U.S. Merit Systems Protection Board

CASE REPORT DATE: September 7, 2007

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BOARD DECISIONS

► **Appellant: Robert C. O'Bleness**
Agency: Department of the Air Force
Decision Number: 2007 MSPB 202
Docket Numbers: DA-3443-06-0361-I-1; DA-3443-06-0360-I-1
Issuance Date: August 30, 2007

Miscellaneous Topics
- USERRA/VEOA/Veterans' Rights

In this USERRA appeal, the appellant claimed that the agency improperly denied him a benefit of employment by improperly charging him for the use of military leave authorized under 5 U.S.C. § 6323(a)(1) on non-workdays, thereby forcing him to use annual leave to cover his absence from his federal civilian position for some of his military reserve service. Relying on copies of the appellant's copies of his Air Force Form 526s and other records, plus a spreadsheet based on those records, the administrative judge (AJ) found that the appellant was entitled to the restoration of 22 days of annual leave for the period of fiscal years 1983 through 1988.

Holding: The appellant did not provide a sworn affidavit as to the specific dates the agency improperly charged him military leave and the specific dates he was thereafter forced to use annual leave to cover his absences for military service, and his documentary evidence did not establish this information. An appellant is not entitled to relief when he fails to identify and submit evidence of the specific dates on which he was required to use some form of civilian leave as a result of an agency's improper charge of military leave. The request for corrective action was therefore denied.

► **Appellant: Charles E. Posey**
Agency: Department of Defense
Decision Number: 2007 MSPB 203
Docket Number: AT-1221-03-0888-M-1
Issuance Date: August 31, 2007
Appeal Type: Individual Right of Action (IRA)

Whistleblower Protection Act
Board Procedures/Authorities
- Criteria for Board Review (Fact Findings)

This case was before the Board on remand from a decision by the U.S. Court of Appeals for the Federal Circuit, *Posey v. Department of Defense*, 180 F. App'x. 931 (Fed. Cir. 2006). The appellant had alleged that the agency took 5 personnel actions against him in retaliation for his making a whistleblowing disclosure. In the original initial decision, the AJ found against the appellant on the merits with respect to the first 3 personnel actions, and that the Board lacked jurisdiction over the last 2 personnel actions because the appellant had waived his appeal rights under a last chance agreement (LCA). The full Board denied the appellant's petition for review of that decision. On appeal to the Federal Circuit, the court found that, by entering into the LCA, the appellant waived his right to argue that the first 3 personnel actions were tainted by retaliation for whistleblowing. Nevertheless, the court reversed the Board's finding that the appellant had waived his right to argue that his supervisors retaliated against him while he was subject to the LCA, and remanded the case to the Board for a determination of whether the agency breached the implied term of good faith by retaliating against the appellant while he was subject to the LCA.

After a hearing, the AJ issued a remand initial decision, finding no basis for concluding that the appellant's supervisors retaliated against the appellant during the LCA, and concluding that the claim of retaliation was in essence an assertion that the appellant was "required to perform the full range of duties of his position." In his petition for review, the appellant asserted that the AJ failed to fairly assess the evidence adduced at the hearing.

Holding: The appeal must be remanded for further adjudication because the AJ did not resolve several material issues relating to the appellant's job performance during the LCA period, as required by *Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587 (1980). In particular, the AJ did not evaluate evidence relating to the appellant's allegations that: (1) His first-line supervisor told the individual who normally ordered supplies not to perform those duties anymore, forcing the appellant to create a new system in that regard; (2) his first-line supervisor prohibited a secretary from doing the timekeeping work she had previously performed; (3) the first-line supervisor had handled scheduling before the start of the LCA period but would not do so during that period; and (4) the agency acted in bad faith by requiring the appellant to work under the direct

supervision of an individual who was a target of the appellant's whistleblowing, even though the appellant's second-level supervisor, who was also a target of the whistleblowing, was directed to recuse himself from supervising the appellant.

► **Appellant: Christine J. Donati**
Agency: Office of Personnel Management
Decision Number: 2007 MSPB 204
Docket Number: PH-0843-05-0336-R-1
Issuance Date: August 31, 2007
Appeal Type: FERS - Death & Survivor Benefits
Action Type: Retirement/Benefit Matter

Retirement
- Survivor Annuity

Following the death of former federal employee Andre Gabert, a New Hampshire probate court determined that he and the appellant had a common-law marriage under a state statute (N.H. Rev. Stat. Ann. § 457:39) that requires that a couple acknowledge one another as husband and wife for 3 years prior to the decease of one of them. In determining whether the appellant was eligible for survivor annuity benefits, the dispositive issue was whether the appellant was a "widow" within the meaning of 5 U.S.C. §§ 8441(1) and 8442(b), which require that the surviving wife have been married for at least 9 months immediately preceding the husband's death. As applied to the facts of this case, the question became whether the New Hampshire common-law marriage statute had retroactive effect in order to meet the 9-month requirement of federal law. In its earlier decision the Board, Vice Chairman Rose dissenting, determined that the law did have retroactive effect and that the appellant was entitled to survivor annuity benefits. *Donati v. Office of Personnel Management*, 104 M.S.P.R. 30 (2006). The Director of OPM sought reconsideration under 5 U.S.C. § 7703(d).

