



# U.S. Merit Systems Protection Board

## CASE REPORT

DATE: March 30, 2007

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## BOARD DECISIONS

### [Nichol v. Office of Personnel Management, 2007 MSPB 82](#)

MSPB Docket No. AT-0842-06-0480-I-1

March 22, 2007

#### **Retirement**

- Annuities
- Definitions

**HOLDING:** To calculate an individual's annuity under FERS if she had some part-time service, the "average pay" is determined by using the annual rate of basic pay that one would have for full-time service; next, the resulting annuity "benefits" are prorated to reflect the period of part-time service.

The appellant retired from federal service with a combination of full-time Civil Service Retirement System (CSRS) service and part-time CSRS Offset and FERS service. In calculating the appellant's gross monthly annuity, OPM used separate high-3 average salary amounts for her CSRS and her FERS service. The appellant appealed OPM's reconsideration decision, asserting that only one high-3 average salary for her entire career should have been used to calculate her annuity. The administrative judge affirmed OPM's decision.

On review, the Board found that the appellant's contention that she has only one high-3 pay amount is correct. The average pay for the computation of CSRS and FERS benefits, i.e., the "high-3" average pay, is the largest annual rate resulting from averaging the employee's rates of basic pay in effect over any 3 consecutive years of creditable service. The Board

determined that there are two steps performed to calculate an individual's annuity under FERS if she had some part-time service: The "average pay" is determined by using the annual rate of basic pay that one would have for full-time service. The next step in calculating the FERS portion of the annuity, or "benefit," is to prorate the benefit to reflect the period of part-time service. The Board therefore found that OPM erred in using separate high-3 average salary amounts for the appellant's CSRS and her FERS service and, thus, vacated the initial decision and remanded the appeal to OPM for recalculation of the annuity.

**Lizzio v. Department of the Army, 2007 MSPB 89**

MSPB Docket No. PH-0752-06-0546-I-1

March 27, 2007

**Settlement**

- Authority under/Effect of
- Breach
- Waiver of Rights

**HOLDING:** The principle that the Board is required to review an agency's decision on an adverse action solely on the grounds invoked by the agency does not apply to the agency's notice of intention to invoke the LCA; the Board is free to rely on different ground than the agency did in determining whether the appellant complied with the LCA.

The parties entered into a last-chance settlement agreement (LCA), in which the agency agreed to hold the appellant's removal in abeyance and the appellant agreed: to "[a]void any misconduct," and, if he failed to abide by the terms of the LCA, the agency would execute the original removal decision; to not contest or appeal any subsequent removal action; to "waive[s] the right to appeal or contest a supervisor's determination of future misconduct and agency action based upon misconduct for one year" (the "¶ 2(b)(2) waiver provision"); and to waive his right to file a grievance, Board appeal, and EEOC complaint of any actions taken under the agreement and actions prior to the signing of the agreement (the "¶ 2(b)(3) waiver provision"). The agency subsequently issued a "Notice of Intention to Invoke [LCA]" for "misconduct" based on the appellant's alleged rude and discourteous behavior to members of the public during the 1-year abeyance period. This notice stated that the appellant failed to "maintain the standards of personal conduct and professionalism required by AR 195-3 and CIDR 195-1." The agency then removed the appellant pursuant to the LCA.

On appeal, the administrative judge (AJ) found that the ¶ 2(b)(2) waiver provision was unenforceable as a matter of public policy. Following the hearing, the AJ found that the appellant had complied with the LCA, and that the agency was therefore not entitled to invoke the appellant's waiver of

appeal rights. Having further determined that the agency did not afford the appellant due process in removing him, the AJ reversed the action.

On review, the Board stated that the threshold issue in determining the Board's jurisdiction over this appeal is whether the appellant violated the LCA by engaging in misconduct. Insofar as ¶ 2(b)(2) might be construed as precluding the Board from addressing that issue, the Board agreed with the AJ's decision not to enforce it on public policy grounds. Thus, the appellant's claim that he did not breach the LCA by engaging in misconduct was properly before the Board.

