U.S. Merit Systems Protection Board

CASE REPORT

DATE: April 20, 2007

Note: These summaries are descriptions prepared by individual MSPB employees. They do not represent official summaries approved by the Board itself, and are not intended to provide legal counsel or to be cited as legal authority. Instead, they are provided only to inform and help the public locate Board precedents.

BOARD DECISIONS

***Umbarger Wright v. Office of Personnel Management*, 2007 MSPB 110**
MSPB Docket No. DE-831M-06-0362-I-1
April 12, 2007

Retirement
- Annuity Overpayment

After the appellant notified the Office of Personnel Management (OPM) that she had recovered and wished to waive her disability retirement benefits, OPM terminated them, but 6 months after June 1, 2005, when they should have been ended under its regulations. When OPM then determined that she had received an overpayment, the appellant requested waiver of the debt on the basis of financial hardship. OPM denied her request, noting that she was obliged to have set aside payments received after June 1, 2005. On appeal, the administrative judge (AJ) found that she was not eligible for a waiver, citing OPM's set-aside rule, and also that her financial situation did not support waiving recovery as inequitable or adjusting the repayment schedule.

On review, the Board declined to affirm OPM's application of the set-aside rule, noting that the appellant denied receiving an alleged June 17, 2004, notice of her annuity's termination date and OPM failed to submit a copy of it. The Board also found the AJ erred in concluding that the appellant's financial situation did not warrant waiver or adjustment. In the absence of a specific challenge, an appellant seeking a waiver should not be required to substantiate her expenses and income unless the information is incomplete or unreasonable on its face. After discussing the evidence, the Board concluded that the AJ should have asked the appellant for clarifying information and remanded the case for further adjudication.

***Smart v. Department of the Army*, 2007 MSPB 111**
MSPB Docket No. DE-0731-06-0294-I-1
April 12, 2007

Miscellaneous Agency Actions
- Suitability
Board Procedures/Authority
- Adjudicatory Error

HOLDING: The agency's nonselection of the appellant was a constructive negative suitability determination where the position in question was in the competitive service, the agency had delegated authority to make suitability determinations, and the basis for the agency's decision was the appellant's misconduct in prior employment and a history of unpaid debt. The administrative judge erred in not addressing the appellant's discrimination and retaliation claims because she is required to adjudicate all material issues presented and inform the appellant of the burdens and elements of proof for such claims.

The appellant appealed the agency's decision not to hire him for a Security Guard position because it found him unqualified due to misconduct in his employment record and a history of unpaid debt. He challenged his nonselection as a negative suitability determination and also alleged that it was based on race discrimination and retaliation for equal employment opportunity (EEO) activity. The administrative judge (AJ) determined that the agency's reliance on the appellant's character and conduct made its action a constructive suitability determination within the Board's jurisdiction, but he found that the agency's action was justified by the appellant's pattern of misconduct or negligence in employment and his history of unpaid debt amounting to dishonesty. Her decision did not address the appellant's discrimination and retaliation claims.

The Board agreed that the appellant's nonselection was a constructive suitability determination within its jurisdiction since the position in question was in the competitive service, the agency had delegated authority from OPM to make suitability determinations, and the agency's decision based on his misconduct in prior employment and dishonest financial conduct was an unsuitability finding within the meaning of 5 CFR Part 731. The Board also agreed the agency proved that the appellant was unsuitable for employment in light of his work record and history of unpaid debts. However, the Board found that the AJ erred in not addressing his discrimination and retaliation claims. The pro se appellant could not be deemed to have abandoned them by not objecting to their omission from the list of issues in the AJ's orders since they did not purport to be exhaustive. The Board also found the AJ erred by not informing the appellant of the burdens and elements of proof on these claims, and it remanded the case for their adjudication.

