



# U.S. Merit Systems Protection Board

## CASE REPORT

DATE: April 13, 2007

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## BOARD DECISIONS

### [Foret v. Department of Army, 2007 MSPB 97](#)

MSPB Docket No. DA-0752-06-0193-I-1

April 6, 2007

#### **Defenses and Miscellaneous Claims**

- Harmful Error

#### **Miscellaneous Topics**

- Statutory/Regulatory Construction

**HOLDING:** The rules of statutory construction apply when interpreting an agency regulation. Under the usual rules of statutory construction, the use of two different terms is presumed to be intentional. Moreover, the provisions of a statute should be read in harmony, leaving no provision inoperative or superfluous or redundant or contradictory. Based on the above rules and the language of the agency's regulation, the Board concluded that a commander is not a "supervisor" for purposes of initiating a drug test under the agency's program. Although the agency erred by having a commander administer the drug test, the appellant did not show by preponderant evidence that the error was harmful.

The appellant was suspended for 30 days for refusing to take a drug test. On appeal, the appellant argued, inter alia, that the agency committed harmful procedural errors by failing to follow language in section 6(b) of the U.S. Army Corps of Engineers (USACE) Drug Testing Procedures for the Army's Drug-Free Federal Workplace (DFW) Civilian Drug Testing Program, specifically by ordering him to take a drug test even though neither his first- nor second-line supervisor recommended to the commander that he be tested. The administrative judge (AJ) upheld the agency's action and rejected the

appellant's claims of harmful error, finding that he did not show that the agency failed to follow its drug-testing procedures and that, in doing so, it caused him harm or otherwise prejudiced his rights.

On review, the appellant argued, inter alia, that the agency's drug policy was not followed and that he was not ordered to take a drug test under the policy. The Board noted that an action may not be sustained on appeal if the employee establishes, by preponderant evidence, that the agency erred in applying its procedures, and that the error is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. Here, however, the appellant did not show that if the agency had followed applicable procedures it would not have suspended him. Thus, the Board concluded that the appellant did not show by preponderant evidence that the agency committed harmful error in failing to comply with its drug testing program.

[Fernandez v. Department of Justice, 2007 MSPB 99](#)

MSPB Docket No. SF-0752-05-0786-I-2

April 6, 2007

**Mootness**

**HOLDING: For the appeal to be deemed moot, the employee must have received all of the relief that he could have received "if the matter had been adjudicated and he had prevailed." If an appeal is not truly moot despite cancellation of the action under appeal, the proper remedy is for the Board to retain jurisdiction and to adjudicate the appeal on the merits.**

The agency removed the appellant from his position with the agency's Bureau of Prisons based on his conviction of a felony in state court. The administrative judge dismissed without prejudice the appellant's appeal pending the appellant's action to have his conviction set aside by the state court. The state trial court subsequently entered a judgment of acquittal and the appellant refiled his appeal. While the refiled appeal was pending, the agency informed the AJ that it had canceled the removal action and reinstated the appellant in a full-duty status retroactive to the effective date of his removal. On this basis, the agency requested that the appeal be dismissed as moot. After issuing a show-cause order and considering the parties' responses, the AJ dismissed the appeal as moot based on his finding that the appellant failed to raise a non-frivolous allegation which, if proven, would show that the Board could still provide any substantial relief in his appeal.

On review, the appellant asserted that he had not received the correct amount of back pay, interest, benefits and attorney fees that he was due. He argued that the AJ erred in dismissing the appeal based on the agency's expressed intent to restore the appellant's back pay without ascertaining

underlying factual proof of payment. The Board found that the appellant's sworn statement that the agency had not paid him all appropriate back pay constitutes a nonfrivolous allegation that his appeal is not moot. The Board therefore remanded the case for the AJ to make a determination as to whether the agency has completely rescinded the appellant's removal and restored him to the status quo ante. If the agency has done so, the Board directed the AJ to again dismiss the appeal as moot. However, if the agency has not done so, the Board directed the AJ to adjudicate the appeal on the merits.

