U.S. Merit Systems Protection Board

CASE REPORT DATE: July 6, 2007

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BOARD DECISIONS

***New v. Department of Veterans Affairs*, 2007 MSPB 166**
MSPB Docket No. PH-0353-95-0695-X-1
June 28, 2007

Compliance

In his petition for enforcement, the appellant raised numerous issues of compliance with the Board's final order in this restoration appeal. Following discovery and several status conferences, the appellant agreed that all her compliance issues had been resolved, except for two: (1) retroactive promotions and/or step increases; and (2) reimbursement for educational expenses. The Chief Administrative Judge granted the appellant's petition as to the first issue, but denied her request for reimbursement for educational expenses, and referred the case to the full Board for enforcement. The agency filed evidence that it had implemented the CAJ's Recommendation by granting the appellant 7 within-grade increases. The appellant responded, contending that the agency incorrectly computed her back pay and annual and sick leave entitlement.

Holding: The agency is now in compliance with the Board's final order. The appellant's challenge to the back pay calculations was based on the mistaken assumption that she was entitled to back pay during the period preceding her request for restoration. During the proceeding before the CAJ, the appellant's representative did not raise any issue relating to leave balances, and so no such issues can now be raised.

***Greenup v. Department of Agriculture*, 2007 MSPB 167**
MSPB Docket No. SF-1221-06-0855-W-1
June 28, 2007

Jurisdiction
- Resignation/Retirement/Separation
Whistleblower Protection Act
- Coverage
- Personnel Actions

The appellant resigned from her position as a Program Technician with the Morrow County Office of the Farm Service Agency, a component of the U.S. Department of Agriculture. She filed a complaint with the Office of Special Counsel (OSC) alleging that her County Office Supervisor and the USDA retaliated against her for making whistleblowing disclosures. The administrative judge dismissed the appeal for lack of jurisdiction. The Board reversed and remanded for further adjudication.

Holdings: (1) The Board lacks jurisdiction over the appellant's resignation as a constructive removal in an adverse action appeal under 5 U.S.C. § 7512 because she was not an "employee" under 5 U.S.C. §§ 2105(a) and 7511(a); (2) the Board lacks jurisdiction over the appellant's IRA appeal in regard to her allegations that personnel actions were taken against her while employed by the County Committee because, at the time of the alleged retaliatory actions, she was not she was not a covered employee, former employee, or applicant for employment; (3) the AJ erred in dismissing the IRA appeal with respect to allegations that the agency retaliated against her by not selecting her for a secretarial position in the Office of General Counsel, after she had resigned from her County Committee Program Technician position; and (4) the appellant otherwise satisfied jurisdictional requirements, i.e., she made a nonfrivolous allegation that she made one or more whistleblowing disclosures, and that such disclosures were a contributing factor in the agency's decision to take or fail to take a covered personnel action.. Regarding the third holding, the WPA does not require that the disclosure must have been made when the individual seeking protection was either an employee or applicant for employment in a covered position.

***Heckman v. Department of the Interior*, 2007 MSPB 168**
MSPB Docket No. SF-3443-06-0791-I-1
June 28, 2007

Board Procedures
- Authority of AJs/Board
- Sanctions
Hearings
- Right to a Hearing

In challenging his non-selection for a position with the agency, the appellant alleged retaliation for whistleblowing disclosures and made claims under the Veterans Employment Opportunities Act (VEOA) and the Uniformed Services Employment and Reemployment Rights Act (USERRA). In her Acknowledgment Order, the AJ ordered the appellant to submit evidence and argument to establish jurisdiction over his various claims. When the appellant did not respond to this order, the AJ issued a second order, to which the appellant filed two responses. The AJ issued another order directing the appellant to submit additional information concerning his USERRA and whistleblower claims. When the appellant failed to respond timely to that order, and after the AJ attempted unsuccessfully to reach the appellant by telephone, she ordered the appellant to show cause why his appeal should not be dismissed for failure to prosecute. After receiving no response to the show-cause order, the AJ cancelled the appellant's requested hearing and determined that the appellant had waived his USERRA and whistleblower claims. The day after the deadline for submitting additional evidence, the appellant registered as an e-filer, and filed a pleading stating that he had understood he would receive electronic notice of MSPB issuances because he had registered as an e-filer in a previous appeal, that he had not received the AJ's earlier orders because he had been away from his home address and did not receive his mail due to a misunderstanding with the Postal Service, and that he had only received the AJ's most recent order the day before he filed his response. He requested that the AJ reopen the record and reschedule his hearing.

The AJ issued an initial decision that: (1) dismissed the appellant's VEOA claim for failure to state a claim upon which relief can be granted; (2) rejected the appellant's request to reopen the record, finding "incredible" his expectation that he would receive electronic notification of pleadings and orders; and (3) found that the appellant failed to make adequate arrangements to receive his mail.

The Board affirmed the initial decision as modified, still dismissing the appeal.

