced the “One America, Many Voices Act of 2010,” which recognizes the importance of bi- and multi-lingual skills in America’s workforce.

Also known as the Bilingual Pay Bill, it provides a five per cent incentive to the base pay of Federal employees whose position requires the use of bi- or multi-lingual skills but who currently receive the same pay as workers in the same job without the same skill requirement.

“To improve both our nation’s ability to provide language-appropriate intelligence and security, and America’s capacity to effectively and efficiently deliver government services,” Honda said, “we must be able to retain a federal workforce that is capable of communicating with an increasingly diverse constituency, both within our borders and outside.

“My legislation helps us recruit and retain a bi- and multi-lingual skilled Federal workforce, while also improving services for persons with limited English proficiency who require translation while conducting business with the Federal Government.”

According to the U.S. Census Bureau, over 19% of the U.S. population (about 55 million people) speaks a language other than English at home. The native-born population with limited English proficiency nearly doubled between 2000 and 2005.

“I understand the difficulties that immigrants face communicating in English while they acquire fluency,” Honda added. “This bill addresses these challenges by promoting the use of bilingual skills throughout the Federal workforce in order to better serve the public and accomplish the mission of Federal agencies.”

Currently, there is no standard across Federal agencies to compensate workers who make substantial use of their bilingual skills in the work-

place, and there is no incentive for current or potential Federal employees to acquire bilingual skills.

“By introducing this bill,” continued Honda, “I am improving the incentives for individuals with multi-lingual skills to apply and stay in Federal Government positions, where they can serve the increasing number of Americans who do not have yet English language proficiency.”

## **Thank you, Ben Stein**

As we look toward Public Service Recognition Week May 3-10, Federal employees often feel the brunt of public scorn rather than appreciation.

We often feel lumped into the negatively loaded term of bureaucrat, “an official who works by fixed routine without exercising intelligent judgment” according to one definition.

So, it was a breath of fresh air listening to Ben Stein’s recent contribution on *CBS Sunday Morning’s* web site at [www.cbsnews.com](http://www.cbsnews.com).

*“Government employees are the doctors and nurses at VA hospitals. They are the teachers who try to teach our kids. They are the men and women who keep track of our economic and health statistics, without which we cannot measure progress or failure.”*

*“Government employees are the CIA agents who launch drone strikes to kill terrorists and who sometimes get killed. Bureaucrats would include the people of the FBI and it would also include the men and women at the Pentagon who guide our armed forces. These people are the muscle and bone of the nation.”*

For the full text, go to:

[www.cbsnews.com/stories/2010/03/28/sunday/main6340942.shtml](http://www.cbsnews.com/stories/2010/03/28/sunday/main6340942.shtml).

# Union stops kindergarten tactics in CA

By Howard Egerman  
Chairman

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To paraphrase the late singer James Brown, Service Reps at Social Security really are the “hardest working people” in the agency. They are the first person a claimant sees when entering an office. SRs can spend entire days (or careers) hearing complaints about missing checks, payments going to the wrong address or financial institution, incompetent payees, and so much more.

And if those examples aren’t enough to make the average employee want to look for another job, Service Reps (like comedian Rodney Dangerfield) very often don’t get the respect they deserve, either.

The situation in the Downtown San Jose, Calif. office recently got much worse for the SRs who work there. They received messages from a supervisor telling them to check in-and-out when they went to lunch or on break.

*They also had to inform management when they went to the bathroom!*

What was the first thing these Service Reps did? They called their Union (Local 3172) and complained about this infringement on their privacy.

The Union Rep spoke to the manager and asked a number of pertinent questions:

- Why are the SRs being treated this way? Claims Reps didn’t have to tell their supervisor when they went to the bathroom.
- What happens if management is in the restroom? Would employees be expected to “hold it” until their supervisor returned?
- Would the agency reimburse employees if they soiled their garments while waiting for a management official to return?

The Union official also noted that employees who are pregnant or have illnesses or medical conditions like those advertised on television should not be treated this way. Service Reps, after all, are adults who make important decisions every day.

Why did the agency feel the need to monitor their toilet time?

