U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for August 29, 2014

BOARD DECISIONS

Appellant: David Rassenfoss
Agency: Department of the Treasury
Decision Number: 2014 MSPB 68
Docket Number: CH-4324-13-0386-I-1
Issuance Date: August 22, 2014
Appeal Type: USERRA
Action Type: Corrective Action

USERRA Proof of Discrimination
USERRA Regulation Requirements
USERRA Benefit Analysis

The appellant took an extended period of leave to serve on active duty in the military, and did not return to his position until more than one year later. Pursuant to agency policy, for the year he was gone, the agency designated him as "not ratable." As a result of this designation, he did not receive a quality step increase (QSI) for the year. The appellant appealed the lack of QSI, alleging that it was a violation of his rights under USERRA. The administrative judge held that the Board had jurisdiction over the appeal, but denied the appellant's request for corrective action in the form of a QSI.

Holding: The Board affirmed the initial decision in part, but remanded the case for further adjudication on the appellant's USERRA reemployment rights claim.

1. The appellant failed to prove that the agency discriminated against him based on military service, because the agency's policies concerning "not ratable" designations and eligibility for QSIs were applied consistently to all

employees, regardless of military service.

2. Under USERRA, the regulations implemented by OPM regarding federal employees must be consistent with the regulations issued by the Secretary of Labor relating to State and private employers.

3. USERRA requires agencies to consider employees absent on military duty for any incident or advantage of employment that they may have been entitled to had they not been absent. This is achieved by, *inter alia*, determining whether it is reasonably certain that the benefit would have accrued to the employee but for the service.

4. Application of the reasonable certainty test applies to both discretionary and nondiscretionary benefits and personnel actions. Prior cases holding that the test applied only to nondiscretionary benefits and actions such as *West v. Dep't of the Air Force*, 117 M.S.P.R. 24 (2011) and *Leite v. Dep't of the Army,* 109 M.S.P.R. 229 (2008), are overruled.

5. The administrative judge failed to address the question of whether the agency met its reemployment obligations, necessitating a remand for further adjudication on whether the appellant was entitled to a QSI as part of his restoration to duty.

6. Member Mark Robbins dissented, stating that he did not believe the appellant was entitled to a QSI based on statute or regulation.

Appellant: Christopher Vincent Kroll
Agency: Department of Homeland Security
Decision Number: 2014 MSPB 69
Docket Number: NY-0842-13-0139-I-1
Issuance Date: August 26, 2014
Appeal Type: Federal Employees Retirement System (FERS)
Action Type: Reconsideration Request

Enhanced Retirement Benefit Eligibility

The appellant served as a Customs Inspector from 1986 through 2004; then served as a Customs and Border Patrol Officer (CBPO) from 2004 through 2007. He was then selected for an Automated Commercial Systems (ACS) Specialist position. In 2008, the agency made a final determination that the ACS Specialist position was not a covered position for purposes of enhanced CBPO retirement coverage. The appellant requested reconsideration of the agency's

determination, and the agency denied the request. The agency stated that although the Customs Inspector and CBPO positions were covered positions, the ACS Specialist position was not, and therefore his service in the ACS Specialist position constituted a break in service, which disqualified him from enhanced retirement coverage. The appellant appealed the denial, and the administrative judge affirmed. The administrative judge determined that the appellant did not establish he was entitled to enhanced retirement benefits because prior experience as a CBPO was not required for his position.

Holding: The Board affirmed the initial decision.

1. An employee's service in both "primary" and "secondary" CBPO positions count toward eligibility for enhanced retirement benefits.

2. The appellant did not establish that his position met the regulatory definition of a "secondary" position because the record was devoid of any evidence that experience as a CBPO was a prerequisite for the ACS specialist position.

Appellant: Kristi L. Putnam
Agency: Department of Homeland Security
Decision Number: 2014 MSPB 70
Docket Numbers: DE-0752-12-0039-I-3 and DE-0752-12-0040-I-3
Issuance Date: August 22, 2014
Appeal Type: Adverse Action
Action Type: Indefinite Suspension/Involuntary Retirement

Due Process Analysis in Security Clearance Adverse Actions
***Ward/Stone* Analysis in Security Clearance Adverse Actions**
Procedure in Discrimination/Security Clearance Cases
Constructive Adverse Action Based on Security Clearance

The appellant served as an Assistant Federal Security Director, and was required to maintain a security clearance for her position. The agency suspended the appellant's clearance based on statements she made to local police, and then indefinitely suspended her due to the suspension of her clearance "based on allegations regarding [her] mental health and personal conduct… [.]" In the process of issuing the suspension, the agency stated that it relied only on the notice it received that the appellant's clearance had been suspended. The appellant appealed the suspension, and her appeal included a claim of disability discrimination and a claim of involuntary retirement. The

administrative judge upheld the action, holding that the agency complied with the appellant's due process rights. The administrative judge also held that he would not address the appellant's discrimination claim because it was intertwined with the clearance determination, and that the Board did not have jurisdiction over the involuntary resignation claim because the appellant did not make a nonfrivolous allegation that her working conditions were so intolerable she had no choice but to retire.

Holding: The Board affirmed the initial decision regarding the indefinite suspension as modified, and affirmed the initial decision regarding the involuntary retirement.

1. The Board modified the initial decision based on its decision in *Buelna v. Dep't of Homeland Security*, 121 M.S.P.R. 262, which was issued subsequent to the initial decision. Pursuant to *Buelna*, the deciding official not having unfettered discretion to take any action he believed to be appropriate was not a violation of the appellant's due process.

2. The agency's consideration of the information for which the appellant's security clearance was suspended did not constitute a violation of her due process rights. Under the *Ward/Stone* line of cases, only ex parte communications introducing new and material information violate constitutional due process. Here, the details of the suspension of the appellant's security clearance were mentioned in the proposal notice and in the appellant's response.

3. The Board is precluded from reviewing allegations of discrimination and reprisal when such affirmative defenses relate to the revocation of a security clearance.

4. A suspension of a clearance, by itself, does not rise to the level of coercion necessary to prove constructive adverse action.

- **The U.S. Court of Appeals for the Federal Circuit did not issue any decisions this week**