U.S. Merit Systems Protection Board

CASE REPORT DATE: July 27, 2007

Note: These summaries are descriptions prepared by individual MSPB employees. They do not represent official summaries approved by the Board itself, and are not intended to provide legal counsel or to be cited as legal authority. Instead, they are provided only to inform and help the public locate Board precedents.

BOARD DECISIONS

***Paige v. United States Postal Service*, 2007 MSPB 176**
MSPB Docket No. AT-3443-07-0156-I-1
July 20, 2007

Jurisdiction
- Resignation/Retirement/Separation
- Excepted Service

The appellant resigned from his position as a PS-3 Custodial Laborer, and the agency denied his subsequent requests for reinstatement. On appeal to the Board, the appellant alleged that his supervisors had told him that, as long as they were in their positions, he could return to his position, and that he resigned based on these promises. The administrative judge (AJ) issued an initial decision dismissing the appeal for lack of jurisdiction, analyzing the case as a denial of reinstatement or restoration under 5 C.F.R. Part 353.

The Board denied the appellant's petition for review (PFR), but reopened the appeal on its own motion to clarify the AJ's jurisdictional analysis. It affirmed the initial decision as modified, still dismissing the appeal for lack of jurisdiction.

Holding: A resignation constitutes a removal when it is the result of an agency's misleading statements on which the employee relied. Here, the appellant had made a non-frivolous allegation that his resignation was involuntary because he received assurances from his supervisors and a Human Resources representative that he would be rehired when he had resolved his personal issues, and that he relied to his detriment on these promises. Nevertheless, the Board lacks jurisdiction because it is undisputed that the appellant was not a preference eligible, a management or supervisory employee, or an

employee engaged in personnel work in other than a purely nonconfidential clerical capacity.

***Steinmetz v. United States Postal Service*, 2007 MSPB 178**
MSPB Docket No. DE-0353-05-0429-I-1
July 20, 2007

Miscellaneous Agency Actions
- Restoration to Duty

The appellant, a Parcel Post Distribution Clerk, sustained an on-the-job injury and began receiving workers' compensation benefits effective August 24, 1998. The agency separated him in February 2003 based on his compensable injury. OWCP terminated his benefits in July 2005, when it found that he was fully recovered and able to perform the duties of his former position. The agency offered the appellant restoration under 5 C.F.R. § 353.301(b), as an employee who had fully recovered more than 1 year from the date his eligibility for OWCP benefits began. The appellant responded that the offer was invalid, asserting that he had was entitled to restoration as an employee who fully recovered within 1 year, and the offer expired without acceptance. On appeal to the Board, the AJ conducted a hearing, after which she determined that the appellant had not fully recovered within 1 year, and was therefore entitled only to priority consideration for reemployment under 5 C.F.R. § 353.301(b), and provided him with an opportunity to establish Board jurisdiction under that provision. The appellant declined to do so, insisting that he had fully recovered within 1 year. The initial decision dismissed the appeal for lack of jurisdiction.

The Board denied the appellant's PFR, but reopened the case on the Board's own motion to clarify the standard for establishing Board jurisdiction over restoration appeals such as this one. The Board reversed the initial decision's dismissal for lack of jurisdiction, but found on the merits that the agency did not violate the appellant's restoration rights.

Holding: To establish jurisdiction over an appeal in which an appellant alleges a denial of restoration as an employee who fully recovered within 1 year of sustaining a compensable injury, the appellant must make non-frivolous allegations that: (1) He is an employee of an executive branch agency; (2) he suffered a compensable injury; (3) he fully recovered from the compensable injury within 1 year from the date his eligibility for compensation began; (4) the agency failed to restore him or improperly restored him; and (5) if he was separated from his position prior to the alleged failure to restore or improper restoration, his separation was from a position without time limitation and substantially related to the compensable injury. The Board found that the appellant had made non-frivolous allegations of all these elements, and therefore established jurisdiction. Regarding the 3d and 4th elements, the record showed that the appellant became eligible for OWCP benefits

August 24, 1998, that the agency offered him an OWCP-approved rehabilitation position in May 1999, that he accepted the position in July 1999, but that the agency withdrew the offer and placed him on administrative leave before he reported to the new assignment. On the merits, however, the evidence showed that the agency did not violate the appellant's restoration rights because the record indicates that OWCP did not consider the appellant to be fully recovered when he was offered the rehabilitation job in 1999.