The AFGE/SSA contract does not address bathroom visits or management monitoring those trips. Just as importantly, they are not included in the employees’ yearly appraisals or performance plans.

After the Union Rep wrote his email to management, he was told it was all just a “misunderstanding.” Service Reps in San Jose did not have to inform management about their restroom visits.

While this matter may seem trivial to an outsider, it was important to the SRs who work there. Social Security offices are not kindergarten classrooms and employees shouldn’t have to raise their hands or get a note from their teacher when nature calls. This requirement was absurd, and it shows again why we have Unions: to protect the bargaining unit from management officials who spend too much time dreaming-up really bad ideas!

## ***Best of the Web for AFGE-SSA issues***

For contract negotiation updates:  
[www.mycontract2009.org](http://www.mycontract2009.org)

For help with grievances and performance appraisal issues:  
[www.afgec220.org/library](http://www.afgec220.org/library)

For back issues of the Digest and UNITY:  
[www.afgec220.org/newsletters](http://www.afgec220.org/newsletters)

For government-wide issues, including those affecting the Social Security Administration: [www.afge.org](http://www.afge.org)

## What to ask during performance discussions

SSA management will conduct two meetings about the new performance appraisal system, PACS. The first meeting will address general changes and is intended for the entire staff. The second meeting will involve you and your supervisor. Your mission, if you choose to accept it, is to get as much information as possible to learn how management defines the terms that govern PACS and to ensure that the agency implements the system fairly and equitably for all workers.

The full text of this lengthy but informative alert is posted to the AFGE Council 220 web site at [www.afgec220.org](http://www.afgec220.org) for your reference.

**Take notes of all meetings.** After the meeting is over, send an email to your supervisor saying this is what you said to me. Ask the supervisor if that is correct. Send it *read receipt requested* so you will know if and when the supervisor reads it. Save the response in a folder. Let the union know if the information does not match and be sure to advise your AFGE Local Representative if numerics other than national goals are used.

### **Element 1—Interpersonal Skills**

Does “treat fellow employees with courtesy and respect” mean the same thing as identified in Article 3, Section 2(A)? How will employee complaints about me be used in rating my performance in this element? When will I have an opportunity to rebut these complaints and/or your observations?

What does “communicate effectively” mean?

What does “contributes to developing trust, respect and cooperation among unit members” mean? What is considered in making this decision? How will this be measured? This does not appear to offer any objective measure.

### **Element 2—Participation**

What does “provides quality support to customers and fellow employees” mean?

How often do I have to “successfully seek solutions” in order to meet the Level 3 standard? Is the emphasis on “resourcefulness” or on “successfully seeking?” Since “successfully” modifies the verb “seek,” it would appear that I only have to be successful in *seeking* a solution and not necessarily

successful in finding or applying it. Is this what the agency intended?

What does “provides assistance to others” mean? Does this mean being willing to take late interviews every day because I come in late so a front end interviewer can leave before 4 pm? Am I supposed to tell you when and how I help other individuals?

How can I volunteer for extra assignments if management has me scheduled to interview all day long? Will employees in specialized units be given first crack at additional work assignments or will they be offered to interviewers and all other employees?

### **Element 3—Demonstrates Job Knowledge**

If I have a difficult case and talk to my supervisor about new POMS material and management has a different interpretation, will I be rated lower for not understanding the material?

If I develop materials for reference, training and mentoring, how do I present this to management for consideration? If the material is rejected, will I still be given credit for my efforts?

If I introduce the use of an automation tool and my unit coworkers do not use it, will that keep me from meeting level 5? Does this mean I can achieve Level 5 by *contributing* or am I required to actually *introduce the use* of automation tools? Can you explain how I can demonstrate that I am *introducing the use* of anything?

### **Element 4—Achieves Business Results**

What does “uses a balanced approach to complete work assignments effectively and efficiently using appropriate technology” mean?

Will there be allowances for times when the system is down; for unexpected absences of coworkers that can limit the time available to perform balanced work?

What will happen when I identify a barrier and develop a reasonable solution? Will management consider my proposal seriously? For example, if I propose a back-up plan for those on leave, will it be considered? How will I know? If you do not implement my proposal, will you give me credit for my suggestion?