***Bollar v. Department of Housing & Urban Development*, 2007 MSPB 112**
MSPB Docket No. AT-0432-02-0580-I-1
April 12, 2007

Timeliness

The appellant filed a petition for review, postmarked on October 30, 2006, that challenged a November 7, 2002 initial decision.. He explained that he had filed an earlier petition by facsimile on December 12, 2002, but had inadvertently used an incorrect area code, and stated that, despite checking the Board's website regularly, he did not learn until October 2006 that his petition had not been filed. He attributed his use of the wrong area code to eye surgery in November 2002. The Board found that the appellant failed to establish good cause for his delay, concluding that even if his medical condition excused his initial failure to file, his failure to inquire about the petition for approximately four years was not the act of a reasonably prudent person.

***Scott v. Department of Justice*, 2007 MSPB 113**
MSPB Docket No. AT-3443-06-1080-I-1
April 12, 2007

Board Procedures/Authorities
- Adjudicatory Error
Miscellaneous Agency Actions
- Employment Practices

HOLDING: The administrative judge (AJ) erred by failing to give the appellant explicit information about what she must present to establish the Board's adverse action jurisdiction until the initial decision, but the notice in the decision permitted her to present it in her petition for review and the Board to resolve her claim. Where the appellant challenged her nonselection as an improper employment practice based on the agency's refusal to waive an OPM educational qualification standard, it was necessary to remand for further adjudication because the AJ did not inform her of the evidence necessary to prove her claim.

The appellant was selected for a lower-graded position than the one she held, accepted it, and began serving in the position. About three months later, the agency discovered that she lacked the educational qualifications required for the position, informed her that the selection was cancelled, and returned her to her previous position. The appellant appealed the agency's action to the Board. The administrative judge (AJ) found that the Board lacked jurisdiction over her nonselection, that she suffered no appealable loss of grade or pay in her reassignment, and that she failed to show jurisdiction over

her case as an employment practice appeal since there was no OPM involvement in the agency's action.

On petition for review, the Board found that the AJ erred in not giving the appellant explicit information about the evidence and arguments she must present to establish the Board's jurisdiction under Chapter 75. However, it found the lack of notice was cured by the AJ's initial decision that set forth the law concerning nonselections and reductions in grade or pay, permitting the appellant to address those issues in her petition for review. The Board determined that, contrary to the AJ's conclusion, the appellant showed she was appointed to the position from which she was reassigned (an SF-52 was issued and her acceptance was shown by her service). Nonetheless, the Board affirmed the AJ's finding it lacked adverse action jurisdiction since the appellant suffered no loss of grade or pay.

The Board reopened the case to address the employment practice issue. It noted that an agency's misapplication of a valid OPM requirement may constitute an appealable employment practice and that the appellant made such a claim by requesting a waiver of the OPM educational qualification standard on which the agency relied. Because the AJ failed to inform the appellant of her burden to prove her claim and the type of evidence necessary to prove it, the Board vacated and remanded this part of the case. It also directed the AJ to take evidence on and address two other issues: whether the appellant's appeal was timely and whether the negotiated grievance procedure was the exclusive means of resolving her employment practice claim.

***Holbrook v. Office of Personnel Management*, 2007 MSPB 114**
MSPB Docket No. CH-0845-06-0515-I-1
April 13, 2007

Retirement
- Annuity Overpayment

The appellant appealed the Office of Personnel Management (OPM's) reconsideration decision notifying him that he had received an annuity overpayment and that it intended to collect it in installments. The Board reopened the case because it found that OPM had made a mathematical error in determining the amount of the appellant's annuity when it applied the formula for computing the "high-three" average salary of a part-time employee that is used for service performed before April 7, 1986. Based on this finding, the Board remanded the case to OPM for further proceedings.

