



U.S. Merit Systems Protection Board

CASE REPORT

DATE: June 8, 2007

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BOARD DECISIONS

[Wallace and Martin v. Department of Commerce, 2007 MSPB 141](#)

MSPB Docket Nos. DC-0752-05-0760-I-1;DC-0752-06-0094-I-1

June 4, 2007

Board Procedures

- Adjudicatory Error

Evidence

- Credibility

Jurisdiction

- Miscellaneous

HOLDING: An appointment allegedly made in violation of 5 U.S.C. § 3110 (which restricts the employment of relatives) constitutes a removal within the Board's jurisdiction where the appellant was: (1) an individual in the competitive service who, at the time the agency cancelled her appointment, had completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less; (2) she was qualified for the position; and (3) the restriction in section 3110 is not an absolute statutory prohibition to appointment. The Board will not give deference to an AJ's demeanor-based credibility determinations where they are inconsistent with the weight of the evidence and do not reflect the record as a whole. In the absence of a finding that appellant Wallace violated 5 U.S.C. §§ 2302(b)(7) and 3110 during the selection of appellant Martin, there is no basis for finding that appellant Martin's appointment was improper and therefore her removal must be cancelled.

The Board granted the appellants' petition for review and reversed their removals. The appeals relate to appellant Wallace's (Wallace) alleged improper involvement in the selection of her sister, appellant Martin (Martin), for the position of Human

Resources Specialist at a time when Wallace was detailed to a supervisory position in the agency's Office of Human Resources (OHR). The agency removed Wallace based on four charges: (1) conduct unbecoming a federal employee; violations of (2) 5 C.F.R. § 2635.502(the appearance of a loss of impartiality in the performance of official duties); (3) 5 U.S.C. § 3110(regarding the employment of relative); and (4) 5 U.S.C. § 2302(b)(7)(designating a violation of section 3110 as a prohibited personnel practice). The agency removed Martin because it found that her appointment was made in violation of 5 U.S.C. §§ 3110 and 2302. The agency also advised Martin that because her appointment was in violation of section 3110, she was not entitled to pay under that appointment.

The administrative judge (AJ) assigned to the case merged the four charges against Wallace into two charges and, after holding a hearing, sustained the charges and the penalty. He also found that the agency properly cancelled appellant Martin's appointment and that the appellants failed to prove their affirmative defenses (Wallace alleged sex discrimination and Martin alleged sex discrimination and retaliation for prior EEO activity).

On petition for review, the Board first addressed the issue of whether the cancellation of Martin's appointment constituted a "removal" for purposes of jurisdiction under chapter 75 and found that it did. The Board noted that an appellant, like Martin, whose appointment has been cancelled as unlawful and who is otherwise entitled to adverse action procedures, will only be deprived of such rights if the appointment was contrary to an absolute statutory prohibition such that the appointee was not qualified for appointment. The Board found that the prohibition against appointments in which a public official has engaged in nepotism in violation of 5 U.S.C. § 3110(b) is not absolute and therefore, even if Martin were appointed in violation of section 3110(b), her appointment was not contrary to an absolute statutory prohibition.

Regarding the merits of the charges against Wallace, the Board first noted that the mere fact that Wallace served as the agency's chief personnel officer at the time her subordinates in OHR selected Martin does not establish a violation of the nepotism statutes. Further, the agency presented no evidence that Wallace was actually involved in the hiring process. To the extent the agency alleged that Wallace advocated for her sister's appointment in violation of 5 U.S.C. §§ 2302(b)(7) and 3110, the Board found that the record does not support the allegation, and the AJ's contrary findings, although based on credibility determinations, may be overturned because they are inconsistent with the weight of the evidence. To the extent the agency charged Wallace with a violation of 5 C.F.R. § 2635.502 and therefore conduct unbecoming a federal employee, the regulation, which requires an employee's participation in a particular matter, is not implicated where, as here, the employee did not participate in the matter. The Board also found that because Wallace did not actually participate in the hiring process, the agency failed to prove that Wallace violated the regulation by not seeking prior authorization from ethics officials. The Board noted that the agency had already decided, prior to its selection of Martin, that if she were selected, she would be detailed out of OHR until Wallace left her supervisory detail to OHR, and the record reflects that the agency took this action following the selection of Martin. Finally, the Board

held that the agency failed to sustain the basis for Martin's removal because the justification for it, an appointment made in violation of the anti-nepotism rules, was not sustained by the Board. The Board found no basis to disturb the AJ's finding that the appellants failed to establish their affirmative defenses.

