U.S. Merit Systems Protection Board

CASE REPORT DATE: October 12, 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

► **Appellant: Raymond H. Ryan**
Agency: Department of the Air Force
Decision Number: 2007 MSPB 240
Docket Number: DA-0752-06-0393-I-1
Issuance Date: October 4, 2007
Appeal Type: Adverse Action by Agency
Action Type: Removal

Adverse Action Charges
- Absence-Related

The appellant petitioned for review from an initial decision that sustained his removal based on a charge of excessive absence from the workplace. The administrative judge (AJ) found that the agency proved its charge, noting that although some of the appellant's absences were covered by approved leave, and generally not actionable, the agency was permitted to bring a removal action based on excessive approved absences under *Cook v. Department of the Army*, 18 M.S.P.R. 610 (1984). The AJ further found that the appellant failed to prove his affirmative defenses and that the removal penalty was reasonable.

Holdings:

1. As a general rule, an agency's approval of leave for unscheduled absences precludes the agency from taking an adverse action on the basis of those absences. The *Cook* exception applies only in a situation where the employee's absence was due to excessive use of unscheduled leave without pay (LWOP). The agency presented no evidence that the appellant made excessive use of unscheduled LWOP; indeed it presented no evidence that the appellant was carried on LWOP at all. Nor could the removal action be sustained on the basis of absence without leave (AWOL), as the agency did not charge the appellant with AWOL.

2. The Board concurred with the AJ's findings that the appellant failed to prove his affirmative defenses.

The Board ordered the agency to cancel the appellant's removal and restore him to employment.

► **Appellant: John M. Killeen**
Agency: Office of Personnel Management
Decision Number: 2007 MSPB 237
Docket Number: CH-0831-07-0013-I-1
Issuance Date: October 4, 2007
Appeal Type: CSRA Retirement - Other Than Initial
Action Type: Retirement/Benefit Matter

Retirement
- Annuities
Defenses and Miscellaneous Claims
- Collateral Estoppel

OPM petitioned for review of an initial decision that found that the appellant was entitled to a basic retirement annuity in an amount higher than OPM determined was appropriate. This controversy was previously before our reviewing court, 382 F.3d 1316 (Fed. Cir. 2004), and in an enforcement proceeding before the Board, 102 M.S.P.R. 627 (2006). The issue is whether OPM was required to do separate calculations for service performed before and after April 6, 1986, when 5 U.S.C. § 8339(p) was enacted. OPM did separate calculations, resulting in a total annuity of $28,850.41, whereas the appellant claimed that a single calculation was appropriate, and that he ought to receive $30,803.00. In the initial decision presently under review, the AJ found that the appellant was entitled to the higher figure.

Holdings:

1. This issue was already litigated and decided in the previous enforcement proceeding, in which the Board found that it was appropriate for OPM to separate the pre-April 7, 1986 and post-April 6, 1986 calculations. That determination is binding in the present appeal under the doctrine of collateral estoppel.

2. Collateral estoppel is an affirmative defense that generally must be timely pled or is deemed waived, and OPM did not raise the defense. But it is appropriate for the Board to raise the issue *sua sponte* in special circumstances, present here, where significant resources were spent evaluating the issue.

► **Appellant: Jacqueline E. Gordon-Cureton**
Agency: United States Postal Service
Decision Number: 2007 MSPB 239
Docket Number: DC-0752-06-0551-B-1
Issuance Date: October 4, 2007
Appeal Type: Adverse Action by Agency
Action Type: Removal

Board Procedures
- Reopening and Reconsideration
Defenses and Miscellaneous Claims
- Law of the Case
Jurisdiction

The appellant petitioned for review of a remand initial decision that dismissed her appeal for lack of jurisdiction. The jurisdictional issue was whether the appellant is a preference-eligible employee entitled to appeal a removal action to the Board. In the original initial decision, the AJ found that the appellant was not a preference-eligible because all of her military service was for training purposes. On petition for review, the full Board found that the appellant's active duty for a specified period was not for training, and that this period of service was the type that would qualify her for preference-eligible status. *Gordon-Cureton v. U.S. Postal Service*, 105 M.S.P.R. 165 (2007). The Board further found that it was unclear from the record whether the appellant had completed the relevant minimum service requirement or qualified for an exemption from this requirement, and remanded the appeal for a determination of those matters. On remand, the AJ again dismissed the appeal for lack of jurisdiction, again finding that all of the appellant's active military duty was for training purposes.

Holdings:

1. The petition for review was dismissed as untimely filed (by 15 days) without good cause shown. Nevertheless, a majority of the Board treated the pleading as a request to reopen the appeal. Although the Board will not generally reopen an appeal to cure the untimeliness of a PFR, it has discretion to do so to prevent a "manifest injustice" when an error implicates a party's "basic procedural rights," and the Board found that reopening was appropriate in this case.

2. Under the law of the case doctrine, an AJ is bound by the findings and conclusions of the full Board in an earlier phase of ongoing litigation. The Board had specifically found that some of the appellant's military service was not for training, and was of the type that would qualify for preference-eligible status, and that finding was binding in the remand proceeding.

3. The Board treated the appellant's statements of frustration at being unable to find a copy of her DD-214 as a discovery request asking the agency to produce her DD-214. The agency representative had made assertions about the appellant's military service, and stated that the agency had position of the DD-214, but never submitted it to the Board. The Board stated that the representative's actions in

this regard "goes beyond zealous representation and smacks of gamesmanship," and ordered the agency to provide the appellant with a copy of her DD-214.