***Graham v. Commodity Futures Trading Commission, 2007 MSPB 100***

MSPB Docket No. DC-0752-06-0238-I-2

April 6, 2007

**Miscellaneous Topics**

**- USERRA/Veterans Rights**

**HOLDING: The Uniformed Services Employment and Reemployment Rights Act (USERRA) does not provide for exhaustion of the complaint before the Secretary of Labor as a matter of time; it instead requires notification from the Department of Labor (DOL) that the Secretary of Labor's efforts did not resolve the appellant's complaint. The Board does not acquire jurisdiction over the appellant's USERRA claim until the appellant receives the required notification from DOL. Here, despite the fact that the DOL had not yet issued its notification while the administrative judge processed the refiled appeal, the record indicates that the appellant had a full and fair opportunity to present his USERRA defense to the AJ.**

The agency removed the appellant on charges of rude and disrespectful conduct, failure to follow instructions, failure to complete work, and being absent without leave (AWOL), all of which the agency alleged the appellant committed after he returned to his position following military service. The appellant filed a complaint with the DOL in which he alleged that his removal violated his rights under the USERRA. The AJ initially dismissed the appellant's appeal without prejudice in order to give DOL time to adjudicate the appellant's claim. However, the AJ subsequently refiled the appeal and processed it without requiring the appellant to indicate whether DOL had resolved his USERRA complaint.

On review, the Board found that, despite the fact that the DOL had not yet issued its notification while the AJ processed the refiled appeal, the record indicated that the appellant had a full and fair opportunity to present his USERRA defense to the AJ. Because the Board perceived no error in the AJ's analysis of the appellant's USERRA defense, and the appellant's PFR failed to establish any basis to reverse or modify the AJ's findings with

respect to the other issues raised in the appeal, the Board affirmed the initial decision.

**[Carol A. Shelton v. Department of Health & Human Services, 2007 MSPB 101](#)**

MSPB Docket No. DA-0752-06-0061-I-1

April 6, 2007

**Penalty**

The Board issued a final order denying the appellant's petition for review of the initial decision upholding her removal for false statements made during an internal agency investigation. Member Sapin dissented because she believed the removal penalty exceeded the bounds of reasonableness. She would have found that a 30-day suspension was the maximum reasonable penalty under the circumstances: the investigation was a managerially inept response to disagreements between the appellant and two co-workers, which was likely the result of the office conditions in which they worked; the false statements were minor compared with the type of misconduct typically involved in a falsification case resulting in removal; the appellant had a good record during her seven years in the job; and there was no evidence of intent on her part to defraud or harm the agency, but only of an attempt to obtain assistance in managing a workplace conflict.

**[McKenna v. Department of the Navy, 2007 MSPB 102](#)**

MSPB Docket No. PH-0351-03-0399-B-1

April 6, 2007

**Reduction in Force**

**- Assignment Rights**

**New Evidence**

**HOLDING: The agency failed to meet its burden to show that it properly followed reduction-in-force (RIF) regulations in effecting the appellant's assignment and so was not in compliance with the Board's order that it reassess the appellant's qualifications for a position he sought and place him in it if he was qualified. Since the Board considers previously available evidence submitted for the first time on petition for review when the party was not put on notice of the nature of a dispositive issue prior to the initial decision, the Board considered the appellant's new evidence, found that it showed a position he formerly held was essentially identical to the one that he sought, concluded that the appellant was qualified for that position, and ordered him placed in it.**

The appellant appealed his assignment in a reduction in force (RIF), and the Board ordered the agency to reassess his qualifications for two positions that he sought and to place him in one of them if he was qualified. After the agency found that the appellant was unqualified for the positions, he

challenged its determination in a petition for enforcement. The administrative judge in a compliance decision found that the agency proved that the appellant was not qualified for the positions. On petition for review, the appellant reiterated his argument that he was qualified for one of the positions, and he submitted new evidence that a position he had formerly held for several years was essentially the same as the position he sought.

In its decision, the Board noted that, when an employee's assignment rights are at issue, the agency must prove that it properly followed the RIF regulations in effecting the assignment. The Board considered the appellant's new evidence, even though it was available before the record closed below, because he was not put on notice before the initial decision that to prevail he needed to show that his former position and the position in which he sought to be placed were essentially identical. The new evidence included the sworn statement of a manager who supervised both positions that the duties of the two positions were the same, and the Board found that the manager's conclusion was corroborated by the statements of employees in the positions and by the two position descriptions. Concluding that the appellant was qualified for the position he sought, the Board ordered the agency to place him in it.

