



## U.S. Merit Systems Protection Board

CASE REPORT

DATE: October 19, 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: Daniel T. Mapstone**  
**Agency: Department of the Interior**  
**Decision Number: [2007 MSPB 243](#)**  
Docket Number: AT-3443-07-0076-I-1  
Issuance Date: October 11, 2007

#### **Jurisdiction**

#### **Miscellaneous Agency Actions - Employment Practices**

The appellant petitioned for review of an initial decision that dismissed his appeal for lack of jurisdiction. The appellant, a FS-0401-12 Fire Management Officer with the National Park Service, applied for a FS-0401-13/14 Fire and Aviation Management Officer position. When the agency notified the appellant of his non-selection, the agency advised that he “did not meet the minimum qualification requirements as stated in the vacancy announcement” and failed to “meet basic requirements.” Responding to the appellant’s request for clarification, the agency advised that, per OPM’s guidelines, one of the “basic requirements” was a “degree” in the relevant fields of study, and that a “degree is identified as successful completion of a full 4-year course of study in an accredited college degree leading to a bachelor’s degree . . . .” The appellant had attained two separate Associate’s Degrees, one in Agriculture, and one in Forestry. In response to the Acknowledgment Order and the agency’s motion to dismiss, the appellant argued that the Board has jurisdiction as an employment practices appeal under 5 C.F.R. §§ [300.103](#) and [300.104](#).

#### **Holdings:**

**1. The Board affirmed the initial decision insofar as it related to the appellant’s non-selection. Although the AJ failed to provide the appellant with adequate**

information about the evidence and arguments he must present in order to make a non-frivolous allegation of jurisdiction, this was cured by the agency's motion to dismiss and the initial decision, and the appellant has not submitted additional evidence and argument to make a non-frivolous allegation of jurisdiction.

2. The Board vacated the initial decision insofar as it related to an employment practices appeal under 5 C.F.R. §§ [300.103](#) and [300.104](#). To establish jurisdiction under these provisions, an appellant must show that: (1) The actions in question constitute employment practices within the meaning of 5 C.F.R. Part 300, Subpart A; (2) the employment practice violates the basic requirements of 5 C.F.R. § 300.103; and (3) OPM is involved in the administration of those practices. The appellant has done that in this case, making a non-frivolous allegation that there is no rational relationship between the minimum educational requirement set out in the vacancy announcement (4-year Bachelor's Degree) and performance in the GS-14 position. The appellant also showed the requisite involvement by OPM. The agency relied on OPM's qualification standard in rejecting the appellant's application, and the appellant had alleged that OPM was involved with the qualifications for this position through the Federal Fire and Aviation Leadership Council.

- ▶ **Appellant: Jerome N. Williams**  
**Agency: Department of Agriculture**  
**Decision Number: [2007 MSPB 244](#)**  
Docket Number: DC-0752-07-0156-I-1  
Issuance Date: October 11, 2007  
Appeal Type: Adverse Action by Agency  
Action Type: Constructive Adverse Action

**Jurisdiction**  
**- Resignation**

The appellant petitioned for review of an initial decision that dismissed his appeal of his resignation from a GS-14 position for lack of jurisdiction. Following his retirement in May 2005, the appellant filed an EEO complaint, alleging that he was discriminated against on the basis of race, age, and disability, and alleging reprisal for prior EEO activity. He contended that he was forced to retire because of intolerable working conditions, including, inter alia: (1) he was directed to perform the duties of a GS-15 supervisory position, even though he had applied for that position but was not selected; (2) he was assigned to an office space and desk size that were not in compliance with GSA standards; (3) that the work was tumultuous; and (4) the agency denied his request to telecommute as a reasonable accommodation for his disability. The agency accepted the first three of these issues for investigation, but dismissed the appellant's allegation of denial of reasonable accommodation on the basis that this claim was the subject of another, on-going EEO complaint. After the agency issued a final decision finding no discrimination, the appellant filed this appeal with the Board, reiterating all of his discrimination claims, including the reasonable accommodation

claim dismissed by the agency. The agency moved to dismiss the appeal for lack of jurisdiction, and as untimely filed.

The AJ dismissed the appeal for lack of jurisdiction, without ruling on the timeliness issue. In his jurisdictional analysis the AJ limited the appellant's constructive discharge claim to the issues the agency accepted for investigation, and found that the appellant's allegations failed to reach the level of coercion necessary to overcome the presumption of voluntariness associated with a retirement.