The Board vacated the remand initial decision and remanded the case for further adjudication. In a separate opinion, Vice Chairman Rose stated her belief that the particular circumstances of this case did not justify the exceptional step of reopening an appeal to cure the untimeliness of the petition for review.

► **Appellant: Kenneth A. DeBlock**
Agency: United States Postal Service
Decision Number: 2007 MSPB 241
Docket Number: CH-0353-07-0024-I-1
Issuance Date: October 5, 2007
Appeal Type: Restoration to Duty
Action Type: Restore After Recover of Comp Injury Denied

Miscellaneous Agency Actions
- Restoration to Duty

The appellant petitioned for review of an initial decision that dismissed his restoration appeal for lack of jurisdiction. The appellant left his position in 1993 and began receiving workers' compensation benefits. He was removed from the agency's rolls in 1999. Effective July 10, 2004, OWCP terminated his compensation because "his work-related conditions have resolved" and he "could return to work in [his] date of injury job without restrictions." The appellant contacted the agency "to be reinstated," reported to the agency on August 14, 2004, and worked 2 full days. The agency then sent him home after he reported for duty on August 18, 2004. The appellant filed this appeal a little more than 2 years later. The AJ dismissed the appeal for lack of jurisdiction, finding that, at the time of his appeal, the appellant was neither fully nor partially recovered from his compensable condition. The AJ further found that, to the extent that the appeal was based on the agency's decision to send the appellant home, and its subsequent failure to honor the appellant's restoration requests, the appellant filed a grievance which was resolved by settlement, and he was therefore foreclosed from appealing those actions to the Board.

Holdings:

1. OWCP's determination that an individual is fully recovered is "final and conclusive for all purposes and with respect to all questions of law and fact." 5 U.S.C. § 8128(b)(1). Accordingly, OWCP's determination of full recovery is binding on the Board, despite contrary evidence adduced by the appellant, including his application for and receipt of disability retirement benefits. The AJ therefore erred in finding that the appellant had neither fully or partially recovered from his compensable condition.

2. An employee in the excepted service may appeal an alleged denial of restoration rights to the Board if he was entitled to priority consideration by presenting information that he was denied restoration rights because of the employment of another person. 5 C.F.R. § 302.501. Because the AJ did not fully apprise the

appellant of his jurisdictional burden of proof in this regard, a remand is necessary.

3. The appellant's allegations may also give rise to a constructive suspension claim, which would require proof that the appellant was a duly appointed employee on August 18, 2004. Such a claim might be moot, however, depending on the circumstances of OPM's award of disability retirement benefits to the appellant.

4. The grievance settlement agreement does not preclude a Board appeal, as preference-eligible Postal employees are entitled to pursue both a grievance and a Board appeal simultaneously.

► **Appellant: Phillip W. Sedgwick**
Agency: The World Bank
Decision Number: 2007 MSPB 238
Docket Number: DE-3443-07-0158-I-1
Issuance Date: October 4, 2007

Miscellaneous Topics
- USERRA/VEOA/Veterans' Rights

The appellant petitioned for review of an initial decision that dismissed his VEOA complaint for lack of jurisdiction. The issue is whether the World Bank is an agency subject to the Veterans Employment Opportunities Act. The AJ, relying on the definition of "agency" contained in 5 U.S.C. § 3330(a), found that the World Bank is not an agency subject to the Act.

Holding: The Board found that section 3330 is not particularly relevant, as that section was not enacted by or affected by the enactment of VEOA, which is codified at 5 U.S.C. § 3330a. Nevertheless, the VEOA is applicable only to the civil service of the United States government, and neither World Bank employees nor recipients of Word Bank funding are employed in the federal government-wide civil service system.

► **Appellant: Sandra J. Roberts**
Agency: Department of Commerce
Decision Number: 2007 MSPB 242
Docket Number: SF-0752-05-0230-I-1
Issuance Date: October 5, 2007
Appeal Type: Adverse Action by Agency
Action Type: Constructive Adverse Action

Timeliness

The appellant petitioned for review of an initial decision issued in 2005.

Holding: The Board dismissed the petition for review as untimely filed without good cause shown.

COURT DECISIONS

► **Appellant: Cassandra A. Augustine**
Agency: Department of Veterans Affairs
Docket Number: 2006-3307
Issuance Date: October 5, 2007

Attorney Fees
- Authority to Award

In the merits proceeding, the Board determined that the agency violated the appellant's veterans' preference rights in connection with her unsuccessful application for employment. As the prevailing party, she moved for attorney fees and expenses under 5 U.S.C. § 3330c(b). The AJ denied that motion on the basis that the appellant's attorney was not a member of the California bar. The court vacated and remanded with instructions to the Board to consider the motion without regard to the state of the attorney's bar membership. *Augustine v. Department of Veterans Affairs*, 429 F.3d 1334 (Fed. Cir. 2005). On remand, the AJ again denied the motion for attorney fees and expenses because, in the AJ's opinion, "[n]one of [the attorney's] services appear to have contributed to the appellant's success on appeal." This decision became the Board's final decision as the appellant did not file a petition for review with the full Board, instead seeking review by the court.

Holdings:

1. Section 3330c(b) provides: "A preference eligible who prevails in an action under section 3330a or 3330b shall be awarded reasonable attorney fees, expert witness fees, and other litigation expenses." The court rejected "out of hand as being completely unsupported by the plain language of the statute" the AJ's determination that attorney fees and expenses are unreasonable if (1) success before the Board was not in some way attributable to the efforts of the successful party's attorney, or (2) services were rendered prior to the attorney's entry of appearance before the Board. The statute requires only that the fees and expenses be reasonable.

2. As to the amount of fees, "the most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." The case was remanded to the Board to determine an appropriate amount of attorney fees.