***Boots v. U.S. Postal Service*, 2007 MSPB 115**
MSPB Docket No. AT-0752-03-0286-P-1
Apri1, 13, 2007

Discrimination
- Physical/Mental Disability - Accommodation
- Remedies

Holding: Where an agency discriminates against an individual by disqualifying him for a position without making an individualized assessment of whether his employment would pose a direct threat to his safety or that of others, the agency is not liable for damages if it demonstrates good faith efforts to reasonably accommodate the employee. The agency's offer to the appellant of a position in another craft was not an accommodation precluding an award of damages.

The agency removed the appellant for inability to perform his tractor-trailer operator position because he was disqualified by his use of anti-seizure medication from operating a commercial motor vehicle under Department of Transportation (DOT) regulations. After review of his removal by the Board and the Equal Employment Opportunity Commission (EEOC), a decision by the Special Panel deferred to EEOC's finding and determined that the agency discriminated against him on the basis of his disability by relying on DOT regulations rather than making an individualized assessment to determine whether he posed a direct threat that could not be eliminated or reduced by reasonable accommodation. Pursuant to that decision, the Board ordered the agency to cancel the appellant's removal and provide benefits due.

The appellant then filed a motion for compensatory damages which the administrative judge (AJ) denied. Applying 42 U.S.C. § 1981a(a)(3), the AJ determined that damages could not be awarded because the agency demonstrated good faith efforts to reasonably accommodate the appellant. He based this finding on the agency's offer of mailhandler positions in the appellant's commuting area and on its alternative proposal that he establish his fitness to drive by foregoing anti-seizure medicine for a period of time and thereby retain his position.

On review, the Board agreed with the AJ that the issue of reasonable accommodation was involved in this case even though the discrimination finding was based on the agency's failure to establish the direct threat qualification standard on which it relied. The Board cited the definition of "direct threat" in 29 C.F.R. § 1630.2(r) and EEOC cases stating that to establish a direct threat the employer must show that no reasonable accommodation exists that would either eliminate or reduce the threat. However, the Board disagreed with the AJ's conclusion that the agency made such a showing. It found that an offer of a position outside the appellant's craft did not constitute a good faith effort to make a reasonable accommodation and that the agency's proposal that he cease taking seizure

medication was not an effort to accommodate, but a means for him to show that he could meet DOT standards without accommodation. Thus the Board remanded the case for further adjudication of the appellant's damages claim.

Chairman McPhie issued a concurring opinion because he agreed that the appellant is eligible for an award of damages, but disagreed with the majority's rationale. He would find the appellant was eligible for damages because the agency violated regulations implementing 29 U.S.C. § 791 by failing to make an individualized assessment of whether the appellant posed a direct threat to himself or others. However, he would find the case was not one where the discriminatory practice involved denial of a reasonable accommodation because neither the EEOC nor the Special Panel made such a finding and the appellant did not request accommodation. In his view, the EEOC cases cited by the majority do not represent a consistent, developed interpretation of discrimination law to which the Board should defer, and other EEOC cases are expressly to the contrary. The Chairman expressed concern that the decision introduces confusion into the law and fails to distinguish between general qualification standards related to the functions of a position and safety-based standards to which the direct threat defense applies.

***Schuringa v. Department of the Treasury*, 2007 MSPB 116**
MSPB Docket No. DA-0752-06-0491-I-1
April 13, 2007

Timeliness

In upholding the administrative judge's dismissal of the appellant's petition for appeal as having been untimely filed, the Board found: (1) the appellant's bare allegations that she attempted, unsuccessfully, to obtain additional evidence from the union did not establish good cause for the filing delay; (2) the fact that someone at the Board purportedly informed the appellant that the Board would not grant her request for an extension of time to file her appeal did not excuse her subsequent untimely filing; and (3) although the administrative judge did not issue the appellant an order informing her of the requirements set forth in *Lacy*, any oversight was remedied when the Clerk subsequently issued a proper *Lacy* notice. On this last point, the Board further found that none of the medical documents submitted by the appellant demonstrate how her medical condition prevented her from timely filing her appeal, especially given the fact that the documents show that she was medically cleared to return to work approximately two weeks prior to the filing deadline. Finally, the Board found that the documents submitted by the appellant actually undermined her claim that a mental health condition prevented her from timely filing her appeal.

