

# Notable FLRA Decisions in 2016

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Brandon H. Iriye,  
Gov't Fellow

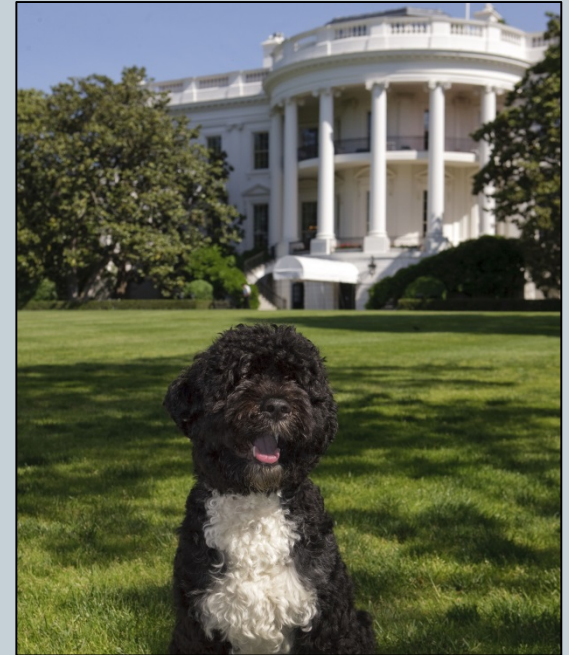
ABA ADR in  
Labor & Employment  
Law Committee



# The Past

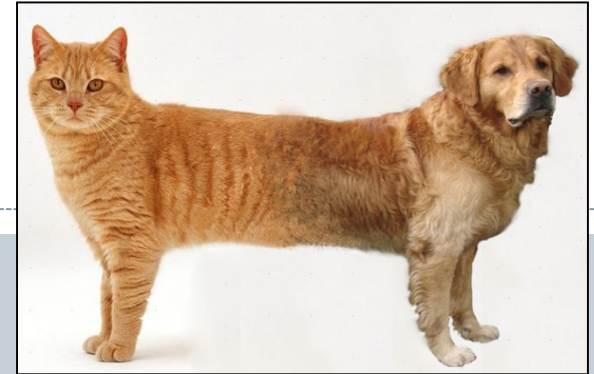
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- Democratic majority:
  - ✦ Chairman Carol Waller Pope (D)
  - ✦ Member Ernest DuBester (D)
  - ✦ Member Patrick Pizzella (R)
- Decisional breakdown:
  - ✦ Authority issued ~102 cases.
  - ✦ Unanimous decisions in ~70% of cases



# The Present

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- No majority party:
  - ✦ Acting Chairman Patrick Pizzella (R)
  - ✦ Member Ernest DuBester (D)
  - ✦ --Vacant--
- Decisional issue:
  - ✦ Without third vote, split decisions cannot issue and will go into abeyance.
  - ✦ Likely that President Trump will appoint a Republican member.

**Time to dig into some decisions!**

# The Future

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There are known knowns. These are things we know that we know. There are known unknowns. That is to say, there are things that we know we don't know. But there are also unknown unknowns. There are things we don't know we don't know.

“We cannot predict the future, but we can read FLRA case law.”  
- *Brandon Iriye*, February 8, 2017 @ 11:07am  
(prediction made January 13 @ 8:56am)

# Notable Unanimous Case – *Attorney Fees*

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- *Dep't of Defense, Def. Logistics Agency, Texarkana, Tex., 69 FLRA 573 (2016)*
  - Historically, Authority has used *Allen* factors (2 M.S.P.R. 420 (1980)) to determine whether attorney's fees are warranted in interest of justice.
  - In recent decisions, Authority has hinted at revising IOJ factors tailored to CB context.
  - Factors will likely be tailored to the collective-bargaining context.