**[McAlexander v. Department of Defense, 2007 MSPB 103](#)**

MSPB Docket No. CB-7121-06-0015-V-1

April 6, 2007

**Jurisdiction**

- Arbitration/CBA Related Issues
- Reassignment

**Discrimination**

- Physical/Mental Disability

**HOLDING:** The Board could review the arbitrator's decision on the appellant's grievance concerning his reassignment if the reassignment was involuntary and resulted in a reduction in pay. The appellant's acceptance of a reassignment in lieu of removal for failure to meet the agency's required hearing standard was not coerced where the standard was job-related and consistent with business necessity. The agency's action was not the product of disability discrimination where it made an individualized assessment that the appellant's employment in the job from which he was reassigned would pose a direct threat to his safety or that of others.

After an examination revealed that the appellant's hearing did not meet new medical standards for his Police Officer, AD-07, position, the agency proposed his removal for failure to meet required standards. Subsequently, the agency rescinded its proposal and reassigned the appellant to the non-law enforcement position of Office Support Assistant, GS-07. The appellant filed

a grievance of the decision to "remove" him from his former position, but the arbitrator denied it, finding the agency's action lawful. The appellant sought Board review, arguing that the agency violated 5 C.F.R. § 339.204 by not waiving its hearing standard for him and committed disability discrimination by "removing" him from his position without an "individualized assessment," under 29 C.F.R. § 1630.2(r), to determine whether he posed a "direct threat" to his or others' safety. Noting that it lacked jurisdiction over a reassignment, the Board ordered the parties to address whether the appellant's reassignment was voluntary and whether it resulted in a reduction in grade or pay.

In its decision, the Board noted that it has jurisdiction under 5 U.S.C. § 7121(d) to review an arbitrator's award where the grievance concerns an action within its jurisdiction and the appellant has alleged discrimination in connection with it. The Board found that it could have jurisdiction over the appellant's reassignment if it had resulted in a reduction in pay, but only if the reassignment was involuntary. It held that, if the appellant could establish that he accepted the reassignment to avoid a threatened removal that the agency should have known could not be substantiated or if he could establish that the proposal to remove him was the product of disability discrimination, then his decision to accept the reassignment in lieu of removal may be considered coerced and involuntary. The Board found that the agency had support for its action because its hearing acuity standard, under which it found the appellant unqualified, was job-related and consistent with business necessity. The Board also agreed with the arbitrator that the agency acted properly in denying a waiver of its hearing standard under 5 C.F.R. § 339.204.

With respect to the appellant's disability discrimination claim, the Board noted that under applicable law an employer may not rely on a safety-based qualification to disqualify an individual without making an "individualized assessment" showing that he would pose a "direct threat" to the safety of himself or others. The Board found that the agency had made such an assessment when it determined that due to his hearing deficit the appellant would be at a greater than normal risk of being injured or injuring others because of background noises he had missed or misunderstood in critical situations and that no hearing aid could correct the problem. Concluding that the appellant failed to show that his reassignment was involuntary, the Board dismissed for lack of jurisdiction.

**[Smith v. Department of the Army, 2007 MSPB 104](#)**

MSPB Docket No. AT-0752-06-0606-I-1

April 6, 2007

#### **Timeliness**

#### **Settlement**

The Board dismissed the appellant's petition for review as having been untimely filed where: (1) the appeal was dismissed pursuant to a settlement

agreement; (2) the initial decision apprised the parties of the date on which the decision would become final; (3) the appellant filed the petition for review 36 days after the issuance of the initial decision and did not allege that he received it more than 5 days after the date of issuance; and (4) the appellant failed to respond to the Clerk's notice that, among other things, provided him an opportunity to show good cause for the failure to file a timely petition. Notwithstanding the foregoing, the case was forwarded to the regional office for docketing as a petition for enforcement given the fact that the appellant, in his petition for review, claimed that the agency had failed to comply with the settlement agreement.