[Smith v. Department of Transportation, 2007 MSPB 142](#)

MSPB Docket No. AT-0752-05-0901-I-2

June 5, 2007

Adverse Action Charges

- **Theft/Misuse/Misappropriation of Government Property/Funds**
- **Constitutional Issues/ Due Process**
- **Due Process**
- **First Amendment**

HOLDING: Appellant's innocent acquisition of incriminating documents from an anonymous source and subsequent disclosure of them to his attorney and EEO investigator in the course of pursuing his discrimination complaint was permissible.

Appellant's disclosure to his attorney and EEO investigator of information improperly accessed from confidential agency files and not relevant to his EEO complaint violated the agency's standards of conduct concerning the safeguarding and use of information, documents and records. Where an appellant's EEO claim is personal in nature and limited to his own situation, it is not a matter of public concern and therefore the appellant's speech is not protected by the First Amendment. The agency's action does not constitute an impermissible restriction on any Fifth Amendment due process right to retain counsel in civil litigation where the appellant had other legal avenues available to him to obtain the information necessary for his EEO complaint.

The appellant is a Labor Relations Manager whose duties and responsibilities included the EEO program. Following his non-selection for a Supervisory Program Analyst position, he filed an EEO complaint alleging that his non-selection was the result of race discrimination and reprisal for prior EEO activity. During the investigation of his complaint, questions posed to the selectee for the Supervisory Program Analyst position indicated that private information about the selectee's prior EEO complaints had been compromised. At the completion of an internal investigation, the agency suspended the appellant for 30 days based on charges of unauthorized use of official government information, unauthorized use of official government documents obtained through government employment, unauthorized removal and possession of a personal government document, and misstating information for another's government claim.

On appeal to the Board, the administrative judge found that the agency failed to prove any of its charges, she rejected the appellant's claim of race discrimination but found that the appellant had established that the agency's action was taken in retaliation

for his prior EEO activity. The Board majority reversed the initial decision (ID) to the extent it declined to sustain charges 1-3 and found that the agency retaliated against the appellant, but affirmed the ID to the extent it declined to sustain charge 4.

With respect to Charge 1, unauthorized use of official government information, the Board did not sustain specification 1 concerning the appellant's release to his attorney and the EEO investigator of information about the selectee's EEO complaints because the Board found that the appellant innocently acquired the information from an anonymous source and did not misuse the information by disclosure to his attorney and the EEO investigator. Thus there was no violation of the agency's standards of conduct relating to the safeguarding and use of agency information. The Board came to the opposite conclusion with respect to Specification 2 of Charge 1, concerning the appellant's disclosure of details regarding the proposed removal of another employee for false statements. The Board found that this information was improperly obtained from confidential agency files to which the appellant had access as part of his duties and that the information was irrelevant to the appellant's EEO complaint. Thus, the Board found that the disclosure was not protected activity and sustained Specification 2. The Board, having sustained Specification 2 of Charge 1, sustained Charge 1. Similarly, the Board found not relevant to the appellant's EEO complaint and improperly obtained a memorandum regarding his supervisor's poor performance, a memorandum the appellant discovered in his supervisor's office while searching for another document the supervisor had authorized him to obtain. Accordingly, the Board found the appellant's disclosure was not protected activity and sustained the agency's charge of unauthorized use. Finally, the Board sustained Charge 3, which related to the removal of the memorandum noted in Charge 2 and copying that document for the appellant's own use.