Next, the Board found that the AJ erred in limiting the issue of the appellant's compliance to the grounds relied upon by the agency's determination that the appellant had engaged in misconduct, i.e., failure to "maintain the standards of personal conduct and professionalism required by AR 195-3 and CIDR 195-1." The principle that the Board is required to review an agency's decision on an adverse action solely on the grounds invoked by the agency does not apply to the agency's notice of intention to invoke the LCA because the resulting removal is not a new adverse action, but reinstatement of the removal that was held in abeyance, and the penalty of removal is then a product of the former misconduct, rather than a breach itself. Thus, the Board is free to rely on a different ground than the agency did in determining whether the appellant established that he complied with the LCA.

Here, regardless of whether the appellant violated AR 195-3, rude and discourteous behavior toward members of the public constitutes misconduct. Thus, the AJ's finding that the appellant was "rude and obnoxious" during his encounter with members of the public is sufficient to establish that the appellant failed to show that he did not breach the agreement. Accordingly, the Board upheld the waiver provision at ¶ 2(b)(3) of the LCA, and dismissed the appeal for lack of jurisdiction.

**[Foley v. U.S. Postal Service, 2007 MSPB 87](#)**

MSPB Docket No. PH-0353-06-0222-I-1

March 26, 2007

**Miscellaneous Agency Topics – Restoration to Duty**

**HOLDING: The Board set forth the test for establishing jurisdiction over an appeal under 5 C.F.R. § 353.304(c); the appellant failed to make a nonfrivolous allegation of jurisdiction over his restoration appeal because he did not nonfrivolously allege that the agency's reduction of his merit award for the period of time that he was receiving OWCP compensation constituted a denial of a right or benefit based upon length of service.**

The appellant filed an appeal with the Board alleging that the agency improperly reduced his merit pay award in FY 2005 for the period of time that

he was in leave without pay and receiving Office of Workers' Compensation Programs (OWCP) compensation. The administrative judge (AJ) found that the Board has jurisdiction in this appeal pursuant to 5 C.F.R. § 353.304(c) because the appellant alleged that the agency had failed to credit time spent on OWCP compensation for the purposes of rights and benefits based on length of service. However, the AJ dismissed the appeal without the hearing requested by the appellant upon finding that he had failed to show that he had been denied any rights or benefits based on length of service.

On review, the Board stated that 5 C.F.R. § 353.304(c) provides Board appeal rights to a partially recovered employee where the agency failed to credit time spent on compensation for the purposes of rights and benefits based upon length of service. To establish jurisdiction over an appeal under 5 C.F.R. § 353.304(c), the appellant must allege facts that, if proven, would show that: (1) He was absent from his position due to a compensable injury; (2) the agency restored him to duty on a part-time basis, to light duty, or to a position with less demanding physical requirements; and (3) the agency failed to credit time spent on compensation for the purposes of rights and benefits based upon length of service. The Board found that the appellant failed to make a nonfrivolous allegation of jurisdiction over his restoration appeal because he did not nonfrivolously allege that the agency's reduction of his FY 2005 merit award for the period of time that he was on LWOP and receiving OWCP compensation constituted a denial of a right or benefit based upon length of service; rather, it was undisputed that the award was similar to a bonus or premium pay. Accordingly, the Board modified the initial decision to dismiss the appeal for lack of jurisdiction.

**[Neice v. Department of Homeland Security, 2007 MSPB 85](#)**

MSPB Docket No. SF-0752-06-0030-I-1

March 26, 2007

**Whistleblower Protection Act**

**- Miscellaneous**

**Jurisdiction – Resignation/Retirement/Separation**

The appellant failed to establish that he was forced to resign because of intolerable working conditions. Thus, the Board lacks jurisdiction over his allegation that the agency coerced his resignation in retaliation for his protected disclosures. The Board forwarded the appellant's other allegations of whistleblowing reprisal to the regional office for individual right of action (IRA) appeal jurisdictional notice and for docketing and adjudication as an IRA appeal.

