



U.S. Merit Systems Protection Board

CASE REPORT

DATE: March 2, 2007

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BOARD DECISIONS

Styslinger v. Department of the Army,
MSPB Docket No. DA-3443-06-0168-I-1
February 22, 2007

USERRA/VEOA/Veterans' Rights

HOLDING: Even though the appellant lacks preference eligibility, the Board has VEOA jurisdiction over his claim that, as a veteran employee of another agency, he was denied the right to compete for a position that the agency filled through merit promotion procedures after accepting applications from individuals outside its own workforce; the Board set forth the test for establishing VEOA jurisdiction over an appeal where a complaint was filed under 5 U.S.C. § 3330a(a)(1)(B); the right to compete granted by 5 U.S.C. § 3304(f)(1) covers an applicant who is a current federal employee at the time he submits his application along with applicants who are seeking initial federal appointments.

The appellant, an alleged employee of the Department of Energy, retired at the rank of Major after serving on active duty in the U.S. Army for over 21 years. The agency issued a vacancy announcement for a GS-14 Assistant Chief of Staff position, stating that the individuals eligible to apply for the position were: "Veterans eligible under Veterans Employment Opportunities Act of 1998. (VEOA) Veterans eligible as 30% Disabled Veterans. Interagency Career Transition Assistance Plan (ICTAP) eligibles. Army employees serving on career or career conditional appointments. Reinstatement eligibles." The agency denied the appellant's application for that position because he was not among the group of eligible applicants. After exhausting his Department of Labor remedy, the appellant filed a Board

appeal claiming that the agency violated VEOA when it denied his application. The AJ dismissed his appeal for lack of jurisdiction.

The Board denied the appellant's petition for review, reopened the appeal, and reversed the initial decision. The Board found that in order to state a viable claim with respect to a complaint filed pursuant to 5 U.S.C. § 3330a(a)(1)(B), an appellant need only allege that he is a veteran described in 5 U.S.C. § 3304(f)(1), and that the agency violated his rights under that section. The Board also found that in a case in which the Secretary of Labor has notified a complainant, in accordance with 5 U.S.C. § 3330a(c)(2), that the Secretary's efforts have not resulted in the resolution of the complaint, the fact that the complainant did not notify the Secretary of his intent to file a Board appeal does not deprive the Board of jurisdiction over the appeal.

The Board then found that it has jurisdiction to adjudicate an appeal filed by a non-preference eligible veteran who alleges that an agency violated his rights under 5 U.S.C. § 3304(f)(1), and who meets the definition of "veteran" described in that section, i.e., he has been separated from the armed forces under honorable conditions after 3 years or more of active service. The Board next found that a retired member of the armed forces may qualify as a "veteran" who "has been separated from the armed forces" for purposes of sections 3304(f)(1) and 3330a(a)(1)(B). Here, the Board found that the appellant, despite the fact that he maintains some connection to the U.S. Army as a regular officer on its retired list, qualifies as such a veteran.

The Board then stated that, in order to establish the Board's VEOA jurisdiction over an appeal where a complaint was filed under 5 U.S.C. § 3330a(a)(1)(B), an appellant must establish that he exhausted his Department of Labor remedy and make nonfrivolous allegations that: He is a veteran described in 5 U.S.C. § 3304(f)(1); the agency denied him the opportunity to compete under merit promotion procedures for a vacant position for which the agency accepted applications from individuals outside its own workforce; and the denial occurred on or after the December 10, 2004 enactment date of the Veterans' Benefits Improvement Act of 2004, Pub. L. No. 108-454 (Dec. 10, 2004) (VBIA). The appellant satisfied this test.

In *Jolley v. Department of Homeland Security*, MSPB Docket No. AT-3443-06-0447-I-1, 2007 MSPB 51, (Feb. 21, 2007) (Feb. 24, 2007 MSPB Case Report), the Board held that the right to compete granted by 5 U.S.C. § 3304(f)(1) covers an applicant who is a current federal employee at the time he submits his application along with applicants who are seeking initial federal appointments. Thus, the agency could not rely on the appellant's status as a current federal employee to deny him the right to compete for the Assistant Chief of Staff position. The Board therefore found that the agency violated 5 U.S.C. § 3304(f)(1) by denying the appellant the right to compete for the Assistant Chief of Staff position. The Board ordered the agency to determine whether the appellant was qualified for the position, and, if he is found qualified, to reconstruct the selection process for the position.

