CASE REPORT DATE: September 14, 2007

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BOARD DECISIONS

► **Appellant: Jennifer Marshall**
Agency: Department of Veterans Affairs
Decision Number: 2007 MSPB 209
Docket Number: CB-7121-07-0017-V-1
Issuance Date: September 7, 2007
Appeal Type: Arbitration Appeals/Grievances

Arbitration/Collective Bargaining-Related Issues
- Election of Remedy
- Review Authority of MSPB

The appellant sought review of an arbitrator's award finding that her removal was not subject to arbitration because she had filed an unfair labor practice (ULP) charge with the FLRA challenging some of the "predicate facts" underlying the removal. The agency removed the appellant from her position for failure to follow instructions, charging that she failed to obey an instruction to return certain supervisory notes she had inadvertently obtained while acting as a union representative. The appellant filed a ULP with the FLRA on May 31, 2006, in which she raised the propriety of the agency's demand. The arbitrator concluded that it was impossible to consider and decide the propriety of the removal without considering and deciding the propriety of the predicate facts, an issue that was being considered by the FLRA. On appeal to the Board, the appellant contended that the arbitrator erred as a matter of law in dismissing the case because the FLRA does not have jurisdiction over a removal.

Holdings:

1. The Board has jurisdiction to review the arbitrator's decision because the subject matter of the grievance (a removal) is one over which the Board has

jurisdiction, the appellant has alleged discrimination under 5 U.S.C. § 2302(b)(1) in connection with the underlying action, and a final decision has been issued.

2. Under the first sentence of 5 U.S.C. § 7116(d), the propriety of the appellant's removal, including "issues" relating to that removal, can properly be raised in an appeal filed with the Board and may not, therefore, be raised as a ULP before the FLRA. The arbitrator erred as a matter of civil service law in failing to apply this provision to this case.

3. The arbitrator erred in interpreting the second sentence of § 7116(d), which provides that the requirement that an employee choose between filing a grievance or a ULP does not apply in matters, such as in the instant removal, that can be raised in either the negotiated grievance or appeals procedures. The proper question before the arbitrator should have been whether the removal fell within the exception to the grievance-or-ULP election requirement of § 7116(d), not whether the May 31, 2006 ULP charge fell within that exception.

4. Because arbitrators are in the best position to make credibility determinations, and given the limited factual review the Board generally conducts in these types of cases, remand to the arbitrator for the issuance of a new award is appropriate. If the FLRA should have issued a decision on any issues raised in the ULP charge, the doctrine of collateral estoppel might be applied to preclude those issues from being relitigated.

► **Appellant: Dennis H. Redmond**
Agency: Office of Personnel Management
Decision Number: 2007 MSPB 210
Docket Number: CH-844E-07-0259-I-1
Issuance Date: September 7, 2007
Appeal Type: FERS - Employee Filed Disability Retirement

Jurisdiction

OPM petitioned for review of an initial decision that reversed its reconsideration decision, which had dismissed appellant's disability retirement application as untimely filed. During a status conference, OPM indicated that it would waive the filing time limit and adjudicate the merits of the appellant's application. The administrative judge (AJ) issued an initial decision that reversed OPM's reconsideration decision and remanded the appeal to OPM for adjudication of the merits of the appellant's application. In its petition for review (PFR), OPM contends that the appeal should have been dismissed for lack of jurisdiction.

Holding: OPM's statement that it would waive the filing time limit and consider the appellant's disability retirement application on the merits, plus its clarification of that statement on review, indicate that it has completely rescinded its reconsideration decision. In such circumstances, the Board no longer retains jurisdiction, and the appeal must be dismissed.

► **Appellant: Carolyn A. Miller**
Agency: Department of the Army
Decision Number: 2007 MSPB 211
Docket Number: AT-0752-05-0990-A-1
Issuance Date: September 7, 2007
Appeal Type: Adverse Action by Agency
Action Type: Attorney Fee Request

Attorney Fees
- Knew or Should Have Known

The appellant petitioned for review of an addendum initial decision that denied her motion for attorney fees. In the initial appeal, the agency removed the appellant for conduct unbecoming a federal employee based on her extramarital affair with an unmarried employee in violation of Georgia law, and for falsely reporting to state police that this employee had raped her. On appeal to the Board, the AJ sustained the first charge, but not the second, and mitigated the penalty to a 60-day suspension. The initial decision became the Board's final decision when the full Board, Chairman McPhie dissenting, denied the parties' petitions for review. *Miller v. Department of the Army*, 102 M.S.P.R. 621 (2006). The AJ denied the appellant's motion for attorney fees. Although the AJ found that attorney fees fees were incurred pursuant to an attorney-client relationship, and that the appellant was a prevailing party, he found that fees were not warranted in the interest of justice under any of the applicable *Allen* categories.