**[LaBoube v. Department of the Treasury, 2007 MSPB 91](#)**

MSPB Docket No. PH-315H-06-0221-I-1

March 27, 2007

## **Jurisdiction**

**- Probationers/5 U.S.C. § 7511(a)(1)(A)**

**HOLDING:** The appellant did not satisfy either prong of 5 U.S.C. § 7511(a)(1)(A), because at the time he was terminated, he had not completed the 1-year trial period nor 1-year of current continuous service; an agency's failure to provide accurate information at the time of appointment about the requirement to serve a trial period is no basis for finding that the trial period was waived or otherwise completed ahead of schedule.

The Board found that the appellant, a Part-Time Seasonal 3-year term Tax Examining Clerk, did not satisfy the first prong of 5 U.S.C. § 7511(a)(1)(A), because he had not completed the 1-year trial period when he was terminated and his prior service as a Clerk could not be credited toward completion of the trial period. An agency's failure to provide accurate information at the time of appointment about the requirement to serve a trial period is no basis for finding that the trial period was waived or otherwise completed ahead of schedule. The appellant did not satisfy the second prong of 5 U.S.C. § 7511(a)(1)(A), because he had not completed 1-year of current continuous service. Because the appellant failed to make nonfrivolous allegations that the agency terminated him based on marital status discrimination, the Board affirmed, as modified, the initial decision that dismissed the appeal for lack of jurisdiction.

**[Livingston v. Office of Personnel Management, 2007 MSPB 84](#)**

MSPB Docket No. DC-844E-06-0325-I-1

March 26, 2007

## **Timeliness**

**- e-appeal**

**- Incapacity**

**Retirement – Procedures/Miscellaneous**

**Miscellaneous Topics – USERRA/VEOA/Veterans' Rights**

**HOLDING:** The appellant showed good cause for his untimely filed petition for review because he attempted to make a timely electronic filing on the Board's e-filing site, he was able to exit the Board's website without receiving a clear warning that he had not yet filed his pleading, and he acted with due diligence in submitting the relevant documents when he became aware of the program; the removal appeal was forwarded to the regional office to provide *Lacy* notice and jurisdictional notice regarding his USERRA claim as either an affirmative defense or a stand-alone appeal; veterans' preference rules appear only to apply to hiring and retention during a reduction in force.

The appellant showed good cause for his untimely filed petition for review because: He attempted to make a timely electronic filing on the Board's e-filing site (an e-Appeal number was created); he was able to exit the Board's website without receiving a clear warning that he had not yet filed his pleading; and he acted with due diligence in submitting the relevant documents when he became aware of the problem. The administrative judge (AJ) correctly dismissed the appellant's disability retirement appeal for lack of jurisdiction because the appellant did not show that he requested reconsideration by the Office of Personnel Management.

The Board vacated the initial decision's dismissal of the removal appeal as untimely filed (25-years late) and forwarded this appeal to the regional office to provide notice and determine whether, under *Lacy v. Department of the Navy*, 78 M.S.P.R. 434 (1998), the appellant suffers from a medical condition that may have affected his ability to file an appeal in a timely manner. Because the appellant checked a box on the petition for appeal form indicating that he was raising Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at 38 U.S.C. §§ 4301-4333) (USERRA) in connection with the removal action, in the new appeal against the employing agency, the AJ shall provide appropriate jurisdictional notice regarding the appellant's USERRA claim as either an affirmative defense or a stand-alone appeal. Should the AJ reach the merits of the removal, the appellant can attempt to show that his removal violated veterans' preference rules and thus was not "in accordance with law," under 5 U.S.C. § 7702(c)(2)(C). However, the veterans' preference rules appear only to apply to hiring and retention during a reduction in force. The Board found that the appellant failed to establish jurisdiction over his Veterans Employment Opportunities Act of 1998 claim because he did not show that he exhausted his administrative remedies with the Department of Labor.

