U.S. Merit Systems Protection Board

CASE REPORT DATE: June 22, 2007

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BOARD DECISIONS

***Luzi v. Office of Personnel Management*, 2007 MSPB 158**
MSPB Docket No. AT-831E-06-0901-I-1
June 15, 2007

Retirement
- Disability Retirement
Defenses and Miscellaneous Claims
- Collateral Estoppel/Res Judicata/Law of the Case

In an initial decision that became final when neither party petitioned for review, the administrative judge (AJ) affirmed the Office of Personnel Management's (OPM) denial of appellant's application for disability retirement based on appellant's claim of Post-Traumatic Stress Disorder (PTSD). Appellant filed a second application for disability retirement, which OPM dismissed based on a finding that appellant's application relied on the same medical conditions previously rejected as a basis for disability retirement. On appeal, the AJ found that appellant's disability claim was barred by res judicata. The Board, however, found that appellant was arguing that his PTSD worsened after March 29, 2005, the date of the hearing in appellant's first appeal, and that he is entitled to a decision on the merits of this claim. Because of the lack of clarity in the record as to the basis of appellant's removal, which occurred after issuance of the initial decision in the original appeal, and in order to apprise the parties of their respective evidentiary burdens under *Bruner v. Office of Personnel Management*, 996 F.2d 290 (Fed. Cir. 1993), the Board found remand necessary.

***Liu v. Department of Agriculture*, 2007 MSPB 159**
MSPB Docket No. AT-315H-06-0986-I-1
June 19, 2007

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

HOLDING: Prior service under a temporary limited appointment may count toward completion of a later probationary or trial period.

Appellant served in a temporary appointment for five months and, without a break in service, was appointed to a career-conditional Biological Science Laboratory Technician position, subject to a one-year probationary period. The agency removed her, allegedly one-day prior to the end of her probationary period. The Board found that appellant's prior service pursuant to a temporary appointment did not count toward completion of the one-year of service required to establish employee status under 5 U.S.C. § 7511(a)(1)(A)(ii), but that her service in the temporary appointment could be "tacked" on to her nearly 12 months of service in her career-conditional appointment if it was rendered immediately prior to the career-conditional appointment, was in the same line of work in the same agency, and was completed with no more than one break in service of less than 30 days. Because the administrative judge did not address the issue of tacking under 5 U.S.C. § 7511(a)(1)(A)(i) and because appellant raised a nonfrivolous issue that she had completed one-year of service in her career-conditional position, the Board remanded the appeal to the Regional Office for a jurisdictional hearing.

***Dey v. Nuclear Regulatory Commission*, 2007 MSPB 160**
MSPB Docket No. DC-0432-07-0132-I-1
June 19, 2007

Board Procedures/Authorities
- Dismissals – With/Without Prejudice
Mootness

The agency removed appellant for unacceptable performance under 5 U.S.C. Chapter 43 and for misconduct under 5 U.S.C. Chapter 75. Appellant appealed the Chapter 43 removal to the Board and sought arbitration of the conduct removal. Because the administrative judge (AJ) found that the arbitration decision "could effectively moot" the chapter 43 appeal, she dismissed that appeal without prejudice, over the objection of appellant, and ordered appellant to notify her when a final arbitration decision had been issued in the conduct removal appeal.

The Board found that it was inappropriate to allow the refiling date to be solely contingent on the issuance of a final arbitration decision because a dismissal without prejudice should avoid open-ended periods for resolving appeals. Additionally, the Board found that the arbitration decision would not effectively moot the Chapter 43 appeal because appellant might be able to obtain consequential damages or referral to the Office of Special Counsel if he were able to prove his whistleblower claim. Accordingly, the Board vacated the initial decision and remanded for adjudication.

***Solomon v. Department of Agriculture*, 2007 MSPB 161**
MSPB Docket No. DC-0752-07-0020-I-1
June 19, 2007

Board Procedures/Authorities
- Adjudicatory Error
Jurisdiction
- Resignation/Retirement/Separation

Appellant retired on disability retirement after a lengthy period of paid leave and leave without pay but subsequently alleged that her retirement was involuntary because the agency failed to accommodate her disability. The administrative judge (AJ) found that appellant failed to prove that her retirement was involuntary.

The Board found that the AJ erred by failing to consider whether appellant made a nonfrivolous allegation of adverse action jurisdiction but instead proceeded directly to the ultimate question of whether appellant proved by a preponderance of the evidence that the Board has jurisdiction over the appeal. The Board, however, found the error harmless because appellant failed to make a nonfrivolous allegation of jurisdiction because she did not allege that there was an accommodation available on the date of her separation, either at or below her grade or level, that would have allowed her to continue working and that the agency did not provide her with that accommodation.