Vice Chairman Rose concurred in the result, but dissented consistent with her dissent in *Jolley*.

[Wiley v. Department of Veterans Affairs](#),
MSPB Docket No. CH-315H-04-0557-B-1
February 22, 2007

Miscellaneous Agency Actions - Suitability

HOLDING: The agency was required to obtain OPM's prior approval to make a negative suitability determination under 5 C.F.R. part 315, before it decided to terminate the appellant's probationary appointment on the ground that he had omitted two criminal convictions on a pre-employment questionnaire; where the agency did not obtain such prior approval, the Board lacks jurisdiction over the negative suitability appeal.

The agency terminated the appellant during his probationary period for omitting two criminal convictions on his pre-employment Form 306 after giving him notice of the reason for his termination and 1 day to respond to the notice. The AJ found that the appellant had made a written reply during the notice period and failed to make a non-frivolous allegation that the agency did not follow the procedures for terminating a probationary employee for pre-employment reasons. The AJ therefore dismissed the appeal for lack of jurisdiction. The Board remanded the appeal for further adjudication concerning whether the Board lacks jurisdiction over this appeal as a negative suitability determination made by an employing agency without delegated authority from OPM. *Wiley v. Department of Veterans Affairs*, 101 M.S.P.R. 207 (2006), 2006 MSPB 36.

On remand, the AJ found that the agency did not take a negative suitability action against the appellant. She found no persuasive evidence that OPM authorized the agency to take a negative suitability action against the appellant. She thus found that the Board lacks jurisdiction over the appellant's removal as a negative suitability action. In contrast, she found that the agency did have OPM approval to take action against the appellant under 5 C.F.R. part 315. She concluded, however, that the Board lacks jurisdiction over the appellant's removal during his probationary period under 5 C.F.R. § 315.805.

The Board denied the appellant's petition for review, but reopened this appeal because it found that the AJ erred in determining that OPM had delegated authority to the agency to take action against the appellant under 5 C.F.R. part 315. Contrary to the initial decision, the evidence did not show that the agency received the required approval from OPM prior to terminating the appellant. Therefore, the AJ should have dismissed this appeal for lack of Board jurisdiction because the agency did not have delegated authority from

OPM to take action against the appellant under its own authority at 5 C.F.R. part 315. Contrary to the concurring opinion, the agency was required to obtain OPM's prior approval before it decided to terminate the appellant's probationary appointment on the ground that he had omitted two criminal convictions on a pre-employment questionnaire. The governing regulations are not confusing and OPM's proposed regulations are not controlling.

Vice Chairman Rose issued a concurring opinion, stating that, although she agrees with the result of the decision, she would find that the agency had authority to terminate the appellant under 5 C.F.R. part 315 without seeking prior approval from OPM.

[Wagner v. Department of Homeland Security](#),

MSPB Docket No. DA-0752-06-0098-I-1

February 26, 2007

Board Procedures/Authorities

- **Discovery**
- **Sanctions**

HOLDING: Where the appellant faxed his discovery responses to the agency 81 minutes after the agency notified the AJ that the appellant had not provided it with discovery responses by the "close of the record" that day, the appellant substantially complied with the deadline for discovery responses imposed by the AJ; deeming the agency to have proven its charges because the appellant did not respond to the agency's discovery requests was an excessive sanction.

The appellant appealed his removal. The agency filed a motion to compel discovery and later a motion for sanctions for the appellant's failure to comply with the administrative judge's (AJ) order compelling discovery responses. The AJ again ordered the appellant to respond to the agency's discovery requests no later than the "close of business" on February 3, 2006, or he would be sanctioned by a finding that the agency proved its charges and the disallowance of testimony at the hearing concerning the charges. At approximately 5:00 p.m. on February 3, 2006, the agency faxed a notice of non-compliance, informing the AJ that the appellant had not complied with her discovery order. On February 6, 2006, the AJ issued an order granting the agency's motion for sanctions; she informed the parties that the agency's charges were sustained. Following a hearing limited to the issue of the reasonableness of the penalty, the AJ affirmed the agency's removal action.