Holding: The New Hampshire statute does not have retroactive application. Accordingly, the appellant was not married to Mr. Gabert for the 9 months preceding his death, she does not meet the definition of "widow" in 5 U.S.C. § 8441(1), and she is therefore not eligible for survivor annuity benefits.

Member Sapin issued a dissenting opinion.

► **Appellant: Wayne H. Brehmer**
Agency: United States Postal Service
Decision Number: 2007 MSPB 205
Docket Number: PH-0752-06-0639-I-1
Issuance Date: August 31, 2007
Appeal Type: Adverse Action by Agency
Action Type: Removal

Board Procedures/Authorities
- Initial Decision – Contents
Jurisdiction
- Resignation/Retirement/Separation
- Suspensions
Miscellaneous Agency Actions
- Restoration

The appellant petitioned for review of a decision dismissing his appeal for lack of jurisdiction. The appellant suffered an injury to his left knee in 1986 and was subsequently diagnosed with underlying degenerative joint disease. Following knee surgery in 2000, the appellant filed a workers' compensation claim with OWCP, arguing that the surgery was causally related to his federal employment. The appellant's OWCP claim was denied on June 19, 2003. While that claim was on appeal, the agency assigned him to a limited-duty position, effective September 24, 2003. On June 17, 2005, the Employees' Compensation Appeal Board set aside the Hearing Representative's decision and remanded the case to OWCP for further consideration. Later in 2005, the agency informed the appellant that, because his OWCP claim had been denied, he was no longer eligible for limited duty, and that, while he was eligible for light duty, no light-duty work was available. The appellant asked if he was being laid off, or if he would be placed on administrative leave on account of his veterans' preference status. He was told that he would have to take annual leave, sick leave, or leave without pay. The appellant retired effective February 3, 2006.

On appeal to the Board, the appellant alleged that, by terminating his limited duty status and failing to honor his request for light duty, the agency denied his restoration rights, placed him on enforced leave, and ultimately forced him to retire. He further claimed that the agency discriminated against him by failing to accommodate his disability. Following a hearing, the AJ issued an initial decision finding that the appellant's retirement was voluntary, and dismissed the appeal for lack of jurisdiction without addressing the appellant's remaining claims.

Holdings:

1. The AJ erred in failing to adjudicate the appellant's claim of a constructive suspension, as required by *Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587 (1980), and in failing to apprise the appellant of the elements required to establish Board jurisdiction over an alleged constructive suspension, as required

by *Burgess v. Merit Systems Protection Board*, 758 F.2d 641 (Fed. Cir. 1985). A remand is therefore necessary.

2. Remand is necessary to determine whether the Board may have jurisdiction over a denial of restoration under 5 C.F.R. § 353.404(c).

3. On remand, the AJ must revisit the appellant's constructive removal claim. The AJ found that the agency acted reasonably and on the best information available regarding the status of the appellant's OWCP claim. In particular, he relied on the testimony of an agency official that the agency's policy is that limited-duty status is terminated at the point of OWCP's denial of a claim notwithstanding the fact that an employee has appealed the denial. But on December 25, 2005, when the agency determined that the appellant was no longer eligible for limited duty, the ECAB had vacated OWCP's negative determination and remanded the matter to OWCP for a de novo decision.

In his separate opinion, Chairman McPhie concurred in the majority's decision to remand the case for proper *Burgess* notice and adjudication of the appellant's constructive suspension claim, and the need to revisit the constructive removal claim if appropriate. He disagreed with the majority's decision to also remand the case for proper *Burgess* notice and adjudication of a restoration to duty claim; he would have found that the appellant failed to raise such a claim below.

► **Appellant: Dawonna J. Carriker**
Agency: Office of Personnel Management
Decision Number: 2007 MSPB 206
Docket Number: CH-844E-06-0588-I-1
Issuance Date: August 31, 2007
Appeal Type: FERS - Employee Filed Disability Retirement
Action Type: Retirement/Benefit Matter

Timeliness
Board Procedures/Authorities
- Initial Decision – Contents
- Forwards
Jurisdiction
- Suspensions

The appellant filed an appeal with the Board following OPM's denial of her application for a disability retirement annuity. The AJ issued an initial decision sustaining OPM's denial. The decision informed the appellant that it would become the Board's final decision unless a petition for review was filed by November 15, 2006. The appellant filed a petition for review on April 12, claiming that her employing agency had constructively suspended her by not allowing her to return to work and by failing to comply with an EEOC final decision in her favor regarding a race discrimination complaint she had filed.

Holding: The petition for review was dismissed as untimely filed without good cause shown for the delay. The Board forwarded the appellant's claim of a constructive suspension to the regional office for docketing as a new appeal.