With respect to the appellant's constitutional claims, the Board found that where an EEO complaint is personal in nature and limited to the complainant's own situation, it is not a matter of public concern. The Board also found that, even if the appellant's speech addressed a matter of public concern, the agency's interest in promoting the efficiency of the service outweighs the appellant's interests as a citizen and therefore agency's discipline of the appellant did not violate his First Amendment rights. The Board also rejected the appellant's claim that the agency violated his Fifth Amendment right to due process by requiring pre-clearance of documents and information, thereby restricting the flow of communications between the appellant and his attorney and effectively precluding him from obtaining sound legal advice, noting that the appellant had other avenues available to him, such as the EEO investigation process. The Board applied a balancing test similar to that used in analysis of First Amendment claims and found that the agency's interest in protecting official information outweighs the appellant's interest in discussing the merits of his EEO complaint with his attorney, considering the manner in which the appellant obtained and handled the information.

The Board also rejected the appellant's claim that his suspension was retaliatory. The Board found that the deciding official's application of the *Douglas* factors indicates that the sustained misconduct caused the agency to lose trust in the appellant and his ability to safeguard sensitive personnel. The Board also found that the deciding official, although lobbied by other individuals with possible motives to retaliate,

himself had no motive to retaliate and that the seriousness of the appellant's misconduct was sufficient to outweigh any retaliatory motive.

Chairman McPhie issued a concurring opinion. Member Sapin issued a dissenting opinion, adopting the relevant portions of the AJ's decision.

[Byrne v. Department of Labor, 2007 MSPB 143](#)

MSPB Docket No. CB-7121-07-0007-V-1

June 5, 2007

Adverse Action Charges

- Performance-Based Actions

Arbitration/Collective Bargaining-Related Issues

- Review Authority of MSPB

Discrimination

- Physical/Mental Disability - Accommodation

HOLDING: Reasonable accommodation does not require an agency to lower production or performance standards. Upon determining that the appellant was not capable of meeting the productivity requirements of his position, the arbitrator correctly found that the appellant was not a qualified individual with a disability under the Americans with Disabilities Act because he could not perform the essential functions of his position with or without reasonable accommodation.

The appellant was removed from his Staff Attorney position with the agency's Employees' Compensation Appeals Board (ECAB) for unsatisfactory performance. He grieved his removal and asserted that he suffered from a mental disability and that the agency could accommodate his position by reducing his production requirements. The arbitrator denied the grievance and sustained the removal.

In his request for review, the appellant asserted that the arbitrator erroneously decided the disability discrimination claim. The Board, however, found that the arbitrator applied the correct legal analysis. Specifically, the Board found that reasonable accommodation does not require an agency to lower production or performance standards and, upon determining that the appellant was not capable of meeting the productivity requirements of his position, the arbitrator correctly determined that the appellant was not a qualified individual with a disability under the Americans with Disabilities Act because he could not perform the essential functions of his position with or without reasonable accommodation. The arbitrator did not err in concluding that the agency was not obligated to afford the appellant an opportunity to demonstrate acceptable performance under the performance standards that went into effect after the appellant's performance improvement period (PIP) ended, or in failing to address the appellant's performance with respect to the second critical element for which the agency placed him on the PIP. Accordingly, the Board sustained the arbitrator's decision.

[Dean v. Consumer Product Safety Commission, 2007 MSPB 144](#)

MSPB Docket Nos. AT-3443-05-0147-M-1; AT-3443-05-0179-M-1

June 5, 2007

Miscellaneous Topics

- USERRA/Veterans Rights

This case, involving non-selection claims brought under the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans Employment Opportunities Act (VEOA), was remanded to the Board by the Federal Circuit. The court directed the Board to determine whether the agency's practice of creating multiple certificates of eligibles and requiring applicants to submit more than one application in order to be included on more than one certificate, and selecting from only one certificate, violated USERRA or the appellant's veterans' preference rights. The Board, noting that resolution of these issues may concern facts in dispute, further remanded the case to the regional office for development of the record and a new adjudication. The Board noted that, in light of *Kirkendall v. Department of the Army*, 479 F.3d 830 (Fed. Cir. 2007) (en banc), the appellant should not be bound by his earlier election to proceed without a hearing.