***Blanton v. Office of Personnel Management*, 2007 MSPB 117**
MSPB Docket No. CB-1205-07-0004-U-1

April 13, 2007

Miscellaneous Topics
- Regulation Review

The Board denied the petitioner's request for a regulation review for failure to meet the requirements of 5 C.F.R. § 1203.11(b) because: (1) the petitioner's assertion that his agency violated 5 C.F.R. § 630.306 (pertaining to the time limit for the use of restored annual leave) when it failed to provide him sufficient time to use his annual leave did not specify or explain how the agency's implementation of the regulation required an employee to commit a prohibited personnel practice; and (2) the petitioner failed to identify the prohibited personnel practice the agency committed.

***Coles v. United States Postal Service*, 2007 MSPB 118**
MSPB Docket No. AT-0752-05-0486-I-1
April 13, 2007

Timeliness
- Timely Filing
Compliance
- Miscellaneous/Procedures

HOLDING: On the issue of timeliness, the Board held that a petition for review mistakenly filed with the regional office within the deadline for filing a petition for review is deemed a timely filing with the Board. On the merits, the Board held: (1) it lacked authority to enforce an award of back pay for the time period pre-dating the effective date of the appellant's removal; and (2) a remand was necessary to address the appellant's claim for post-removal overtime back pay.

The appellant, a mail handler for the Postal Service, was removed effective March 18, 2005. On appeal, the removal was reversed and the appellant was ordered restored to the status quo ante. Thereafter she filed a petition for enforcement. The petition was dismissed as moot because the Board determined that the agency complied with its obligation to provide the appellant back pay. However, the Board noted that there were two remaining areas of dispute. As to the first area, overtime back pay, the Board found that the appellant had not raised the issue in her reply to the agency's evidence of compliance but, in the event a dispute remained, she could file a new petition for enforcement. The second area of dispute concerned the appellant's assertion that she was entitled to pre-removal back pay. The Board held that it lacked authority to enforce an award of back pay for the time period pre-dating the appellant's removal.

Following the Board's decision, the appellant filed a new petition for enforcement, essentially re-arguing the matters raised in her initial petition

for enforcement. After the administrative judge (AJ) denied enforcement on June 20, 2006, the appellant filed a petition for review (PFR), postmarked November 13, 2006, with the regional office. That office forwarded the PFR to the Clerk of the Board, who ordered the appellant to submit evidence and argument on the issue of timeliness. The appellant then presented a copy of a PFR, signed July 20, 2006, that included a certificate of service attesting that it was filed with the Atlanta Regional Office on that date. This evidence was unrebutted. Citing prior precedent, the Board held that a PFR mistakenly filed with the regional office within the deadline for filing is deemed a timely filing with the Board.

On the merits of the appellant's PFR, the Board referenced its earlier decision, in which it concluded that it does not have authority to award back pay for the time period pre-dating removal. However, as to the appellant's claim for post-removal overtime back pay, the Board held that the AJ, in finding that the Board had previously resolved the issue, had misinterpreted its decision. Because this issue had not been raised as part of the initial petition for enforcement, the Board did not decide it; rather, the Board merely informed the appellant of her right to file a new petition for enforcement concerning her entitlement to overtime back pay. Accordingly, the Board remanded the case for adjudication of the appellant's claim that she is owed overtime back pay.

***Randall v. Department of Justice*, 2007 MSPB 119**
MSPB Docket No. SF-3443-06-0187-I-1
Apri1, 13, 2007

Miscellaneous Topics
- USERRA/VEOA/Veterans' Rights

Holding: Allegations of USERRA jurisdiction should be broadly construed, and the weakness of supporting statements is not a basis for a jurisdictional dismissal.