***Jinn v. Department of Justice*, 2007 MSPB 177**
MSPB Docket No. PH-0353-06-0569-I-1
July 20, 2007

Miscellaneous Agency Actions
- Restoration to Duty

The appellant is a WS-14 General Foreman with a Federal Bureau of Prisons' Federal Medical Center. Effective March 11, 2005, the agency "assigned" the appellant to the Escort Cadre of Correctional Services pending the resolution of an administrative investigation into possible wrongdoing by the appellant. Three days later, the appellant sustained a back injury while performing escort duties, for which he received workers' compensation benefits. In March 2006, the appellant was cleared to return to work, and the agency issued an SF-50 returning him to his former position. The agency immediately assigned the appellant to phone monitoring duties pending the completion of the administrative investigation that had started a year earlier, which had not been completed. While performing these duties, the appellant re-injured himself in April 2006, and was assigned light duty in the phone monitoring position. In July, he was cleared by his doctor to return to full-duty status, but the agency kept him performing phone monitoring duties.

On appeal to the Board, the appellant alleged that the agency violated his restoration rights by failing to restore him to the duties of his WS-14 General Foreman position after his full recovery from a compensable injury, instead indefinitely reassigning him to phone monitoring duties in which he was "unable to work within his appointed job description[,]", "denied the opportunity to develop managerial skills," and where "his daily work ha[d] been reduced to a set of menial tasks . . . ." The agency countered that the appellant has at all times encumbered his General Foreman position, with the pay and grade associated with that position. The AJ dismissed the appeal for lack of jurisdiction without conducting a hearing, finding that the Board lacks jurisdiction over the agency's detailing and reassigning the appellant to another position at the same grade and pay. On PFR, the appellant asserts that the agency improperly restored him, in that his position, status, duties, seniority, and responsibilities as a phone monitor were not equivalent to those of his WS-14 General Foreman position.

Holding: Although the AJ erred in applying a "preponderance of the evidence" standard to the appellant's allegations of jurisdiction, instead of the proper standard of making non-frivolous allegations, that error was harmless. There was nothing improper in the agency assigning the appellant duties other than his supervisory duties as a General Foreman. The reason was the agency's ongoing investigation into possible wrongdoing on the appellant's part, not his compensable injury. To require restoration to his General Foreman duties would place the appellant in a better position than he would have been had he not been absent from the agency due to injury. Accordingly, the Board affirmed the initial decision as modified, still dismissing the appeal for lack of jurisdiction.

***Cranston v. United States Postal Service*, 2007 MSPB 181**
MSPB Docket No. PH-0353-06-0422-I-1
July 20, 2007

Timeliness
- Notice of Time Limit/Appealable Matter

The appellant suffered a compensable injury in 1990. In 1992, he accepted the agency's offer of a modified position. The agency abolished the appellant's modified position in November 2002, and the appellant made several subsequent requests for restoration. In a letter dated January 16, 2003, the agency notified the appellant that it was unable to accommodate his request for limited duty. This letter did not notify the appellant of any appeal rights to the Board. The agency removed the appellant effective January 23, 2006, due to his medical inability to work. Thereafter, the appellant initiated equal employment opportunity pre-complaint counseling with the agency, which issued an April 18, 2006 final interview letter that notified the appellant that he may have right to appeal some of his claims to the Board. The appellant filed this appeal on May 2, 2006.

