U.S. Merit Systems Protection Board

CASE REPORT DATE: August 16, 2007

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BOARD DECISIONS

Appellants: Jacques E. Lamour and Scott Rosebery
Agency: Department of Justice
Decision Number: 2007 MSPB 185
Docket Numbers: NY-0752-06-0267-I-1; NY-0752-06-0266-I-1
Issuance Date: August 10, 2007
Appeal Type: Adverse Action by Agency
Action Type: Suspension - Indefinite

Constitutional Issues/Due Process
Miscellaneous Agency Actions
- Indefinite Suspensions
Nexus

The appellants are Senior Officer Specialists at a federal prison. The agency proposed their indefinite suspensions pending the results of an Office of Inspector General investigation concerning the appellants' alleged use of unnecessary force and criminal assault against an inmate. In their response, the appellants explained that they were involved in a physical altercation while helping other officers subdue and escort an inmate to another unit, but "vigorously denied partaking in any physical assault involving an inmate." The agency imposed the indefinite suspensions.

On appeal to the Board, the appellants argued that the agency had failed to establish a nexus between their suspensions and the efficiency of the service, that the agency failed to establish reasonable cause to believe they had committed a crime for which a sentence of imprisonment may be imposed, that the suspensions had no ascertainable end, and that indefinite suspensions without pay would financially ruin them. The agency replied that the allegation against the appellants was very serious in light of their responsibilities as correctional officers, and that maintaining them in any paid position until the final disposition of the investigation would be inappropriate, as they would continue to have contact with inmates. The AJ issued an initial decision

reversing the indefinite suspensions, finding that the agency failed to establish reasonable cause that either of the appellants committed a crime for which a sentence of imprisonment may be imposed.

On petition for review, the agency contends there are two different kinds of indefinite suspensions: those effected with a shortened notice period, for which the agency must establish reasonable cause to believe that the employee committed a crime for which a sentence of imprisonment may be imposed; and those in which the employee is given 30 days advance notice, for which the agency must only establish that the action was taken to promote the efficiency of the service.

Holdings:

1. After the PFR was filed, the Board's reviewing court ruled that an agency that provides an employee with 30 days advance notice may indefinitely suspend an employee pending an investigation of the employee's possible criminal conduct without establishing reasonable cause to believe that the employee committed a crime for which a sentence of imprisonment may be imposed. *Perez v. Department of Justice*, 480 F.3d 1309, 1311 (Fed. Cir. 2007). In light of *Perez*, the Board granted the agency's PFR and vacated the initial decision.

2. A majority of the Board held that the agency deprived the appellants of Constitutional due process because its proposal notices noted only that the appellants were being investigated for allegations of using unnecessary force and criminal assault against an inmate, without offering any details concerning the alleged assault, thereby denying them a meaningful opportunity to be heard.

3. The majority further held that the agency failed to establish that the suspension promoted the efficiency of the service. While an agency may choose to investigate incidents such as those alleged here, it cannot meet its burden of establishing that suspending a correctional officer without pay during the course of such an investigation promotes the efficiency of the service where the agency has failed to establish any basis to believe that the employee's actions were contrary to the normal and proper execution of his duties. The majority noted that the agency had an alternative to returning the employees to duty pending the outcome of the investigation – leave with pay.

In his dissent, Chairman McPhie concurred in the first holding, but disagreed with the second and third holdings, concluding that the appeals should be remanded for findings and conclusions on whether the indefinite suspensions promoted the efficiency of the service. He found that the existing record was insufficient to make definitive findings, because the AJ did not permit development of the record based on the mistaken assumption that the appellants must prevail as a matter of law.