Holding: Attorney fees are warranted in the interest of justice under the 5th *Allen* category: that the agency knew or should have known that it would not prevail on the merits. Attorney fees are warranted under the 5th category where, as here, the Board sustains the charge in an adverse action appeal, but mitigates the penalty based on evidence that was before, or readily available to, the agency at the time it took the action.

Chairman McPhie issued a dissenting opinion, stating that he would have found that attorney fees were not warranted in the interest of justice.

► **Appellant: Ronald A. Davis**
Agency: Department of Defense
Decision Number: 2007 MSPB 212
Docket Number: PH-1221-07-0017-W-1
Issuance Date: September 10, 2007
Appeal Type: Individual Right of Action (IRA)

Whistleblower Protection Act
- Contributing Factor
- Jurisdiction

The appellant petitioned for review of an initial decision that dismissed his IRA appeal for lack of jurisdiction. The Board dismissed an earlier appeal because the appellant had not exhausted his remedies with OSC as required by 5 U.S.C. § 1214(a)(3). *Davis v. Department of Defense*, 103 M.S.P.R. 516 (2006). In the present appeal, after filing a new complaint with OSC, the appellant alleged that 3 personnel actions—a performance appraisal, a non-selection, and the denial of a cash award—were taken in retaliation for his making whistleblowing disclosures. In dismissing the appeal, the AJ found that the appellant failed to establish that he had a reasonable belief that his disclosures evidenced an abuse of authority. She found in the alternative that the appellant could not show that his disclosures were a contributing factor in a personnel action because of the timing of the actions and his disclosures.

Holdings:

1. Because the performance appraisal and non-selection actions predate the appellant's disclosures, the disclosures could not have contributed to those personnel actions.

2. The appellant's claim that he was denied some sort of cash award between June and August 2005 has never been fully explained. Based on the lack of specificity in this claim, the Board found that the appellant failed to make a nonfrivolous allegation in this regard.

► **Appellant: Harold H. Mistelske**
Agency: Department of Veterans Affairs
Decision Number: 2007 MSPB 213
Docket Number: CH-0752-07-0285-I-1
Issuance Date: September 10, 2007
Appeal Type: Adverse Action by Agency
Action Type: Removal

Board Procedures/Authorities
- Withdrawal of Appeal/PFR
Timeliness

The appellant filed an appeal of his removal and designated a union official to represent him. On March 16, 2007, the representative withdrew the appeal. The same day, the AJ issued an initial decision dismissing the appeal as withdrawn, informing the parties that the decision would become final on April 20, 2007, unless a petition for review was filed by then or the Board reopened the case on its own motion. The appellant filed a PFR more than a month later, on May 22, 2007.

Holdings: The Board treats a PFR of an appellant-initiated dismissal of an appeal as a late-filed appeal or as a request to reopen and reinstate the prior appeal. As a new appeal, the May 22, 2007 filing was 2½ late, without good cause shown, and the Board found that the appellant did not exercise due diligence in seeking reopening.

► **Appellant: Marc A. Garcia**
Agency: Department of State
Decision Number: 2007 MSPB 214
Docket Number: AT-3443-06-0635-I-1
Issuance Date: September 11, 2007

Miscellaneous Topics
- USERRA/VEOA/Veterans' Rights

The agency petitioned for review of an initial decision that found that it had violated the appellant's rights under USERRA. The appellant is employed in the Foreign Service, and is also an officer in the Army Reserve. In August 2005, while assigned to a position in Miami, Florida, the appellant submitted a "bid list," i.e., a list of positions for which he wished to be considered, and also requested that his Miami assignment, scheduled to end in the summer of 2006, be extended for an additional year. In October 2005, he began a period of active military duty for training purposes, and on November 7, 2005, began a 1-year tour of active military duty. While the appellant was on active military duty, the agency notified him that it had denied his request for extension of his Miami assignment. During subsequent correspondence, the agency advised the appellant that his August 2005 bid list was no longer active, and that other bidders had been selected for the positions for which he had bid.