The appellant conceded that the Board lacked jurisdiction over his removal because he was not a preference-eligible employee, but asserted a claim of a denial of restoration following partial recovery. The agency moved to dismiss the appeal as untimely filed. The appellant cited *Shiflett v. U.S. Postal Service*, 839 F.2d 669 (Fed. Cir. 1988) for the proposition that the time limit for filing his restoration appeal never began to run because the agency never informed him of his appeal rights. The AJ dismissed the appeal as untimely filed without good cause shown, despite the agency's failure to provide a notice of appeal rights, based on an OPM regulation, 5 C.F.R. § 353.104, as construed in *Green v. U.S. Postal Service*, 103 M.S.P.R. 278 (2006). The regulation provides that an agency must provide a notice of appeal rights when it fails to restore an employee because of compensable injury, but further provides that, "regardless of notification, an employee is still required to exercise due diligence in ascertaining his or her rights. . . ."

Holding: The Board's interpretation of *Green* in section 353.104 conflicts with the Board's prior interpretation of that regulation in *Dunklebarger v. Department of the Army*, 67 M.S.P.R. 607 (1995), where the Board concluded that § 353.104 only requires an appellant to be diligent in discovering and exercising his restoration rights, not his appeal rights from a denial of restoration. The Board concluded that its interpretation in *Dunklebarger* was correct and overruled *Green*. An appellant who was not provided a required notice of appeal rights is not required to show that he exercised due diligence in attempting to discover his appeal rights; the question is whether he was diligent in filing an appeal after he learned he could do so. Here, the appellant filed an appeal within two weeks of learning that he had appeal rights. The appeal was remanded for adjudication on the merits.

***Romero v. Department of Defense*, 2007 MSPB 180**
MSPB Docket No. DC-0752-06-0136-B-1
July 20, 2007

Board Procedures/Authorities
- Bias
Defenses and Miscellaneous Claims
- Collateral Estoppel/Res Judicata/Law of the Case
Evidence
Miscellaneous Agency Actions
- Indefinite Suspensions

This case involved a remand of a previous Board decision, reported at 104 M.S.P.R. 245 (2006), in which the Board found that it lacked jurisdiction to consider the imposition of the appellant's indefinite suspension, which was based on preliminary decision to deny him access to Sensitive Compartmented Information (SCI), because the appellant had waived his appeal rights in a settlement agreement. The Board found, however, that because the agency kept the appellant on indefinite suspension for at least 4 months after a final decision denying his access to SCI, the waiver of appeal rights did not apply to that period of time, and remanded the appeal to the regional office for the limited purpose of determining whether the agency had improperly constinued the appellant's indefinite suspension. On remand, the AJ found that the agency had initiated the appellant's removal within a reasonable time after a final determination denying the appellant's access to SCI. On PFR, the appellant challenged the merits of both the imposition of his indefinite suspension and his subsequent removal, as well as the continuation of his indefinite suspension. He also claimed that the AJ was biased.

Holdings: 1. Neither the original imposition of the indefinite suspension nor the appellant's removal are properly before the Board; the former is precluded by the law of the case doctrine, the latter is

the subject of a separate appeal. 2. The appellant failed to establish that the AJ was biased. 3. Although the agency submitted a timeline that purported to explain its actions, it was in the form of an unsworn pleading filed by agency counsel, which is not considered evidence, and the agency therefore did not establish the reasonableness of its action. Accordingly, the Board ordered the agency to cancel the indefinite suspension for the period in question.

***Young v. Department of the Interior*, 2007 MSPB 179**
MSPB Docket No. SF-0752-06-0443-I-2
July 20, 2007

Timeliness

The PFR was filed approximately one month after the deadline specified in the initial decision. The appellant did not respond to the notice issued by the Clerk of the Board that informed the appellant that his PFR appeared to be untimely filed, and which afforded him the opportunity to show that the petition was timely filed or that good cause existed for the delay.

Holding: The Board dismissed the PFR as untimely filed with no showing of good cause for the delay.

FEDERAL REGISTER NOTICES

72 Fed. Reg. 40215 (July 24, 2007). The Merit Systems Protection Board amended Appendix II of its Part 1201 regulations to announce the change in location of its Western Regional Office. The new location is 201 Mission Street, Suite 2310, San Francisco, CA 94105-1831. The telephone number changes to (415) 904-6772 and the facsimile number changes to (415) 904-0580.