On review, the appellant asserted, without rebuttal, that 81 minutes after the agency notified the AJ that he had not provided it with discovery responses, i.e., 6:18 p.m., he faxed his responses to the agency. Neither party ever informed the AJ that the appellant had filed any discovery responses before the initial decision was issued. Thus, the AJ did not abuse her

discretion in imposing a sanction because the record before her did not show that the appellant had complied with her discovery order. However, the Board reopened the appeal and found that the appellant substantially complied with the deadline for discovery responses imposed by the AJ because: 81 minutes after the agency notified the AJ that the appellant had not provided it with discovery responses, he faxed his responses to the agency; the AJ's final warning did not explain what "close of business" meant; and the agency did not allege prejudice.

In any event, deeming the agency to have proven its charges because the appellant did not respond to the agency's discovery requests was an excessive sanction; a more appropriate sanction would have been to preclude the appellant from presenting evidence related to the disputed discovery requests. In light of the agency's allegation that the appellant's discovery responses were incomplete, the Board remanded the appeal to determine whether the appellant complied with the AJ's discovery order and, if not, what sanction, if any, is appropriate for his non-compliance.

Adams v. Department of the Army,
MSPB Docket No. CH-0752-06-0251-I-1
February 23, 2007

Adverse Action Charges

- **Security Clearance Determinations**

Board Procedures/Authorities

- **Authority of Administrative Judges/Board**

HOLDING: The Board has jurisdiction to review the agency's determination to suspend the appellant's computer access that led to his removal; the computer access determination was not a national security clearance decision outside the Board's jurisdiction; the appellant's removal for failure to maintain computer access was sustained based on his refusal to pay his debts.

The agency suspended the appellant's computer access because he had refused to make repayments on over \$50,000 of debt he owed to third parties, evidencing a lack of integrity and responsibility. The agency then removed the appellant for failure to maintain access to the computer system, a requirement of his position. After first reviewing the merits of the agency's decision to suspend the appellant's computer access, the administrative judge (AJ) reversed the removal action.

First, the Board found that it has jurisdiction to review the computer access decision as a qualification for the appellant's position that led to his removal. The Board then found that the computer access decision was not a national security clearance determination outside the Board's jurisdiction. The Board sustained the removal, finding that the agency's concerns about the

appellant's integrity and responsibility, due to his refusal to pay his debts, were legitimate reasons to suspend his computer access. Therefore, the agency proved the charge of failure to maintain computer access, a nexus to the efficiency of the service, and the reasonableness of its penalty of removal.

Member Sapin dissented, stating that she concurred with the AJ's decision that the agency failed to consider mitigating factors and that it failed to show that the appellant's refusal to pay his debts reflected adversely on his integrity and responsibility.

McCarty v. Environmental Protection Agency,

MSPB Docket No. CH-1221-05-0902-W-1

February 28, 2007

Whistleblower Protection Act

- Election of Remedies

- Jurisdiction, Generally

HOLDING: Where the appellant's claim was not grievable, she was not precluded from filing an IRA appeal of her termination despite having grieved her proposed termination through the negotiated grievance procedure.

The agency terminated the appellant from her excepted service appointment under the Federal Career Intern Program. The appellant filed an informal written grievance of her termination before it was effective through the negotiated grievance procedure in which she alleged, inter alia, that the agency's failure to convert her 2-year appointment to a permanent appointment amounted to reprisal for whistleblowing. The appellant then filed an individual right of action (IRA) appeal. Without first informing the appellant of her jurisdictional burden or making a jurisdictional determination, the administrative judge (AJ) proceeded to the merits of the IRA appeal and determined that the appellant had not made any protected disclosures. This was error. The Board therefore granted the appellant's petition for review, vacated the AJ's initial decision, and remanded the appeal to inform the appellant of her jurisdictional burden of proof and for a jurisdictional determination.

In addition, the Board found that the appellant's pursuit of relief through the negotiated grievance procedure did not preclude her from filing this IRA appeal because her claim was not grievable. That is so because, as an employee serving an excepted service appointment that was subject to a trial period, she was precluded from filing a grievance under the terms of the applicable collective bargaining agreement.

DiCastro v. Office of Personnel Management,

MSPB Docket No. NY-0842-06-0142-I-1

February 23, 2007

Timeliness - Miscellaneous

HOLDING: The pro se appellant showed good cause for her 10-day delay in filing her appeal because she was the primary caregiver of her seriously ill husband and she understandably may have believed that her Congressman was taking care of the matter appealed.