**[Walker v. Office of Personnel Management, 2007 MSPB 105](#)**

MSPB Docket No. PH-831M-06-0579-I-1

April 9, 2007

**Retirement**

- **Disability Retirement**
- **Annuity Overpayment**
- **Procedures/Miscellaneous**

**HOLDING: To properly determine an appropriate repayment schedule for an appellant deemed to have received an annuity overpayment, an appellant's monthly tax liability must be considered in relation to his gross income.**

The appellant received a disability retirement annuity in 1987. In 2006, the Office of Personnel Management (OPM) determined that the appellant had been restored to earning capacity in 2001 and, as a result, he had become ineligible for continued disability retirement benefits as of June 30, 2001. OPM further found that, in total, the appellant had received an annuity overpayment of \$56,834.19 during the period July 1, 2001 through March 30, 2006. OPM also deemed the appellant ineligible for a waiver of the overpayment because he was not without fault in creating the overpayment.

In considering the appellant's petition for review, the Board held that the administrative judge correctly analyzed the appellant's monthly income by considering his gross, as opposed to net, wages. Additionally, the Board held that, insofar as the appellant did not dispute the administrative judge's finding that he was not without fault in causing the overpayment, he was not entitled to a collection waiver.

The Board also held that the appellant's monthly tax liability must be considered in determining whether or not to grant his request for an adjustment to his repayment schedule based on financial hardship. In this case, the appellant did not present any evidence concerning his tax liability to the administrative judge; consequently, the administrative judge acted appropriately by adjudicating this matter without considering the impact of the appellant's taxes. However, because the evidence submitted by the

appellant as part of his petition for review was sufficient to establish that his gross income may be subject to a significant tax liability that could potentially affect his ability to comply with the existing repayment schedule, the Board remanded the appeal to afford the parties an additional opportunity to submit evidence and argument concerning the appellant's monthly tax liability.

**[Uson v. Office of Personnel Management, 2007 MSPB 106](#)**

MSPB Docket No. SE-0831-03-0227-I-1

April 9, 2007

**Timeliness**

The Board dismissed the appellant's petition for review as having been untimely filed where: (1) his purported inability to engage legal counsel failed to establish good cause for the untimely filing of the petition; (2) the initial decision clearly provided notice concerning the time limit within which to file the petition; and (3) the petition was filed more than 3 years after the expiration of the deadline for filing a petition.

**[Leatherbury v. Department of the Army, 2007 MSPB 107](#)**

MSPB Docket No. SF-0752-06-0100-I-1

April 10, 2007

**Adverse Action Charges**

**- Falsification/Fraud**

The agency removed the appellant on charges of filing false claims for overtime compensation and for filing and approving false travel vouchers. The agency alleged that he claimed overtime compensation for hours spent conducting official business that actually was conducted during his normal duty hours and that he sought reimbursement for travel while in the course of his daily commute. The Board sustained three of the four charges, finding that the appellant acted with reckless disregard for the truth or for ascertaining the truth when he sought overtime compensation for a period of several years despite not having kept records by which he could have accurately calculated the amount incurred and used dollar figures that were calculated to the exact penny without any hint that the figures were in fact mere estimates. It also sustained the false travel voucher charges that he failed to deduct his normal commuting mileage from the amount claimed. The Board found that that, as a supervisor and a travel approving official who had received training in the travel regulations, the appellant was responsible for knowing the such deductions were required and more likely than not acted with reckless disregard either for the truth or for ascertaining the truth of the matter. In evaluating the penalty, the Board noted that falsification is a serious offense and that it has long held that removal is a reasonable penalty for such misconduct. In light of the seriousness of the offense and the

testimony of the deciding official that he would have removed the appellant on any one of the charges, the Board upheld the removal.

**[Willis v. Department of Defense, 2007 MSPB 108](#)**

MSPB Docket No. PH-0752-06-0530-I-1

April 10, 2007

**Jurisdiction**

**Settlement**

**- Waiver of Rights**

The appellant was removed for violating a Last Chance Agreement (LCA) by being absent without authorization (AWOL) because of failing to request leave in accordance with established procedures. On appeal he alleged that the agency violated its standard procedures when it denied his request for retroactive leave. The administrative judge (AJ) dismissed the appeal for lack of jurisdiction, finding that the appellant violated the LCA by being AWOL, that the LCA clearly provided that a violation would result in reinstatement of his removal, and that in the LCA he knowingly waived his right to appeal should that occur.