► **Appellant: Angela B. Goodwin**
Agency: Department of Transportation
Decision Number: 2007 MSPB 207
Docket Number: DA-0752-06-0624-I-1
Issuance Date: September 4, 2007
Appeal Type: Adverse Action by Agency
Action Type: Reduction in Grade/Rank/Pay

Arbitration/Collective Bargaining-Related Issues
- Election of Remedy

The appellant asked for review of an initial decision that dismissed her appeal from an alleged involuntary reduction in pay resulting from a reassignment for lack of jurisdiction on the ground that she made a binding election to first grieve the matter before filing her Board appeal.

Holding: Contrary to the AJ's finding, the record shows that the appellant first elected to contest her reassignment through the EEO process rather than through the negotiated grievance procedures, filing a formal EEO complaint 2 days before she filed her first grievance. The Board found that the appellant thus made a binding election under 5 U.S.C. § 7121(d) and 29 C.F.R. § 1614.301(a) to seek a remedy to the agency's actions through "the applicable statutory procedure" and not through the negotiated grievance procedure. The appellant was thus entitled to have her EEO complaint processed as a "mixed case" in accordance with 29 C.F.R. § 1614.302(d). The initial decision was vacated and the case remanded to the regional office for further adjudication.

► **Appellant: Paul Durand**
Agency: Environmental Protection Agency
Decision Number: 2007 MSPB 208
Docket Number: DC-3443-06-0809-I-1
Issuance Date: September 4, 2007

Miscellaneous Topics
- USERRA/VEOA/Veterans' Rights

The appellant petitioned for review of an initial decision that dismissed his VEOA and USERRA appeals for lack of jurisdiction. The appellant applied, but was not selected, for a GS-9 position with the agency. On his application, he indicated that he was entitled to 5-point veterans' preference on the basis of his active duty service as a Public Health Service (PHS) Commissioned Officer from 1975 through 2005. He filed an appeal with the Board after the Department of Labor determined that his service as a PHS Commissioned Officer did not entitle him to veterans' preference. The AJ

dismissed the appeal for lack of jurisdiction, finding that the appellant is not a preference-eligible veteran under the VEOA, and that the Board lacks jurisdiction under USERRA because the appellant merely alleged that he did not receive more favorable treatment because of his uniformed service.

Holdings:

1. The appellant established jurisdiction under USERRA because he made nonfrivolous allegations that: (1) he performed duty in a uniformed service of the United States; (2) he was denied initial employment; and (3) the denial of initial employment was due to the performance of duty in the uniformed service. The Board remanded this claim for a hearing.

2. The appellant failed to establish jurisdiction under VEOA because he failed to establish that he is a preference-eligible veteran. While 42 U.S.C. § 213(a) provides that commissioned officers in the PHS have the same rights under federal law as commissioned officers of the Army under any of 3 specified conditions, none of those conditions was satisfied here. The Board found that the appellant did not serve "in time of war." The Board found persuasive in this regard OPM's *VetGuide*, which indicates that "war," as used in 5 U.S.C. § 2108(1)(A) means an armed conflict for which a declaration of war was issued by Congress. The last "war" for which active duty is qualifying for veterans' preference is World War II.

Chairman McPhie issued a separate opinion in which he concurred with the majority as to the VEOA claim, but did not agree that the appellant has asserted a claim under USERRA that must be remanded for a hearing.

COURT DECISIONS

► **Appellant: Raleigh W. Robinson, Jr.**
Agency: Department of Homeland Security
Docket Number: 2006-3123
Issuance Date: August 30, 2007

Adverse Action Charges
- Security Clearance Determinations
Constitutional Issues/Due Process
- Due Process

The agency removed Robinson from his position as a Special Agent because his security clearance, which was a condition of his employment, had been revoked. On appeal to the MSPB, Robinson argued that his minimum due process rights had been denied because the agency's decision to revoke his security clearance had been "predetermined." The AJ excluded the testimony of a witness who would have

addressed this issue, reasoning that the proffered testimony was not relevant to the only issue to be adjudicated—"whether the appellant was granted minimum due process protection." In an initial decision that became the Board's final decision, the AJ found that the agency had afforded Robinson minimum due process in the denial of his security clearance and had properly followed the procedures of 5 U.S.C. § 7513 when it removed him from his position.

Holding: In a per curiam opinion, the 3-judge panel affirmed the Board's decision. The court held that security clearance decisions are not reviewable for "minimum due process protection," stating that federal employees do not have a liberty or property interest in access to classified information, and that the revocation of a security clearance therefore does not implicate constitutional procedural due process concerns.

In a concurring opinion, Judge Rader wrote separately "to clarify that this court and the Merit Systems Protection Board ("Board") lack jurisdiction to review security clearance removal processes at all." Judge Plager issued a separate concurring opinion stating his view that the court's opinion did not adequately respond to one of Robinson's major arguments—that, like the plaintiff in *King v. Alston*, 75 F.3d 657 (Fed. Cir. 1996), he is entitled to have the MSPB and the court review the manner in which his security clearance was revoked.