### **Holdings:**

**1. When an appellant alleges that intolerable working conditions led to his retirement, the jurisdictional test is whether, under all the circumstances, working conditions were made so difficult by the agency that a reasonable person in the employee's position would have felt compelled to retire. When allegations of discrimination are made in connection with a claim of involuntariness, they may be addressed only insofar as they relate to the issue of voluntariness. Here, the AJ should have considered the appellant's claim of denial of a reasonable accommodation, in addition to the other allegations of involuntariness. Considering all of these matters, the appellant made allegations of fact which, if proven, could establish the Board's jurisdiction over his retirement, and he is therefore entitled to a jurisdictional hearing.**

**2. Because the appeal was filed within 30 days after the appellant received the agency's final decision on his discrimination complaint, it was timely filed under 5 C.F.R. § [1201.154](#)(b)(1).**

In his dissent, Chairman McPhie stated that the AJ's show-cause order reasonably construed the appeal as alleging that the appellant "was forced into retirement because of discrimination based on his race, sex, and age," and also "in reprisal for his prior discrimination complaints," and noted that the appellant responded to this order by addressing the timeliness question only. In finding that the AJ should have considered the alleged denial of reasonable accommodation, the majority relied on 5 pages in the agency's 250-page Report of Investigation, but the appellant did not raise these matters himself on appeal. Chairman McPhie wrote that "the lesson for administrative judges is that they must plow through as many pages of documents as the parties choose to submit to determine whether an argument that the appellant has not raised in response to a show-cause order, but could have raised, might provide a basis for relief."

- **Appellant: Jennifer A. Williams**  
**Agency: Department of Housing and Urban Development**  
**Decision Number: [2007 MSPB 245](#)**  
Docket Number: CH-0752-95-0053-I-1  
Issuance Date: October 11, 2007  
Appeal Type: Adverse Action by Agency  
Action Type: Removal

#### **Timeliness**

The appellant petitioned for review of an initial decision, issued in 1995, that dismissed her removal appeal pursuant to a settlement agreement. She did not submit evidence or argument to excuse the 12-year delay in seeking review.

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

### **COURT DECISIONS**

- **Appellant: [James A. Lowder](#)**  
**Agency: Department of Homeland Security**  
Docket Number: 2006-3181  
Issuance Date: October 16, 2007

#### **Retirement**

##### **- Service Credit – Law Enforcement Provision**

The issue was whether the appellant's 1970-1978 service in the United States Secret Service Uniformed Division qualified primary law enforcement officer service such that he would be qualified for the more favorable retirement benefits associated with that status. While at the Uniformed Division, the appellant's regular duties involved protecting the President of the United States, his family and the White House grounds. The MSPB administrative judge ruled that the appellant did not qualify for law enforcement officer coverage because his service in the Uniformed Division "was not in a position which existed for the purpose of investigating, apprehending, or detaining individuals suspected or convicted of violating the criminal laws of the United States," as required by law, and therefore did not constitute law enforcement officer service.

#### **Holdings:**

**1. In the "position-oriented approach" adopted by the court in *Watson v. Department of the Navy*, 262 F.3d 1292, 1304 (Fed. Cir. 2001), the determination whether a particular employee is a "law enforcement officer" emphasizes "the official documentation of the position" in evaluating whether "the 'basic reasons for the existence of the position' was the investigation, apprehension, or detention of**

criminals or suspects.” The Board correctly found that the appellant’s duties did not meet this requirement. This finding is reinforced by the classification by OPM of the appellant’s position in the 083 Police Series. In *Watson*, the court stated that “the official documentation of the GS-083 series indicates that all officers in that series in all departments of the federal government are presumptively not entitled to [law enforcement officer] credit.” Nothing in the record overcame that presumption.

2. That the Board’s decision did not explicitly discuss several of the appellant’s contentions did not merit reversal or remand. The AJ “wrote a detailed opinion that convincingly explained why Lowder’s service with the Uniformed Division was not a ‘law enforcement officer.’ No more detailed discussion was required.”

3. The AJ did not abuse his discretion in excluding the testimony of three witnesses that the appellant wanted to present.

4. The appellant’s contention that his claim for law enforcement officer status should have been determined under the Civil Service Retirement System, but under the later-enacted Federal Employees’ Retirement System, was without merit.

#### Non-Precedential Decisions

Additional, non-precedential decisions issued by the Court of Appeals for the Federal Circuit that reviewed MSPB decisions can be found at the court’s [website](#).