U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for August 1, 2014

BOARD DECISIONS

Appellant: Stephen W. Gingery
Agency: Department of Defense
Decision Number: 2014 MSPB 59
Docket Number: CH-3443-06-0582-C-2
Issuance Date: July 28, 2014
Appeal Type: Compliance
Action Type: Veterans Employment Opportunities Act

Reconstructed Hiring Procedure

The appellant appealed the agency's failure to hire him for an Auditor position, stating that the agency's action violated his veterans' preference rights under the Veterans Employment Opportunities Act (VEOA). The administrative judge (AJ) found that the agency violated VEOA, and ordered the agency to reconstruct the hiring process for the appellant. The agency did so, and made the appellant a tentative offer of employment. The agency's offer required the appellant to obtain a security clearance. The appellant filed a petition for enforcement, stating that the agency was not in compliance with the Board's order because it required him to fill out a security clearance form as of the date he completed the form, and not as of the date he would have completed them had the agency initially hired him before his first Board appeal. All candidates for that position were required to fill out the form as of the date of completion of the form. Upon consideration of the petition, the AJ found that the agency had complied with the Board's order and denied the petition for enforcement.

Holding: The Board affirmed the initial decision.

1. **When offering a position to an applicant pursuant to a reconstructed**

hiring process, an agency may subject the applicant to the same pre-appointment process as all other employees in that position.

Appellant: Redale Benton-Flores
Agency: Department of Defense
Decision Number: 2014 MSPB 60
Docket Number: DC-1221-13-0522-W-1
Issuance Date: July 31, 2014
Appeal Type: Individual Right of Action (IRA) appeal
Action Type: Probationary Termination

Evidence Considered in Determining Alleged Disclosures Made Before OSC
Identification of Disclosures
Requirement for Form of Disclosures
Evidentiary Burden in Disclosures Made in Normal Course of Duties

The appellant was terminated from her position as a teacher with the Department of Defense Dependent Schools during her probationary period. She filed an individual right of action (IRA) appeal alleging that the termination was predicated on retaliation for protected disclosures. The administrative judge dismissed the appeal for lack of jurisdiction based on a finding that the appellant did not demonstrate exhaustion of the protected disclosures with the Office of Special Counsel (OSC).

Holding: The Board granted the appellant's petition for review, reversed the initial decision and remanded the appeal for further adjudication.

1. The administrative judge must consider all of the allegations contained throughout the entire record, including the initial OSC complaint and other written correspondence, before deciding to dismiss an IRA appeal for lack of jurisdiction.

2. The test for a non-frivolous allegation of a protected disclosure is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the disclosed action violated one or more of the 5 categories listed in 5 U.S.C. § 2308(b)(8). In this case, three of the appellant's disclosures amounted to protected disclosures.

3. An appellant is not required to cite to a particular law, rule, or regulation, when disclosing violations under 5 U.S.C. § 2308(b)(8).

4. Under the Whistleblower Protection Enhancement Act of 2012, if the appellant made the disclosures within the course of her normal duties, she must prove that the personnel action was taken as reprisal for the disclosure.

The U.S. Court of Appeals for the D.C. Circuit Issued the Following Non-Precedential Opinions:

Appellant: Joseph P. Carson
Agency: Merit Systems Protection Board
Decision Number: 2013-1273
Docket Numbers: AT-1221-13-0285-W-1
Issuance Date: July 30, 2014
Appeal Type: Whistleblower
Action Type: Reprimand

Personnel Actions Under the Whistleblower Protection Act

The appellant filed a claim of whistleblower reprisal with the Board after his supervisor informed him that his forwarding an e-mail to one of his co-workers was inappropriate. The administrative judge held that the Board lacked jurisdiction based on the lack of a non-frivolous allegation of a retaliatory agency personnel action, and the Board affirmed.

Holding: The Court affirmed the Board's decision.

1. The appellant's supervisor's e-mail stating the appellant's e-mail was inappropriate did not constitute a significant change in duties, responsibilities, or working conditions such that it would fall within the scope of a personnel action as required by the whistleblower protection act.

The President of the United States Issued the Following Executive Order:

Executive Order – Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal government, and Executive Order

11246, Equal Employment Opportunity

On July 21, the President issued an Executive Order (EO) that amends equal employment opportunity related EO's 11478 and 11246, prohibiting discrimination by Federal agencies on the basis of "gender identity" (11478), and prohibiting federal contractors from discriminating against employees on the bases of sexual orientation and gender identity (11246).

http://www.whitehouse.gov/the-press-office/2014/07/21/executive-order-further-amendments-executive-order-11478-equal-employmen