The appellant filed an appeal with the Board under the Uniformed Services Employment and Reemployment Rights Act (USERRA) alleging that she performed duty in the uniformed service and that the agency discriminated against her on account of her obligation to perform such duty by harassing her in various ways: placing her in AWOL status when she had timely requested and received approved leave to perform military duty; complaining to her Reserve unit that she gave the agency insufficient advance notice of her military orders; informing her that her civilian position took precedence over her military obligation; threatening to deny her military leave; and contacting her superior officer to demand that a training order be changed. She asked that the agency be ordered to cease its threats and harassment. The AJ found that the appellant failed to make nonfrivolous

allegations of facts which, if proven, would establish the Board's jurisdiction and dismissed her appeal.

On review, the Board noted that its USERRA jurisdiction may be established by showing performance of duty in a uniformed service and nonfrivolous allegations that the appellant was denied a benefit of employment because of military service or obligation, as provided in 38 U.S.C. § 4311(a). Such a claim should be broadly construed, the Board stated, and the weakness of supporting assertions is not a basis for a jurisdictional dismissal; rather, if the appellant fails to develop her contentions, the claims should be denied on the merits. Finding that the appellant's allegations of harassment were sufficient to establish USERRA jurisdiction over her appeal and that she was entitled to a hearing under *Kirkendall v. Army*, 479 F.2d 830 (Fed. Cir. 2007) (en banc), the Board remanded for further adjudication of her USERRA claim.

Before the Board, the appellant also stated that her performance ratings were lowered because of her military commitments, that she was charged with AWOL for military leave, and that she resigned from her civilian position as a result of agency harassment. The Board noted that her involuntary resignation claim may be a basis for the Board's jurisdiction under chapter 75 and ordered the AJ on remand to notify the appellant of her burden of proof to establish adverse action jurisdiction and the timeliness of her chapter 75 appeal.

***Robey v. U.S. Postal Service*, 2007 MSPB 120**
MSPB Docket No. CH-0752-06-0696-I-1
April 17, 2007

Timeliness
Board Procedures/Authorities
- Authority of Administrative Judges/Board

Holding: When an appellant files a second petition for appeal after withdrawing a first one, it is generally appropriate to treat the second petition as a new late-filed appeal and to determine whether there is good cause to waive the filing deadline. AJs lack the authority to reinstate an appeal in which there is a final Board decision.

After the agency removed the appellant on November 25, 2005, he appealed to the Board, but later he asked to withdraw his appeal, indicating he would challenge it through a union grievance. The administrative judge (AJ) dismissed the appeal with prejudice as withdrawn in a decision that became final when no petition for review (PFR) was filed. The appellant pursued a grievance, which was ultimately submitted to arbitration. The arbitrator denied the grievance, and on July 26, 2006, the appellant filed a new MSPB appeal of his removal. When the AJ notified him the appeal appeared to be barred by res judicata, the appellant stated he was seeking

review of the arbitrator's decision. The AJ dismissed for lack of jurisdiction because of the appellant's withdrawal with prejudice of his previous removal appeal. He also found that Postal Service employees are not entitled to Board review of arbitration decisions and that the appellant also failed to show unusual circumstances warranting reinstatement of his prior removal appeal.

The Board denied the appellant's PFR, but reopened to vacate the initial decision because it was based in part on the AJ's finding that the appellant showed no basis for reinstating his prior appeal, when AJs lack the authority to reinstate appeals in which there has been a final Board decision. The Board held that, when an appellant files a second appeal after withdrawing his first one, it is generally appropriate to consider the second appeal as a new, late-filed one and to determine whether there is good cause to waive the filing deadline. The appellant cited his financial circumstances and medical conditions to excuse his lateness, but the Board noted that financial difficulty does not establish good cause for untimeliness, and it found that the appellant's medical evidence did not explain how his condition prevented him from timely filing. The Board also noted that his pursuit of a grievance during the period of his delay was inconsistent with his claim his condition prevented him from filing timely, and it dismissed his appeal as untimely. It also found there were no unusual circumstances to justify its reopening his original appeal.