**[Horton v. Department of the Navy, 2007 MSPB 86](#)**

MSPB Docket No. PH-0752-06-0605-I-1

March 26, 2007

**Timeliness - Miscellaneous**

The Board found that the appellant did not constructively receive the agency's decision letter when it was delivered to his rooming house and accepted by an unauthorized and unrelated person there while the appellant was on vacation because the appellant did not provide the rooming house address to the agency as his mailing address and he specifically instructed the agency to mail the decision letter to his e-mail address. Therefore, the Board found that the appellant could not reasonably be charged with receipt of the notice prior to the date on which he actually received that letter. Because the appellant filed his appeal 30 days thereafter, his appeal was timely.

**[Rogers v. U.S. Postal Service, 2007 MSPB 83](#)**

MSPB Docket No. SF-0752-06-0642-I-1

March 26, 2007

**Timeliness – e-Appeal**

The appellant showed good cause for his untimely filed petition for appeal because: He attempted to make a timely electronic filing on the Board’s e-filing site (an e-Appeal number was created); he was able to exit the Board’s website without receiving a clear warning that he had not yet filed his pleading; and he acted with due diligence in submitting the relevant documents when he became aware of the problem. The Board excused the appellant’s failure to submit this evidence and argument below, because the acknowledgment order did not put him on notice of the relevant timeliness issue, i.e., whether the appellant’s e-filing activities constituted a “filing.”

**[Special Counsel ex rel. Waddell v. Department of Justice, 2007 MSPB 90](#)**

MSPB Docket No. CB-1208-06-0020-U-5

March 26, 2007

**Special Counsel Actions - Stays**

The Board granted the Office of Special Counsel’s (OSC) request for an indefinite extension of the previously granted stay of Waddell’s reassignment in light of OSC’s filing of a corrective action.

**[Ferguson v. Department of the Air Force, 2007 MSPB 88](#)**

MSPB Docket No. SF-0752-00-0050-I-1

March 26, 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 (6-years late) without good cause shown notwithstanding his claims of ineffective representation and mental or physical incapacity, or his arguments concerning the merits of his appeal,.

**Marshall v. Department of the Army, 2007 MSPB 92**

MSPB Docket No. SF-0752-00-0050-I-1

March 28, 2007

**Compliance – Settlement-Related  
Settlement - Breach**

The Board granted the agency's petition for enforcement, rescinded the parties' settlement agreement, and reinstated the appeal because the appellant did not contest the administrative judge's finding that he materially breached the settlement agreement and this finding was supported by the record.

**DISMISSALS-SETTLEMENT/WITHDRAWN**

*Miller v. U.S. Postal Service*, CH-0752-06-0813 I-1 (3/22/07)

*Alexander v. Department of Transportation*, SF-0752-06-0039-I-1 (3/23/07)

*Filardi v. Department of Veterans Affairs*, NY-1221-06-0116-W-1 (3/23/07)

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

The following appeals were affirmed:

*Kincade v. Department of the Treasury*, 06-3342, BN-0752-01-0143-I-3 (3/28/07)

The following appeals were dismissed:

*Jackson v. Department of the Interior*, 07-3052, AT-0831-05-0900-I-2 (3/26/07)

A petition for rehearing was denied in the following cases:

*Abadia v. Office of Personnel Management*, 06-3297, DC-0831-03-0453-I-1 (3/23/07)

*Siwa v. Office of Personnel Management*, 06-3174, CB-1205-05-0024-U-1 (3/23/07)

The court recalled the mandate and reinstated the appeal:

*Herbert v. Office of Personnel Management*, 06-3422, PH-0831-06-0170-I-1 (3/28/07)

*Bloom v. Department of the Army*, 07-3102, DC-1221-05-0024-B-1 (3/28/07)