On review, the appellant submitted an unemployment compensation decision issued after the AJ's decision to support his claim. The Board held it was previously unavailable, new evidence that supported the appellant's claim that he did not violate the LCA. The unemployment decision found that he credibly testified he was not aware at the time of his brief absence of the need to request leave, that he quickly did so when he was informed of the need, and that denial of his request was inconsistent with the agency's normal practice, which was for the supervisor to advise an employee of the need to request leave before charging him with AWOL. The Board held that the appellant made a nonfrivolous allegation of compliance with the LCA and that the agency's mere factual contradiction of his prima facie showing of jurisdiction was not dispositive, and it remanded for a jurisdictional hearing.

**[Woodworth v. Department of the Navy, 2007 MSPB 109](#)**

MSPB Docket No. SE-1221-04-0166-M-1

April 10, 2007

**Whistleblower Protection Act**

**- Danger to Public Health or Safety**

**HOLDING:** To establish that he had a reasonable belief that his disclosure met the criteria of 5 U.S.C. § 2302(b)(8), the appellant must show that a reasonable person in his position would believe that the reported matter evidenced a substantial and specific danger, a test that

**may be met even though the perceived danger was to a limited number of government personnel and not to the public at large.**

The appellant filed an appeal claiming that agency officials in Japan decided not to extend his overseas duty as a reprisal for his protected disclosures to the facility's commanding officer. The agency responded that his overseas duty was not extended because he requested a return to his position in California. The administrative judge (AJ) found that the appellant failed to make a nonfrivolous allegation of jurisdiction and dismissed. The Board affirmed on the ground that officials in California, who were unaware of his alleged disclosures, were responsible for the decision not to extend his overseas duty. On appeal, the Federal Circuit granted the agency's motion to remand on the ground that the Board failed to distinguish two distinct personnel actions - the extension of the appellant's overseas tour, which was under the authority of officials in Japan, and the extension of his return rights, which was subject to the authority of officials in California.

On remand, the Board overruled its decision based on finding the two actions were interdependent and remanded for further consideration. The AJ again dismissed for lack of jurisdiction. He found, based on a memo submitted on remand and inadequacies in the appellant's evidence, that the agency's decision not to extend the appellant's overseas tour was the result of his earlier notice of intent to exercise his return rights. On petition for review, the appellant argued that the AJ erred by making unwarranted inferences from the memo and by treating the agency's contrary evidence as dispositive.

In its decision, the Board found that the appellant exhausted his administrative remedies with the Special Counsel and made nonfrivolous allegations of the other elements of a whistleblower appeal: 1) he made a protected disclosure to the commanding officer when he told him that workers who disassembled missiles were exposed to missile blast residue containing harmful chemicals and metals, a situation that a reasonable person would believe constituted a substantial and specific danger to public health and safety (since the statutory test is satisfied even though the perceived danger was to a limited number of government workers); 2) the decision not to extend an overseas tour constituted a covered personnel action because it was a significant change in his duties or working conditions; and 3) the notice of the expiration of his overseas tour about eight months after first his disclosure was sufficient to establish a presumption his disclosures were contributing factors in the personnel action. The Board remanded the case for a hearing on the merits of the appellant's claim, noting that he will bear the burden of proving its elements by the preponderance of the evidence. It held that the reasons cited by the AJ for finding no jurisdiction may more appropriately be applied to whether the appellant met his burden of proof to show that his disclosures were a contributing factor in taking the personnel action.

## DISMISSALS-SETTLEMENT/WITHDRAWN/MOOT

*Smith v. U.S. Postal Service*, SF-0752-05-0923-X-1 (4/06/07)

*Mazzei v. Department of the Army*, PH-0752-05-0319-X-1 (4/11/07)

## COURT DECISIONS

*Trobovic v. Merit Systems Protection Board & General Services Administration* (NP)

Fed. Cir. No. 2006-3341; MSPB Docket No. NY-0752-05-0347-I-1

April 6, 2007

### **Jurisdiction**

- **Suspensions**

### **Hearings**

- **Right to a Hearing**

**HOLDING:** The appellant made a nonfrivolous allegation that he was constructively suspended by being excluded from his workplace, and therefore the administrative judge erred by denying the appellant's request for a hearing. In considering an appellant's allegations, the AJ must not prematurely weigh evidence.