The appellant filed her appeal of OPM's reconsideration decision 10-days late. The administrative judge dismissed the appeal as untimely filed without good cause shown. On review, the Board denied the appellant's PFR, reopened the appeal on its own motion, vacated the initial decision, and remanded the appeal for adjudication of the merits. The Board found that the appellant did not intend to accept OPM's reconsideration decision but, rather, contacted her Congressman prior to the filing deadline and expressed a clear objection to the decision. Because of her husband's serious illness, her extensive responsibilities as his primary caregiver, and the Congressman's prior assistance in responding to OPM's initial decision regarding this retirement matter, the pro se appellant may have understandably failed to realize that her next step lay with the Board and not with her Congressman. The Board therefore found that the appellant showed good cause for the untimely filing of her appeal.

Heffernan v. Department of Health & Human Services,
MSPB Docket No. DC-0752-04-0756-E-1
February 23, 2007

Precedential Effect of Authority – Binding/Persuasive - EEOC

HOLDING: The Board concurred in and adopted EEOC's finding that the agency discriminated against the appellant on the basis of religion and retaliation for EEO activity.

In a January 24, 2007 decision, the EEOC found that the appellant proved his claims of religious discrimination and reprisal for equal employment opportunity activity and, thus, returned this case to the Board for action. (Feb. 16, 2007 MSPB Case Report). The Board found that the EEOC decision rests solely upon an interpretation of discrimination law and that there was no proper basis on which to conclude that the EEOC decision was so unreasonable that it amounts to a violation of civil service law. Thus, the Board lacks authority to disagree with the EEOC decision. Accordingly, the Board concurred in and adopted EEOC's finding that the agency discriminated against the appellant on the basis of religion and retaliation for EEO activity.

Evans v. U.S. Postal Service,

MSPB Docket No. CH-315H-04-0557-B-1

February 23, 2007

Adverse Action Charges - Miscellaneous

The Board issued a Final Order denying the appellant's petition for review (PFR) and the agency's cross-PFR of the initial decision that sustained the charge of unacceptable conduct towards a craft employee (engaging in "goosing" a subordinate employee and being aware of "goosing" being performed in the office by his subordinates, but doing nothing to stop it), but mitigated the removal penalty to a demotion to the next lower-graded, nonsupervisory position with the least reduction in grade. Chairman McPhie issued a dissenting opinion stating that he would have sustained the removal penalty.

Mitchell v. Department of Homeland Security,

MSPB Docket No. NY-0353-05-0235-X-1

February 28, 2007

Back Pay

HOLDING: Because the FAA is not subject to the Back Pay Act and the personnel provisions of the FAA do not provide for back pay or interest, the Board lacks authority to order interest on back pay in an appeal filed by a non-screener employee of the TSA.

In *Mitchell v. Department of Homeland Security*, 102 M.S.P.R. 636 (2006), the Board ordered the agency to amend the appellant's personnel record to reflect that his pay band is H retroactive to the date of his restoration to duty, with the appropriate back pay. The appellant filed a petition for enforcement claiming that he had not received back pay. The Board ordered the agency to respond to the appellant's compliance concerns.

Although the appellant worked for the Transportation Security Administration (TSA), TSA is required by law to apply the Federal Aviation Administration (FAA) personnel system under 49 U.S.C. § 40122, to non-screener employees, like the appellant. The agency thus claimed that the Board must apply the FAA's personnel provisions, which do not provide for back pay. Nevertheless, the agency filed evidence of compliance that showed that it had paid the appellant back pay. The appellant responded, expressing satisfaction with the agency's evidence of compliance except for the agency's failure to pay interest on the back pay, as ordered by the administrative judge in the Recommendation.

The Board found that 49 U.S.C. § 40122(g)(2) had the effect of, among other things, making the Back Pay Act inapplicable to FAA employees.

Because the TSA Administrator has not modified the FAA personnel system for TSA's non-screener employees with regard to the Back Pay Act, the Board must apply the personnel provisions of the FAA, which do not provide for back pay or interest. The Board, therefore, lacks authority to order interest in this case. To the degree that the Recommendation provided for the payment of interest, the Board does not accept that finding. Since the Recommendation otherwise did not order the agency to comply with the Back Pay Act, the Board found the agency in compliance.