[Brooks v. Department of the Treasury, 2007 MSPB 145](#)

MSPB Docket Nos. AT-3443-06-0957-I-1

June 5, 2007

Miscellaneous Topics

- USERRA/Veterans Rights

Without holding the hearing the appellant had requested, the administrative judge denied the appellant's request for corrective action under Uniformed Services Employment and Reemployment Rights Act (USERRA). While the appellant's petition for review was pending before the Board, the Federal Circuit issued *Kirkendall v. Department of the Army*, 479 F.3d 830 (Fed. Cir. 2007) (en banc), which held that USERRA claimants are entitled to a hearing before the Board. The Board found, consistent with *Kirkendall*, that the appellant is entitled to the hearing he requested. Accordingly, the Board remanded the appeal to the regional office for further adjudication.

[Giove v. Office of Personnel Management, 2007 MSPB 146](#)

MSPB Docket No. DE-844E-00-0370-C-2

June 5, 2007

Compliance

- Miscellaneous/Procedures

Miscellaneous Topics

- Compensatory/Consequential Damages

HOLDING: The Board has authority to review matters related to Thrift Savings Plan (TSP) accounts, including claims that an agency failed to take corrective actions it should have taken with respect to an account. Tax-related consequences of withdrawal of TSP funds due to denial of a disability retirement application are damages, and the Board lacks authority to award damages in a retirement appeal.

The appellant successfully appealed the denial of his disability retirement application by the Office of Personnel Management (OPM), and the Board ordered OPM to approve his application and make his annuity retroactive to his last day of pay. The appellant filed a petition for enforcement stating he had withdrawn \$61,000 from his TSP account between 1999 and 2004 and asking the Board to allow a 2006 tax-deductible contribution to his account in the same amount. OPM stated that it did not administer the TSP and moved to dismiss. The administrative judge (AJ) denied the petition on the ground that the Board lacks jurisdiction to review matters within the discretion of the TSP Board.

On petition for review, the Board held that its enforcement authority under 5 U.S.C. § 1204(a)(2) permitted it to review matters related to TSP accounts, including claims that an agency failed to take required corrective action with respect to such an account. At the same time, it found that compliance with its order in the appellant's appeal did not require any agency to permit the redeposit that the appellant requested. It found that, to the extent the appellant's withdrawal was related to OPM's denial of his disability retirement application, tax-related and other consequences of the withdrawal would represent damages from the disallowance. However, the Board held that it lacked authority to award damages in a retirement appeal and denied the appellant's petition for enforcement. The Board also found that other claims raised by the appellant would more appropriately be raised on appeal from a new reconsideration decision by OPM addressing them.

FEDERAL CIRCUIT AFFRIMANCES/DISMISSALS (NP)

The following appeals were dismissed:

Gibson-Michaels v. Federal Deposit Insurance Corporation, 07-3080, 07-3081, 07-3107; DC-0752-05-0633-C-1, DC-0752-05-0633-C-2, DC-0752-06-0515-I-1 (05/31/07).

Livingston v. Office of Personnel Management, 07-3197; DC-844E-06-0325-I-1 (05/31/07)

The following appeals were affirmed:

Labio v. Office of Personnel Management, 2006-3399; SF-0831-06-0249-I-1 (06/01/07)

Dichoso v. Office of Personnel Management, 2007-3055; SF-0831-06-0409-I-1
(06/05/01)

Stewart v. Merit Systems Protection Board and Department of Veterans Affairs, 2007-
3070; AT-0752-06-0585-I-1 (06/05/07)

Rods v. Department of the Interior, 06-3424; AT-0842-05-0695-I-2 (06/05/07)

Freeman v. U.S. Postal Service, 07-3026; BN-0752-03-0133-A-1 (06/05/01)

The following appeals were vacated and remanded:

Freund v. Department of the Air Force, 2006-3140; CH-315H-05-0773-I-1 (06/06/07)

Amato v. Department of the Army, 2005-3380; DC-3443-04-0299-I-2 (06/06/07)