The appellant was employed by General Services Administration (GSA) as a building management specialist. He appealed to the Board from an alleged constructive suspension. Specifically, he alleged that four distinct actions caused his constructive suspension: (1) being barred from his workplace, (2) being placed in absent without leave (AWOL) status, (3) being subjected to a hostile work environment, and (4) being denied work that would accommodate his disabilities. The administrative judge (AJ) dismissed his appeal for failure to make nonfrivolous allegations sufficient, if proven, to establish jurisdiction, and the decision became final when the Board denied review.

On review, the court found that the appellant's allegation that he was barred from his workplace was not inherently implausible and could not be deemed frivolous. While GSA submitted an e-mail indicating that the appellant had not been barred from the building during normal working hours, the weighing and assessing of the credibility of that evidence should have been reserved pending jurisdictional hearing. The danger of prematurely weighing evidence is illustrated here by the strength lent to the appellant's allegation by new evidence discovered by the appellant. That evidence, which GSA acknowledges it should have disclosed to the appellant during the Board proceedings, may turn out to substantiate the allegation that he was denied access to his workplace during normal working hours.

The court rejected other allegations made by the appellant. The court rejected, as conclusory, the appellant's allegation that GSA erroneously

rejected his medical documentation of his inability to work. The court further found that even if the GSA failed to consider the appellant's medical documentation for 71 days, as alleged by the appellant, such a delay in this case was not so lengthy as to show deliberate delay. With respect to the appellant's hostile work environment claim, the court found that the administrative judge's failure to examine the appellant's specific allegations was improper. The court nonetheless concluded that the alleged facts did not rise to the level of working conditions so intolerable that a reasonable person confronted with the same circumstances would feel coerced into leaving the workplace. Finally, the court rejected the appellant's claim that the agency unlawfully failed to offer available light-duty work accommodating his medical restrictions. The court found that the appellant had not alleged that light-duty work was available.

### **FEDERAL CIRCUIT AFFIRMANCES/DISMISSALS (NP)**

The following appeals were affirmed:

*Plasai v. Department of Transportation*, 07-3043, DA-0752-06-0208-I-1 (4/05/07)  
*Phillips v. Merit Systems Protection Board*, 06-3401, AT-0752-06-0274-I-1 (4/06/07)  
*Henson v. Department of Justice*, 06-3400, DA-0752-03-0645-I-1 (4/09/07)  
*Stephens v. Department of the Treasury*, 06-3402, CH-0752-05-0634-I-1 (4/09/07)  
*Garcia v. Department of the Army*, 06-3406, AT-0752-05-0735-I-1 (4/09/07)  
*Sinigaglio v. Department of the Army*, 06-3412, SF-0752-06-0197-I-1 (4/09/07)  
*Reeping v. U.S. Postal Service*, 06-3417, PH-0752-02-0185-I-1 (4/09/07)  
*Cook v. Office of Personnel Management*, 07-3002, AT-844E-06-0133-I-1 (4/09/07)

The following appeals were dismissed:

*Garcia v. Department of Homeland Security*, 07-3144, DC-0752-04-0110-I-1 (4/06/07)  
*Ide v. Merit Systems Protection Board*, 06-3302, AT-0752-03-0379-I-1 (4/10/07)  
*Madewell v. Department of Veterans Affairs*, 07-3016, DA-0432-0585-I-1 (4/10/07)  
*Purcell v. Merit Systems Protection Board*, 07-3035, DC-0752-06-0307-I-1 (4/10/07)  
*Edmonds v. Department of Defense*, 07-3083, AT-0752-05-0027-I-2 (4/10/07)  
*McIntosh v. Office of Personnel Management*, 07-3121, DA-0831-07-0032-I-1 (4/10/07)  
*Cunningham v. Department of the Air Force*, 07-3094, CH-0752-04-0584-I-2 (4/11/07)  
*Meza v. Department of Homeland Security*, 07-3150, DA-0752-06-0240-I-2 (4/11/07)  
*Tennyson v. Office of Personnel Management*, 07-3156, SE-844E-07-0035-I-1 (4/11/07)

The court recalled the mandate and reinstated the appeal:

*Coach v. Department of Justice*, 06-3332, DC-0752-05-0798-I-1 (4/10/07)