***Parrish v. Department of the Interior*, 2007 MSPB 162**
MSPB Docket No. DE-0351-05-0293-M-1
June 20, 2007

Jurisdiction
- Miscellaneous
Miscellaneous Topics
- Statutory/Regulatory/Legal Construction

HOLDING: Failure of the agency to publish in the Federal Register any document specifically identifying the regulatory RIF appeal provisions it intended to waive or supersede did not satisfy the statutory requirement of Public Law No. 105-77 for eliminating Board jurisdiction over RIF appeals of SIPI employees. Because the agency failed to comply with the statutory provision requiring explicit waiver of Board appeal rights, the asserted waiver is ineffective and the Board retains jurisdiction to hear appellant's RIF appeal.

Appellant filed a reduction-in-force (RIF) appeal, which the Board dismissed for lack of jurisdiction on the basis that the legislation authorizing the Southwestern Indian Polytechnic Institute (SIPI) to establish a demonstration project did not provide for Board appeals of RIF separations and did not authorize the Board to enforce the procedural requirements of that legislation or to nullify actions taken pursuant to that legislation. The Federal Circuit vacated the Board's decision, holding that the Board has the authority to analyze an agency action to ensure that the agency has complied with the requirements Congress imposed as a condition for limiting the Board's jurisdiction. The Court remanded for the Board to determine whether the agency

satisfied the statutory requirements for eliminating Board jurisdiction over RIF appeals and, if not, the effect of such noncompliance.

The Board found that the agency did not satisfy the statutory requirements for eliminating Board jurisdiction over RIF appeals of SIPI employees because it did not provide an explicit waiver in its Personnel Manual describing its alternative personnel system, in its regulations describing that system, or in the Federal Register notices regarding the system. The Board found that the agency's failure to comply with the statutory requirements rendered the purported waiver of Board appeal rights ineffective. Accordingly, the Board found it had jurisdiction over appellant's RIF appeal and remanded the appeal to the field office for further proceedings.

COURT DECISIONS

***Bowles v. Russell*, 2007 WL 1702870**
Supreme Court Docket No. 06-5306
June 14, 2007

HOLDING: The statutory time limit for filing a notice of appeal of a district court's denial of a writ of habeas corpus is jurisdictional and therefore is not subject to forfeiture or waiver.

After a district court denied petitioner's federal habeas corpus application, he moved to reopen the period during which he could file his notice of appeal under Fed. Rule App. Proc. 4(a)(6) which allows district courts to extend the filing period for 14 days from the date the district court grants the order to reopen. The District Court granted petitioner 17 days in which to file his notice of appeal and he filed within the 17 days allowed but 2 days beyond the 14-day statutory time limit and the Sixth Circuit dismissed the case for lack of jurisdiction. The Supreme Court, in a 5-4 decision, affirmed, finding that the statutory time limit established by Congress in 4(a)(6) is jurisdictional and therefore, unlike court-created procedural rules, is not subject to equitable exceptions. Thus, the Court rejected petitioner's argument that his untimeliness should be excused under the "unique circumstances" doctrine which purports to create an exception to a jurisdictional rule.

Quiocson v. Office of Personnel Management
Fed. Cir. No. 2007-3084; MSPB Docket No. SF-0831-06-0449-I-1
June 19, 2007

Retirement
- Survivor Annuity

HOLDING: The exception in 5 U.S.C. § 8333(b) to the requirement that at least one of the two years prior to separation be covered service applies only to waiver of that requirement for an employee who served in a covered position.

The Court held that petitioner was not entitled to a survivor annuity because her husband, who held a series of temporary appointments, never served in a position covered by the Civil Service Retirement System (CSRS). The Court rejected petitioner's argument, based on 5 U.S.C. § 8333(b), that because her husband died while in service he did not need to meet the covered service requirement. The Court approved the Board's interpretation of section 8333(b) that the exception applies only to waive the time-in-service requirement for a covered employee but does not eliminate the requirement that the employee must have served in a covered position.

Finding that a retroactive deposit cannot convert a non-covered position into a covered position, the Court rejected petitioner's argument that she should have been allowed to make a deposit on her husband's behalf to overcome the problem that no retirement deductions were taken from his pay. The Court also rejected petitioner's argument that her late husband's tenure group was evidence that his position qualified as "covered service."

FEDERAL CIRCUIT AFFRIMANCES/DISMISSALS (NP)

The following cases were affirmed:

McKnight v. Merit Systems Protection Board, 2007-3018; AT-3443-05-0157-I-1 (06/11/07).

Williams v. Merit Systems Protection Board and Army, 2007-3021; DE-0752-05-0185-I-2 (06/14/07)

The following cases were dismissed:

Martin v. Department of the Interior, 2007-3222; AT-0752-06-0949-I-1 (06/14/07)

Foret v. Department of the Army, 2007-3221; DA-0752-06-0195-I-1 (06/15/07)

Perfilio v. Department of the Air Force, 06-3369; CH-3443-05-0492-I-1 (06/18/07)

Nichols v. Merit Systems Protection Board, 06-3403; DE-0752-03-0454-C-1 (06/19/07)