***Guthrie v. Office of Personnel Management*, 2007 MSPB 121**
MSPB Docket NO. AT-844E-06-1002-I-1
April 17, 2007

Retirement
- Disability Retirement
Evidence

The appellant appealed the Office of Personnel Management's (OPM's) decision denying her application for disability retirement based on depression, severe stress and anxiety. She cited her medical diagnosis and treatment, her physician's conclusion that she could not perform her duties, the duration of her condition, and inability to be accommodated. The administrative judge (AJ) affirmed OPM's decision, finding that the generalized opinions of her doctors that did not address any particular duties were insufficient to show that her condition prevented her from performing the duties of her position.

On petition for review, the appellant argued, inter alia, that the AJ erred by not considering the Social Security Administration's (SSA) award of disability benefits. The Board found that the AJ's failure to consider the SSA award was not prejudicial because there was no indication as to the basis for its determination and such an award is of little weight unless it is based on the same underlying condition as that for which disability retirement is sought. The Board also found that, even assuming it was, the medical evidence was

insufficient to support the appellant's claim. Although job-related stress resulting in mood disorders can be disabling, unless there is evidence establishing impaired performance of duties, it is insufficient even coupled with absence from work due to it. The Board found that the supervisor's statement failed to explain how the appellant's performance was deficient, and the statements of her doctor and psychologist also failed to explain how her condition affected specific work requirements. In addition, the evidence suggests that her conditions are largely situational and does not make the required showing of inability to perform her job duties in general and not just in a specific environment. Thus the Board affirmed the AJ's decision as modified.

***Matson v. Office of Personnel Management*, 2007 MSPB 122**
MSPB Docket No. SF-844E-06-0374-I-1
April 18, 2007

Retirement
- Disability Retirement

Holding: The Board recognizes that appeals involving entitlement to retirement benefits under the law are fundamentally different from other types of appeals, such as disciplinary appeals involving competing interests, and it is therefore more willing to reopen such appeals in the interest of equity.

In April 2005, the appellant, who had not worked since October 2001 because of an on-the-job injury, applied for disability retirement stating that she suffered from post-traumatic stress disorder, major depressive disorder, and panic disorder with agoraphobia. After the Office of Personnel Management (OPM) denied her application, she appealed to the Board. The administrative judge (AJ) found that the appellant's psychological conditions prevented her from rendering useful and efficient service in her position. However, finding that the appellant had refused facially reasonable treatment for her conditions and was therefore barred from receiving a disability annuity, the AJ affirmed OPM's decision.

On petition for review (PFR), the Board said it saw no reason to disturb the AJ's finding, which OPM did not dispute, that the appellant was unable due to her conditions to render useful and efficient service in her position for a perod exceeding a year. The only issue was the correctness of the AJ's finding that the appellant was barred from receiving disability retirement because of her refusal of treatment, a finding based on letters from the appellant's psychologist stating that the appellant had a substance abuse problem and had voluntarily stopped pursuing treatment for her psychological problems. The appellant submitted evidence that contradicted the finding, letters from her primary care provider indicating that she was providing

regular treatment as were a chemical dependency specialist and an addictions specialist, and that the appellant was seeing a psychologist on a weekly basis.

While this information was not previously unavailable so as to support granting the appellant's PFR, the Board reopened the appeal on its own motion, explaining its willingness to do so by its longstanding view that appeals involving entitlement to retirement benefits are fundamentally different from appeals involving the competing interests of agency management and employee rights. Although the appellant's new evidence was contrary to her answers to OPM's interrogatories below, the Board noted that the latter were completed by her representative and found that it would be inequitable to deny the appellant benefits to which she is entitled because of the representative's errors. Finding that the appellant did not voluntarily refuse facially reasonable treatment for her conditions, the Board reversed the initial decision and ordered OPM to grant the appellant's application for disability retirement.