Appellant: Robert P. Isabella
Agency: Department of State
Decision Number: 2007 MSPB 186
Docket Numbers: AT-3443-05-0550-B-1; AT-0330-05-0409-B-1
Issuance Date: August 10, 2007

Miscellaneous Topics
- USERRA/VEOA

This case concerns the agency's handling of the appellant's application for employment as a Special Agent. The vacancy announcement for this position specified a maximum age under 37. The appellant was 36 when he applied, but the agency stopped processing his application after he turned 37. In his appeal to the Board, the appellant made claims under both the Uniformed Services Employment and Reemployment Rights Act (USERRA), which prohibits discrimination based on uniformed service or application or obligation to perform uniformed service, and the Veterans Employment Opportunities Act of 1998 (VEOA), which provides remedies when an agency violates a person's rights under any statute or regulation relating to veterans' preference. In the original appeal, the AJ dismissed both claims for lack of jurisdiction, and the Board vacated and remanded. *See Isabella v. Department of State*, 102 M.S.P.R. 259 (2006). On remand, the AJ issued two initial decisions in which he denied corrective action under both laws on the merits, and the appellant petitioned for review.

Holdings:

1. The Board found that the record established that the maximum entry age for the position is not essential to the performance of the duties of the Special Agent position, and that the agency's failure to waive this age requirement violated the appellant's rights under statutes related to veterans' preference, specifically 5 U.S.C. §§ 3312(a)(1) and 3320. As a remedy for this VEOA violation, the Board ordered the agency to waive the maximum entry age requirement and to reconstruct the selection process, including affording the appellant any other advantage to which his status as a preference eligible might entitle him.

2. In light of its disposition of the appellant's VEOA claim, the Board found that the appellant's USERRA claim had been rendered moot.

Chairman McPhie issued a separate opinion in which he concurred with the result, but not the reasoning of the majority opinion.

Appellant: Gerald R. Elliott, Jr.
Agency: Department of the Army
Decision Number: 2007 MSPB 184
Docket Number: AT-0752-07-0780-R-1
Issuance Date: August 8, 2007
Appeal Type: Adverse Action by Agency
Action Type: Removal

Timeliness

When the appellant did not timely respond to his order concerning the timeliness of his appeal, the administrative judge (AJ) issued an initial decision dismissing the appeal as untimely filed without good cause shown. The following day, the agency submitted evidence and argument showing that the appeal was, in fact, timely filed, because the appellant had filed a complaint of discrimination concerning the removal, on which the agency had not yet issued a final decision. The Board reopened the appeal on its own motion, vacated the initial decision, and remanded the appeal to the AJ for adjudication.

Appellant: Adron Parker
Agency: Department of Housing and Urban Development
Decision Number: 2007 MSPB 187
Docket Number: DA-3443-07-0005-I-1
Issuance Date: August 10, 2007
Appeal Type: Miscellaneous

Jurisdiction
- Burgess Notice

The appellant, a GS-12 Realty Specialist, applied for the position of Relocation Specialist, GS-13, but was not selected, and filed an appeal with the Board. In the Acknowledgment Order, the AJ ordered the appellant to submit evidence and argument to establish jurisdiction. In his response, the appellant cited 5 C.F.R. § 1201.3(a)(19), which refers to employment practices administered by OPM, which cites 5 C.F.R. § 300.104. In dismissing the appeal for lack of jurisdiction, the AJ found that the appellant's nonselection did not fall within the Board's jurisdiction because "nonselections are not directly appealable to the Board and the appellant has raised no other matter which is appealable." In his petition for review, the appellant complains that he was prevented from conducting discovery that might have helped establish jurisdiction.

Holding: The Board vacated and remanded the appeal to the regional office for further adjudication. Under *Burgess v Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985), an appellant must receive explicit information on what is required to establish an appealable jurisdictional issue. The appellant had not been advised as to the requirements for establishing jurisdiction over an employment practices claim under 5 C.F.R. § 300.104.

COURT DECISIONS

The U.S. Court of Appeals for the Federal Circuit has not issued any precedential decisions involving MSPB decisions since the last Case Report. The court has, however, issued some nonprecedential decisions involving MSPB decisions, which can be accessed at the court's website: http://www.fedcir.gov/dailylog.html