On appeal to the Board's regional office, the appellant alleged that the agency had violated his USERRA rights by denying him his right to bid on assignments based on his military service, and by denying his request to have his Miami assignment extended. The AJ found that the appellant had not established that his military service was a substantial or motivating factor in the denial of his request for an extension of his Miami assignment. The AJ further found, however, that the appellant was entitled under USERRA to be considered for assignments for which he had bid in August 2005, even if his scheduled military service would preclude him from serving in those assignments at the time they became available. Because the agency improperly failed to consider the appellant for those vacancies, the AJ ordered the agency to reconstruct the assignment process for those positions. The AJ declined to order interim relief pending the outcome of a PFR.

Holdings:

1. The AJ did not abuse his discretion in not ordering interim relief. The appellant's cross-petition for review was therefore denied.

2. The AJ erred in addressing the appellant's reemployment rights under 38 U.S.C. § 4313, when the parties and the AJ in their pre-hearing pleadings and issuances referred to 38 U.S.C. § 4311 as the applicable section of law. No claim under § 4313 would have been ripe for review when the appeal was filed, or even when the hearing was held. The Board vacated that part of the initial decision in which the AJ addressed rights under § 4313. The appellant may assert a claim under § 4313 on remand if he believes such a claim has become ripe for review.

3. While the agency's PFR was pending before the Board, the Federal Circuit issued a decision addressing an arguably similar claim, *Tully v. Department of Justice*, 481 F.3d 1367 (Fed. Cir. 2007), in which the court held that USERRA did not entitle an employee who was absent to military duty to preferential treatment. Factors such as the length of an absence were "proper grounds for assessing similarity," and the difference between the expected duration of an employee's military leave and the expected duration of another kind of leave could be relevant in determining whether an employee absent for military leave was entitled to a certain benefit of employment. As applied to this case, if the agency considers the assignment bids of employees on absences comparable to the appellant's absence for military duty, then the agency may have denied the appellant a benefit of employment in violation of 38 U.S.C. § 4311.

► **Appellant: Christian M. DeJohn**
Agency: Department of the Army
Decision Number: 2007 MSPB 215
Docket Number: PH-3443-06-0336-I-1
Issuance Date: September 11, 2007

Miscellaneous Topics
- USERRA/VEOA/Veterans' Rights

The appellant petitioned for review of an initial decision that denied his request for corrective action under USERRA. In this appeal, the appellant alleged that the agency discriminated against him on account of his military status when it failed to select him for a GS-11 Historian position. The vacancy announcement for this position was advertised in both an internal announcement and an external announcement. The appellant applied under the external announcement, and was awarded 5 additional points based on his veteran status, giving him a score of 103, the highest rank on the external list. Douglas Murphy, a non-veteran who applied for the position under the internal announcement, was ranked below the appellant with a score of 100. The selecting official chose Murphy, who declined the job. The selecting official than canceled the recruiting action in its entirety without making another selection. On appeal to the Board, the AJ found it undisputed that the appellant had performed duty in a uniformed service and that the agency did not select him for the position, but denied corrective action, finding that the appellant failed to show that his non-selection was based on his prior military service.

The Board granted the appellant's petition for review, but affirmed the initial decision as modified, still denying the appellant's request for corrective action.

Holdings:

1. The AJ erred to the extent that he implied that the appellant's USERRA claim was weakened by his failure to apply for this Historian position under the internal announcement. This was immaterial in determining whether he proved by

preponderant evidence that his military status was a substantial or motivating factor in the agency action.

2. The AJ erred to the extent that he implied that the appellant's USERRA claim should be subjected to a higher standard because it was brought against an agency that "supports the military" and is "made up, in good measure, [of] veterans." A USERRA claim against a civilian component of the armed forces is not subject to a higher standard than one brought against some other agency.

3. The Board found shortcomings in the AJ's determination that the selecting official's testimony was "believable" and "straightforward." There were in fact significant inconsistencies in that testimony. Nevertheless, the issue in this USERRA case is whether he discriminated against the appellant based on the appellant's military status, and the evidence does not show that he did so.