DISMISSALS-SETTLEMENT/WITHDRAWN

Garner v. U.S. Postal Service, DA-0353-06-0646-I-1 (4/13/07)
Boque v. Department of Veterans Affairs, NY-3443-06-0353-I-1 (4/17/07)

COURT DECISIONS

Rapp v. Office of Personnel Management **(P)**
Fed. Cir. No. 2006-3172; MSPB Docket No. AT-844E-05-0056-I-1
April 18, 2007

Retirement
- Disability Retirement
- Procedures/Miscellaneous
Board Procedures/Authorities
- Representation

HOLDING: An appellant who is denied continuation of her disability retirement annuity because of failure to prove continuing mental disability and who then seeks legal assistance is entitled to a hearing before the Board on whether she is mentally competent to represent herself. If the Board finds that appellant is not competent, then it is to reevaluate her claim once she acquires or has been appointed adequate legal counsel.

The appellant, during her employment by the Department of the Navy, developed severe mental health problems and was unable to meet the requirements of her position. In February 1997, OPM approved her disability retirement based on a medical diagnosis of major depression and anxiety. To continue receiving her disability retirement annuity, appellant was subject to

annual medical evaluations to certify that she was still mentally disabled. In March of 2004, OPM informed appellant that the latest medical report she submitted did not adequately support her continued entitlement to the annuity. In response, the appellant submitted a statement from her psychiatrist indicating that her depression was controllable with medication and that he saw "no signs of psychiatric impairment." Accordingly, OPM determined that appellant failed to establish her continued entitlement to the annuity.

The appellant appealed to the Board and provided testimony from a psychologist indicating that she still suffered from a major depressive order. The administrative judge (AJ) found the psychiatrist's views to be more persuasive and found for OPM. The decision became final when the full Board denied review of the AJ's decision.

Before the court, appellant filed a motion requesting legal assistance and raised the issue of whether the Board had committed procedural error when it allowed appellant to represent herself before the Board. The court noted that its standard for mental incompetence is set out in *French v. Office of Pers. Mgmt*, 810 F.2d 1118, 1120 (Fed. Cir. 1987), which is an inability to handle one's personal affairs because of either physical or mental infirmity. The majority found, however, that *French* provided little guidance in this case because it was unclear from the record whether the issue of appellant's mental competence (as opposed to her past mental disability) had been before the Board. Therefore, the court vacated the Board's decision and remanded to the Board for further proceedings to determine whether appellant was mentally competent to represent herself. The court ordered further that, if the Board found that appellant was not competent, then it was to reevaluate her claim once she acquired or had been appointed adequate legal counsel.

One judge dissented in part, opining that a competency hearing would be redundant because appellant had already demonstrated inability to represent herself. The dissenting judge suggested that, instead, the court should have ordered that appellant be given reasonable legal assistance in showing that she remains mentally disabled.

White v. Merit Systems Protection Board **(NP)**
Fed. Cir. No. 07-3007; MSPB Docket No. DE-0752-05-0497-I-1
April 16, 2007

Timeliness
- Mixed Cases
- Miscellaneous

HOLDING: The Board's interpretation of 5 C.F.R. § 1201.154(b)(1), that an appeal must be filed within 30 days of receipt of a final agency decision in an equal employment opportunity complaint, even if the employing agency does not issue the decision within the required 120

days, does not constitute an abuse of discretion. A document is considered received by an appellant when it is received at his place of residence.

The petitioner, a former supervisor with the Bureau of Prisons, filed an equal employment opportunity complaint alleging that disability discrimination had forced him to retire. Thereafter, an Equal Employment Opportunity Commission (EEOC) administrative judge (AJ) dismissed the complaint because Mr.White's allegations that his retirement was coerced made the matter a "mixed case" that had to be appealed to the Board. The EEOC AJ returned the case to the Bureau of Prisons for processing as a "mixed case," and on February 6, 2004, the case was submitted for a final agency decision (FAD).

On August 2, 2005, 543 days after the case was submitted, the agency issued a FAD finding no discrimination. The FAD was sent by certified mail to Mr. White's home and a receipt was signed for by his mother-in-law on August 5, 2005. The FAD informed petitioner that he had 30 days from the date he received it to file an appeal with the Board. Because the last day of the 30-day period fell on a Sunday, and the following day was a federal holiday, his MSPB appeal was due by September 6, 2005. Mr. White did not file his appeal until September 11, 2005. The MSPB AJ dismissed the appeal for lack of jurisdiction, but on petition for review the Board found instead that the appeal was untimely filed.

Before the Court of Appeals, Mr. White argued that, because the Bureau of Prisons issued its FAD 543 days after his EEO complaint was submitted as mixed case, pursuant to 5 C.F.R. § 1201.154(b)(2), the 30-day time limit for filing an appeal set forth in subsection (b)(1) did not apply and he could file his appeal at any time. In addressing this argument, the court discussed its process of construing a regulation and an agency's interpretation of its own regulation. The court stated that it gives broad deference to an agency's interpretation of its regulations and that an agency's construction is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." The court found that the Board's interpretation of section 1201.154(b)(1), that an appeal must be filed within 30 days of receipt of a FAD, even if the employing agency does not issue its FAD within the required 120 days, did not constitute an abuse of discretion.

Mr. White also argued before the court that his appeal was timely because, despite the fact that his mother-in-law signed a receipt for the FAD on August 5, 2005, he did not receive the decision until August 13, 2005, when he returned home from an out-of-state trip. The court found, however, that the Board did not abuse its discretion in finding that the FAD was constructively received when it was signed for by his mother-in-law. Finally, the court found that the Board did not abuse its discretion when it found that petitioner failed to show good cause for the 5-day delay in filing.

FEDERAL CIRCUIT AFFIRMANCES/DISMISSALS (NP)

The following appeal was affirmed:
Boyd v. Department of the Treasury, 2007-3033, CH-0752-05-0612-I-2 (4/18/07)

The following appeal was dismissed:
Hardy v. U.S. Postal Service, 07-3112, CH-0353-05-0849-I-1 (4/13/07)

The court denied petitions for rehearing in these cases:
Aleksandr Stoyanov v. Department of the Navy, 06-3363, DC-1221-06-0266-W-1 (4/12/07)
Yuri Stoyanov v. Merit Systems Protection Board, 06-3358, -3359, DC-1221-06-0160-W-1, DC-531D-06-0228-I-1 (4/16/07)
King v. Department of Veterans Affairs, 07-3034, AT-1221-05-0790-W-1 (4/17/04)

FEDERAL REGISTER NOTICES

72 Fed. Reg. 19093 – 19099 (April 17, 2007)

OPM issued final regulations on compensatory time off for time spent in a travel status away from the official duty station when such time is not otherwise compensable. The regulations implement Section 203 of the Federal Workforce Flexibility Act of 2004, amending 5 U.S.C. chapter 55, subchapter V.

72 Fed. Reg. 19099 – 19100 (April 17, 2007)

OPM adopted as a final rule a change in the Federal Employees Health Benefits Program regulations stating that OPM may waive the eligibility requirements for health benefits coverage as an annuitant for an individual when it determines that it would be against equity and good conscience not to allow a person to be enrolled. The regulations state that an individual's failure to satisfy eligibility requirements must be due to exceptional circumstances. The change eliminates a list of specific situations where a waiver will not be granted, such as where an individual’s retirement is based on a disability or involuntary separation or when an individual was misadvised by his/her employing office, thus providing OPM with more flexibility when granting waivers.