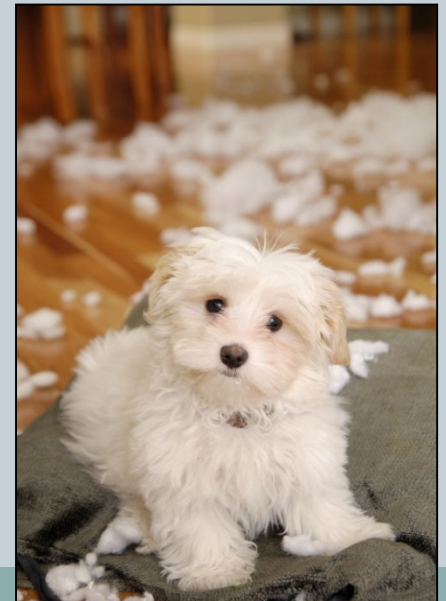
Stay tuned!



# Union Conduct

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- *AFGE, Nat'l Border Patrol Council, Local 2266, 69 FLRA 525 (2016)*
  - The majority found the grievant's conduct statutorily protected (5 USC § 7102) when he was disciplined for inappropriately submitting his official time requests.
  - Dissent's focus is that misconduct cannot be protected activity and that protected activity applies to "traditional" collective-bargaining contexts.

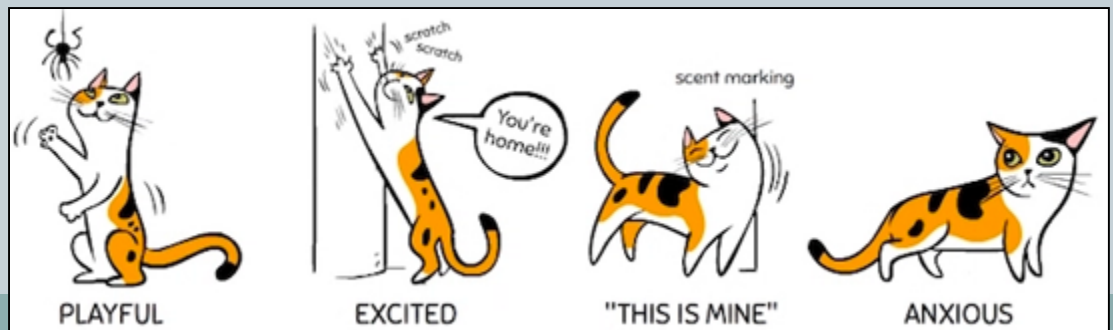




# Precision of Language

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- Member Pizzella disagreed w/ majority's interpretation of:
  - Arbitrator award's specificity – *SSA*, 69 FLRA 271 (2016) (Member DuBester concurring, Member Pizzella dissenting)
  - Nonfact exception language specificity – *U.S. Dep't of VA*, 69 FLRA 144 (2015) (Member Pizzella dissenting in part).
  - Contrary-to-law exception language specificity – *AFGE, Local 1897*, 67 FLRA 239 (2014) (Member Pizzella concurring).



# Arbitrator Deadlines

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- *AFGE, Local 1667*, 70 FLRA 155, 159 n. 51 (2016)
  - Majority held Arbitrator's failure to timely issue award doesn't render it deficient if no objection to delay before the award's issuance or the delay caused actual harm.
  - Member Pizzella notes that untimeliness may constitute a sufficient basis to find that award deficient. *SSA*, 69 FLRA at 212 n.69.
  - Emphasizes that, in his view, a party doesn't have to object to timeliness before award is issued or show harm.





# Agency head's exclusive authority

- *AFGE, Local 1547*, 67 FLRA 523 (2014) (Member Pizzella dissenting), *pet. for review granted, decision vacated U.S. Dep't of the Air Force, Luke Air Force Base, Ariz. v. FLRA*, 2016 WL 7480255 (D.C. Circ. 2016).
  - Majority found negotiable civilian access to commissaries
  - Member Pizzella wrote that Title 10 gives sole discretion to the Sec. Def.
  - Reviewing the Authority's interpretation of Title 10 *de novo*, the D.C. Circuit rejected the Authority's reading of that statute, concluding instead that "Congress has given the military unfettered discretion to determine" shopping access.

Thank you, enjoy the rest of the conference, and good luck in 2017!