Holding: The AJ did not abuse her discretion by cancelling the appellant's requested hearing for noncompliance with her orders, or by dismissing the appellant's USERRA and whistleblower claims as abandoned. Even if the AJ had erred by cancelling the hearing, the appellant was not

prejudiced because there is no genuine issue of material fact concerning his VEOA claim. Although the Board's regulations do not specifically require an appellant to register separately as an e-filer every time he files a new appeal, having received the Acknowledgment Order and a subsequent order by Postal mail only, he could not have reasonably maintained his assumption that he would receive notices regarding his appeal electronically. The Board agreed with the AJ's determination that the appellant had failed to make adequate arrangements for the handling of his mail. The dismissal of the appellant's USERRA and whistleblower claims was not an abuse of discretion where the appellant failed to comply with multiple orders over a period of nearly 2½ months.

***Cadman v. Office of Personnel Management*, 2007 MSPB 169**
MSPB Docket No. CH-844E-07-0002-I-1
June 28, 2007

Retirement
- Disability Retirement

After sustaining an on-the-job injury as a City Letter Carrier, the appellant accepted the Postal Service's offer of a position as a "Full-time Regular Mail Processing Clerk (modified)," which was consistent with her medical restrictions. The appellant later filed an application for disability retirement with OPM, stating that, while the Postal Service had accommodated her neck and back pain, she still experience "much discomfort . . . and there was nothing anyone can do about [her] body pain, especially the lower back, loss of eye sight and the constant fatigue." OPM found that the appellant's medical evidence lacked objective clinical findings and failed to establish that her illnesses were severe enough to cause her service deficiency in her position under the accommodations provided by the agency. On appeal, the AJ affirmed, finding that there was insufficient medical evidence to show that the appellant's conditions prevented her from performing the duties of a Modified Clerk.

Holding: Remand was necessary to determine the appellant's position of record when she applied for disability retirement—the Modified Clerk position she accepted in 2003, the City Letter Carrier position, or some other position, citing *Ancheta v. Office of Personnel Management*, 92 M.S.P.R. 640 (2002), in which the Board held that a modified job in the Postal Service that does not "comprise the core functions of an existing position" is not a "position" or a "vacant position" for purposes of determining eligibility for disability retirement.

***Felton v. Department of the Air Force*, 2007 MSPB 170**
MSPB Docket No. AT-0752-07-0285-I-1
June 28, 2007

Timeliness
- Mixed Cases

Effective July 18, 2006, the agency removed the appellant from his position based on a charge of unauthorized absence. The appellant filed his appeal on December 29, 2006, stating that he had filed a timely formal complaint of discrimination with the agency. In his Acknowledgment Order, the AJ advised the appellant of the Board's time limits under 5 C.F.R. §§ 1201.22(b) and 1201.154(b), and ordered the appellant to submit evidence and argument that the appeal was timely filed or that good cause to excuse the delay existed. The appellant did not respond to the Acknowledgment Order. The agency moved to dismiss the appeal as untimely, stating that the appellant had not filed a formal complaint of discrimination with the agency regarding the removal. The AJ issued an initial decision finding that the appeal was untimely filed without good cause shown.

Holding: Remand was necessary because the Board could not determine on the existing record whether the appellant filed a formal complaint or whether the appeal was timely. Although the agency representative stated that the appellant had not filed a formal complaint, this submission was not sworn and bore no indication that the agency representative had any personal knowledge of the appellant's EEO activity. Although the appellant did not respond to the Acknowledgment Order, he did state in the appeal that he had filed a formal complaint of discrimination.

***Graves v. U.S. Postal Service*, 2007 MSPB 171**
MSPB Docket No. DC-0752-06-0828-I-1
June 29, 2007

Hearings
- Right to a Hearing
- Waiver

The appellant timely appealed his removal for unsatisfactory attendance/absence without permission. On the day before the scheduled hearing date, the appellant filed a handwritten statement that he wanted to withdraw from the hearing and that he would file a written statement in support of his appeal. He added, "However[,] the appeal trail is still active." The AJ decided the case on the written record after giving both parties an opportunity to submit additional evidence and argument. On petition for review, the appellant argued that he was denied the opportunity to call witnesses.

Holding: Remand is necessary because it is not clear from the record that the appellant knowingly and voluntarily waived his right to a hearing. Because there is a strong policy in favor of granting an appellant a hearing on the merits of his case, withdrawal of a hearing request much come by way of clear, unequivocal, or decisive action, and a decision to withdraw a hearing request must be informed, i.e., the appellant must be fully apprised of the relevant adjudicatory requirements and options, including the right to request a postponement or continuance of the hearing or a dismissal of the appeal without prejudice to its timely refiling. The appellant's statement that "the [appeal] trail is still active" raises doubts as to whether he fully understood that he was completely waiving his right to a hearing.

COURT DECISIONS

Lary v. United States Postal Service
No. 2006-3050
July 3, 2007

The petitioner, Robert H. Lary, Jr. died after the court issued its original opinion in this case, *Lary v. U.S. Postal Service*, 472 F.3d 1363 (Fed. Cir. 2006). Robert H. Lary, Sr., his father and personal representative, moved to be substituted as the petitioner, and the government petitioned for rehearing, asking the court to vacate the original position and dismiss the appeal as moot. The court granted the motion to substitute and denied the government's motion. The court briefly explained its reasons for denying the government's motion for rehearing.