[Johnson v. Department of the Army](#),
MSPB Docket No. DA-0752-02-0258-I-1
February 28, 2007

Board Procedures/Authorities
- Reopening/Reconsideration
- Withdrawal of Appeal/PFR
Timeliness - Miscellaneous

Because the appellant withdrew his removal appeal, the Board treated his petition for review (PFR) as a late-filed petition for appeal and a request to reopen and reinstate his appeal. The Board dismissed the appellant's petition for appeal as untimely filed (4-years late) without good cause shown because he failed to respond to the Clerk's timeliness acknowledgment order and his unsworn statement in his petition does not constitute good cause. The Board denied the appellant's request to reopen the appeal because more than a reasonable time has passed since the appeal became final, and he did not show the required unusual circumstances.

[Cooper v. U.S. Postal Service](#),
MSPB Docket No. DA-0752-96-0212-I-1
February 28, 2007

Timeliness - Miscellaneous

The Board dismissed the appellant's petition for review (PFR) of the initial decision that dismissed his appeal as settled as untimely filed (10-years late) without good cause shown because he failed to respond to the Clerk's timeliness acknowledgment order and he did not show how the circumstances surrounding the settlement agreement interfered with his ability to file a timely PFR.

COURT DECISIONS

[Dean v. Consumer Product Safety Commission](#) (NP)
Fed. Cir. No. 2007-3038, MSPB Docket Nos. AT-3443-05-0147-I-1, -0179-I-1
February 28, 2007

USERRA/VEOA/Veterans' Rights

HOLDING: The court remanded the USERRA/VEOA case to the Board to determine whether the agency's hiring procedure, i.e., establishing two separate lists of candidates (one a competitive list of ranked candidates and the other a non-competitive list of candidates) and then selecting from only one of the lists, is in accordance with law and merit principles.

The appellant responded to the agency's advertisement for a Product Safety Investigator, GS-7/9. The vacancy announcement set forth the following policy:

"Status candidates and individuals who are eligible for special hiring authorities, who wish to be considered under both merit promotion or special hiring authority and competitive procedures, MUST submit two (2) complete applications. If one application is received, it will only be considered under the special hiring authority or the merit promotion procedure."

The appellant initially submitted only one application, in which he identified himself as a 30% disabled, preference-eligible veteran, and requested consideration for appointment under non-competitive hiring authorities for disabled veterans. He alleged that he later mailed additional applications, which the agency denied receiving. In accordance with the vacancy announcement, the appellant was not considered under competitive procedures. The agency selected a non-preference eligible from the competitive list.

The appellant then filed an appeal under the Veterans Employment Opportunities Act of 1998 (VEOA), claiming violation of his veterans' preference rights, as well as an appeal under the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at 38 U.S.C. §§ 4301-4333) (USERRA), claiming discrimination based on his status as a disabled veteran. The AJ took jurisdiction over both appeals. Based on the documentary evidence, he found that the agency had only one application from the appellant at the time it made its selection, and processed that single application in accordance with the conditions set forth in the vacancy announcement. The AJ dismissed both appeals for failure to state a claim upon which relief can be granted.

The Board denied the appellant's petitions for review by Final Order. Chairman McPhie filed a separate opinion, concurring with respect to the VEOA claim, and dissenting with respect to the USERRA claim. *Dean v. Consumer Product Safety Commission*, 103 M.S.P.R. 272 (2006). The Chairman raised concerns about the use of two lists and stated that the Board has never ruled on whether this procedure is acceptable under federal employment law. He also expressed concern that persons such as disabled

veterans must either submit multiple applications or encounter the possibility of not even being considered for the announced position.

On review, the Federal Circuit concluded that the Board erred in declining the appellant's request to consider the validity of the agency's hiring procedure, i.e., establishing two separate lists of candidates (one a competitive list of ranked candidates and the other a non-competitive list of candidates) and then selecting from only one of the lists, discarding the other. The agency did not explain the reasons for this procedure. In view of the impact on the appellant and his veterans' preference status, the procedure on its face raises questions. Therefore, the court vacated the Board's decision and remanded the case for determination of whether the agency's procedure is in accordance with law and merit principles.

FEDERAL CIRCUIT AFFIRMANCES/DISMISSALS (NP)

The following appeals were dismissed:

Winters v. Office of Personnel Management, 07-1027, DA-844E-06-0188-I-1 (2/27/07)

Baxter v. Department of Veterans Affairs, 07-3103, AT-1221-06-0158-W-1 (2/27/07)

Starr v. U.S. Postal Service, 07-3105, PH-0752-05-0522-C-1 (2/27/07)

The court recalled the mandate and reinstated the appeal:

Cuellar v. Department of Homeland Security, 07-3074, DA-0752-06-0283-I-1 (2/26/07)