► **Appellant: James R. Dacus**
Agency: Office of Personnel Management
Decision Number: 2007 MSPB 216
Docket Number: DA-831M-06-0616-I-1
Issuance Date: September 11, 2007
Appeal Type: CSRA - Overpayment of Annuity
Action Type: Retirement/Benefit Matter

Timeliness

The appellant petitioned for review of an initial decision that affirmed OPM's determination that his request for reconsideration was untimely filed. In 4 letters, starting in August 2004, and culminating in 2 letters dated April 1, 2005, OPM notified the appellant that it was terminating his disability retirement benefit because he had been restored to earning capacity, and that he had received an overpayment of $17,457.72. More than a year later, on May 19, 2006, the appellant requested reconsideration and waiver of the overpayment. OPM dismissed the request as untimely. On appeal to the Board's regional office, the AJ affirmed OPM's action.

Holdings:

1. The Board affirmed the initial decision insofar as it upheld OPM's rejection of the appellant's request for reconsideration of OPM's determinations that the appellant had been restored to earning capacity, that his disability benefits were terminated, and that he had received an overpayment of $17,457.72, as untimely filed under 5 C.F.R. § 831.109(e)(1). OPM may extend the 30-day time limit for requesting reconsideration when the applicant can prove he was not notified of the time limit and was not otherwise aware of it, or that he was prevented by circumstances beyond his control from making a timely request. The appellant has not established any of these conditions for excusing the time limit.

2. A request for reconsideration of a decision to collect a debt is governed by 5 C.F.R. § 831.1304. Although this regulation specifies a 30-day time limit, it also specifies the contents of OPM's notice, including the date on which full payment is

due, OPM's policy on interest, penalties, and administrative charges, and the right to a hearing before the Board on a waiver request. None of this information was included in OPM's letters. Per the Board's decision in *Rossini v. Office of Personnel Management*, 101 M.S.P.R. 289 (2006), a request for reconsideration cannot be considered untimely when the notice provided to the appellant does not meet the requirements of 5 C.F.R. § 831.1304(a). The Board remanded the appeal to the regional office to adjudicate the merits of the appellant's entitlement to a waiver of the debt.

Chairman McPhie issued a dissenting opinion with respect to the second holding.

► **Appellant: Jack D. Cosby**
Agency: Office of Personnel Management
Decision Number: 2007 MSPB 217
Docket Number: DA-844E-07-0006-I-1
Issuance Date: September 11, 2007
Appeal Type: FERS - Employee Filed Disability Retirement

Retirement
- Disability Retirement

OPM petitioned for review from an initial decision that reversed OPM's denial of the appellant application for disability retirement benefits. The appellant was removed from his position with the Department of the Air Force for inability to perform the essential duties of his position. The appellant filed a disability retirement application with OPM, claiming that post-traumatic stress disorder, anxiety, panic attacks, and depression made him unable to function at his former work site. OPM denied the application, concluding that the medical evidence failed to substantiate a disabling condition, but rather that he was only unable to perform his duties in the context of what he perceived as a hostile work environment. On appeal to the Board, the AJ found that OPM failed to rebut the *Bruner* presumption that an employee who has been removed for physical inability to perform the essential duties of his position is entitled to disability retirement.

Holding: The medical and other evidence fails to indicate that the appellant could not perform the essential functions of his position in general, but instead indicates that he could not perform them in what he perceived as a hostile environment, i.e., the evidence shows that the appellant's disability is situational. He therefore does not meet the requirements for disability retirement benefits.

► **Appellant: Vivian J. Blaha**
Agency: Office of Personnel Management
Decision Number: 2007 MSPB 218
Docket Number: DA-0831-07-0068-N-1
Issuance Date: September 11, 2007
Appeal Type: CSRA Retirement - Other Than Initial

Stay Requests

The Director of OPM asked the Board to stay its decision in *Blaha v. Office of Personnel Management*, 106 M.S.P.R. 265 (July 16, 2007), while the Director's request for reconsideration of that decision is pending before the Board.

Holding: Whether to grant a stay pending reconsideration is a matter within the Board discretion, in which the Board is guided by 4 factors: (1) whether the stay applicant has made a strong showing that she is likely to prevail on the merits; (2) whether the applicant will be irreparably harmed absent a stay; (3) whether the issuance of a stay will substantially harm other parties interested in the proceeding; and (4) where the public interest lies. The Board did not evaluate the first factor "because OPM's support for a stay based on the last three factors is not even slight." The Board denied the request for a stay.

COURT DECISIONS

The court has not issued any precedential decisions reviewing MSPB decisions since the issuance of the last Case Report. It has issued some nonprecedential decisions reviewing MSPB decisions, which can be found at the court's website: