



# U.S. Merit Systems Protection Board

CASE REPORT

DATE: November 2, 2007

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## BOARD DECISIONS

- ▶ **Appellant: John F. Murphy**  
**Agency: Department of Justice**  
**Decision Number: [2007 MSPB 256](#)**  
Docket Number: DA-3443-06-0528-I-1  
Issuance Date: October 30, 2007

### Miscellaneous Topics

#### - USERRA/VEOA/Veterans' Rights

The appellant petitioned for review of an initial decision that dismissed his USERRA appeal as moot. During the processing of this appeal, the appellant presented testimony and documentary evidence purporting to show that, because he was charged military leave on non-workdays, he was forced to use 8 hours of annual leave on 15 separate days, for a total of 120 hours of annual leave. The agency presented evidence that, based on the appellant's testimony, it credited him with 120 hours of leave, and moved to dismiss the appeal as moot, arguing that the appellant had received all of the relief to which he would be entitled in this appeal. Over the appellant's objection, the administrative judge (AJ) accepted the agency's evidence and dismissed the appeal as moot.

The Board denied the appellant's petition for review, but reopened the case on its own motion to consider the appellant's argument that the agency's motion to dismiss was an attempt to circumvent the appellant's motion for an award of attorney fees to which the appellant's counsel is entitled.

### Holdings:

1. Under USERRA, [38 U.S.C. § 4324](#), the appellant's recovery of attorney fees is not part of the relief on the merits. This case is thus like attorney fees under [5 U.S.C. § 7701\(g\)](#), where the Board has held that the potential recovery of attorney fees does not prevent the dismissal of an appeal as moot, and is unlike attorney fees in IRA appeals, [5 U.S.C. § 1221\(g\)\(1\)\(B\)](#), where the statutory

provision includes attorney fees as part of the corrective action to be awarded on the merits.

2. Pursuant to the Federal Circuit's recent ruling in *Pucilowski v. Department of Justice*, 498 F.3d 1341 (Fed. Cir. 2007), the Board has authority to order agencies to correct their records to restore military leave to appellants. While the agency evidently has compensated the appellant for the annual leave he was forced to take, there is no evidence to show that the agency has corrected the appellant's records so that they no longer reflect that the appellant used military leave on non-workdays. Accordingly, the appeal is not moot and must be remanded for further adjudication.

- **Appellant: Alvern C. Weed**  
**Agency: Social Security Administration**  
**Decision Number: 2007 MSPB 259**  
**Docket Number: DE-3443-05-0248-I-3**  
**Issuance Date: October 30, 2007**

#### **Miscellaneous Topics**

##### **- USERRA/VEOA/Veterans' Rights**

Both parties petitioned for review of an initial decision that granted the appellant's request for relief in this VEOA appeal. The appellant alleged that the agency violated his veterans' preference rights in connection with his application for two vacancies in the agency's Montana Field Office, when it non-competitively selected two non-preference eligible applicants under the Outstanding Scholar Program. The AJ determined that, under *Dean v. Department of Agriculture*, 99 M.S.P.R. 533 (2005), the appellant's veterans' preference rights were violated, and the AJ ordered the agency to reconstruct the selections for the two positions under the competitive examination process. The AJ further found that the appellant had shown by preponderant evidence that the agency's violation was willful, a finding that would entitle the appellant to back pay as liquidated damages.

#### **Holdings:**

1. The meaning of "willful," which is not defined in 5 U.S.C. § 3330c(a), is an issue of first impression. The Board adopted the meaning given by the U.S. Supreme Court for a similar provision in the Age Discrimination in Employment Act (ADEA), which is that a violation is "willful" if the "employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." Applying this standard to the instant appeal, the Board found that the agency's violation of veterans' preference rules was not willful. The violation occurred prior to the Board's decision in *Dean*. In the 24 years between the approval of the Outstanding Scholar Program and the *Dean* decision, no binding authority had ever held that using that Program's appointing authority violated veterans' preference rules.

2. The appellant's challenge to the sufficiency of the agency's reconstruction of the hiring process was forwarded to the Denver Field Office for adjudication as a compliance matter.

- **Appellant: Victor W. Welshans**  
**Agency: United States Postal Service**  
**Decision Number: [2007 MSPB 249](#)**  
Docket Number: PH-3443-06-0353-I-1  
Issuance Date: October 25, 2007

**Miscellaneous Topics**

**- USERRA/VEOA/Veterans' Rights**

The agency petitioned for review of an initial decision that granted the appellant's request for corrective action in this USERRA appeal. The appellant alleged that he was improperly charged military leave for non-workdays while serving in the U.S. Army reserve from August 1983 through August 2004. The agency moved to dismiss the appeal on the grounds that the military leave provisions of [5 U.S.C. § 6323](#), as interpreted by the U.S. Court of Appeals for the Federal Circuit in *Butterbaugh v. Department of Justice*, 336 F.3d 1332 (Fed. Cir. 2003), do not apply to Postal employees. The appellant responded that he is entitled to leave under the agency's Employee and Labor Relations Manual (ELM). The AJ determined that the appellant had been improperly charged annual leave on two dates in 1999, and ordered the agency to correct its records.

**Holdings:**

- 1. Because the appellant is a Postal employee, he is not entitled to military leave under [5 U.S.C. § 6323\(a\)](#).**
- 2. The Board will enforce employee rights derived from agency rules and collective bargaining agreements, and the fact that the appellant is not covered by 5 U.S.C. § 6323(a), but instead is covered by an agency rule, does not affect the Board's authority to consider the case under USERRA.**
- 3. The ELM provisions in effect in 1999, unlike the present provisions, unambiguously required that non-workdays falling within a period of absence for active duty be charged against the paid leave allowed full-time employees. Because the appellant's allegations, taken as true, do not support a conclusion that he is entitled to corrective action, the Board dismissed the appeal for failure to state a claim upon which relief can be granted.**

- **Appellant: Gary P. Pittman**  
**Agency: Department of Justice**  
**Decision Number: [2007 MSPB 251](#)**  
Docket Number: NY-3443-05-0113-M-1  
Issuance Date: October 26, 2007

**Miscellaneous Topics**

**- USERRA/VEOA/Veterans' Rights**

**Arbitration**

**- Election of Remedy**

The case was before the Board pursuant to the Federal Circuit's decision in [Pittman v. Department of Justice](#), 486 F.3d 1276 (Fed. Cir. 2007). The court affirmed

the Board's denial of the appellant's USERRA claim, but vacated the denial on the merits of his claims of an improper removal, holding that the Board lacked jurisdiction to consider those claims because the appellant had elected to file a grievance concerning his removal. The court directed the Board to dismiss the appellant's improper removal claims for lack of jurisdiction.

**Holding: In accordance with the court's ruling, the Board dismissed the appellant's improper removal claims under USERRA for lack of jurisdiction.**

► **Appellant: Nancy R. Keys**

**Agency: Office of Personnel Management**

**Decision Number: [2007 MSPB 250](#)**

Docket Number: DC-0831-07-0325-I-1

Issuance Date: October 25, 2007

Appeal Type: CSRA Retirement - Other Than Initial

Action Type: Retirement/Benefit Matter

**Retirement**

**- Survivor Annuity**

OPM petitioned for review of an initial decision that reversed its reconsideration decision denying the appellant's claim for survivor annuity benefits under CSRS. OPM denied the appellant's request for a survivor annuity on the ground that she had not been married to her late husband for 9 months preceding his death, as required by [5 U.S.C. § 8341\(a\)\(1\)](#). Although the appellant and Mr. Keys were not married in a formal ceremony until the month prior to his death, the appellant contended that they had entered into a valid common-law marriage prior to that. On appeal to the Board's regional office, the AJ found that the appellant and Mr. Keys entered into a common-law marriage in the District of Columbia at some point in 2001 or 2002, and that the appellant was entitled to survivor benefits.

**Holding: Although it is undisputed that the appellant and Mr. Keys had entered into a common-law marriage, her entitlement to a survivor annuity turns on whether they were married at the time of his retirement on May 3, 2002, at which time Mr. Keys indicated he wanted a lifetime-only annuity with no survivor benefits. If he was married at that time, that election was ineffective because he and the appellant did not waive her right to a survivor annuity in a written election filed with OPM. If Mr. Keys was not yet married to the appellant at the time of his retirement, then she would be entitled to a survivor annuity only if he had subsequently elected a reduced annuity in a signed writing received by OPM within 2 years of their marriage, which does not appear to have occurred. Because the record is inadequate to determine whether the common-law marriage between the appellant and Mr. Keys commenced before his retirement, the Board remanded the case to the regional office for additional development of the record.**

► **Appellant: Deborah A. Fearon**  
**Agency: Office of Personnel Management**  
**Decision Number: [2007 MSPB 252](#)**  
Docket Number: PH-831M-07-0022-I-1  
Issuance Date: October 26, 2007  
Appeal Type: CSRA - Overpayment of Annuity  
Action Type: Retirement/Benefit Matter

**Retirement**  
**- Annuity Overpayment**

The appellant petitioned for review of an initial decision that affirmed OPM's reconsideration decision, which found that the appellant had received an annuity overpayment and that she was not entitled to waiver of the overpayment. The appellant retired on disability in 1989. By letter dated May 24, 2006, OPM informed the appellant that her eligibility for disability retirement benefits had terminated on June 30, 2004, because she had been restored to earning capacity, and that, for the period from July 2004 through June 2005, she had been overpaid in the amount of \$10,366. The existence and amount of the overpayment were not in dispute. OPM informed the appellant that she could either remit the entire amount, or repay that amount, plus interest, in monthly installments of \$250.

On appeal to the Board, the AJ determined that the appellant was not without fault in the creation of the overpayment, and therefore ineligible for a waiver. The AJ further found that he could not address the question of whether the appellant was entitled to an adjustment of the repayment schedule, as it did not appear that OPM could collect the debt by administrative offset.

**Holdings:**

**1. Recovery of an overpayment will be waived when the annuitant is without fault and recovery would be against equity and good conscience. [5 U.S.C. § 8346\(b\)](#). A recipient of an overpayment is without fault if she has performed no act of commission or omission that resulted in the overpayment. [5 C.F.R. § 831.1401](#). The Board held that the appellant was without fault in the creation of the overpayment, because:**

- a. Contrary to the AJ's finding, the Board found no evidence that the appellant made incorrect statements or omissions of material fact that delayed the termination of her disability benefits;**
- b. Even if the appellant did misreport her earned income, OPM has not alleged that she underreported the amount, or that the amount she reported was below the 80% threshold;**
- c. Once the appellant satisfied her obligation by submitting her earned income report, she could reasonably expect that OPM would make the correct determination and notify her promptly if her benefits were to be terminated; and**

d. When the payments continued, she had every right to assume that OPM had examined her earned income report and concluded that she was still entitled to a disability annuity.

2. As to whether recovery of the overpayment would be against equity and good conscience on the ground that it would cause financial hardship, the Board found that further development of the record is necessary because the question is a close one and the financial data is now over a year old. It therefore remanded the case to the regional office for further adjudication.

► **Appellant: LeRon Atkinson**

**Agency: Department of State**

**Decision Number: [2007 MSPB 254](#)**

Docket Number: DC-1221-07-0301-W-1

Issuance Date: October 26, 2007

Appeal Type: Individual Right of Action (IRA)

**Whistleblower Protection Act**

- Exhaustion of Remedy

- Protected Disclosure

- Contributing Factor

**New Evidence**

The appellant petitioned for review of an initial decision that dismissed his IRA appeal for lack of jurisdiction. The agency terminated the appellant's employment during his probationary period citing unacceptable performance. After receiving a letter from the Office of Special Counsel informing him of his right to seek corrective action from the Board, the appellant filed an appeal with the Board, claiming that he was terminated in retaliation for disclosing that his supervisor instructed him to maintain unofficial timekeeping records separate from the official records. The appellant alleged that he made disclosures concerning this matter to the supervisor herself, the second-level supervisor, agency officials responsible for the time and attendance system, and the agency's Inspector General. The AJ issued an Order to Show Cause in which she suggested that it would be helpful if the appellant provided a copy of his correspondence with OSC to show that his OSC complaint addressed all of the matters raised in his IRA appeal. The appellant responded, but did not submit any of his correspondence with OSC. In the initial decision, the AJ found that: (1) The appellant failed to establish that he exhausted his administrative remedies before OSC with respect to the particular allegations raised before the Board; (2) the appellant failed to explain why he believed that the actions he disclosed constituted a violation of law, rule, or regulation, or any other category specified in [5 U.S.C. § 2302](#)(b)(8); the appellant's disclosures were not protected because they were made as part of his normal job duties.

**Holdings:**

1. The AJ correctly ruled that the appellant failed to exhaust his remedy with OSC as required by [5 U.S.C. § 1214](#)(a)(3), as he never presented evidence to the AJ to establish what issues he raised before OSC. Although the appellant has submitted

such evidence on PFR, he did not seek this evidence until after the initial decision was issued, and almost 3 months after the AJ requested the evidence. Under the circumstances, the Board found that the appellant did not exercise due diligence in attempting to obtain copies of his correspondence with OSC, and it therefore denied the petition for review.

2. Nevertheless, the Board exercised its discretion to reopen the appeal because the appellant's evidence implicates the Board's jurisdiction and warrants a different outcome.

3. The appellant's allegations that his supervisor asked him to keep unofficial time and attendance records that differed from the official records are sufficient in and of themselves to constitute a nonfrivolous allegation that his supervisor violated a law, rule, or regulation.

4. Because it does not appear that reporting wrongdoing was part of the appellant's normal job duties, the appellant's disclosures, with the exception of the disclosure to the supervisor herself, are protected. The appeal was remanded for adjudication on the merits.

- **Appellant: Calvin Slocum**  
**Agency: United States Postal Service**  
**Decision Number: [2007 MSPB 253](#)**  
Docket Number: AT-0752-07-0157-I-1  
Issuance Date: October 26, 2007  
Appeal Type: Adverse Action by Agency

**Miscellaneous Agency Actions**  
**- Indefinite Suspensions**

The appellant petitioned for review of an initial decision that dismissed his appeal for lack of jurisdiction. The appellant, a preference-eligible Mail Handler, submitted a Family and Medical Leave Act certification in which his doctor stated that the appellant needed to be absent from work indefinitely. The appellant continued reporting to work, however, and the agency informed the appellant that his FMLA certification was incomplete. On the new certification, the appellant's doctor stated that the appellant needed to be released from work until he completed medical treatment, a period the doctor estimated could last a year or more. On October 4, 2006, 2 days after receiving the second certification, the agency placed the appellant in a non-duty status because of his doctor's medical assessment. Between October 4 and December 8, 2006, the appellant used a combination of sick leave, annual leave, and leave without pay (LWOP).

The appellant filed an appeal on November 16, stating that he was challenging a removal and a negative suitability determination, but identified the effective date of the challenged action as October 4, 2006. In its response to the appeal, the agency stated that it had taken "steps to reverse the enforced leave period, changing the pay status to administrative leave beginning on October 18, 2006." The AJ held that the Board lacked jurisdiction to review either the appellant's placement on LWOP for 14 calendar days or his placement on administrative leave.

### Holdings:

1. The Board's jurisdiction is determined by the nature of an agency's action at the time an appeal is filed with the Board, and an agency's unilateral modification of its action after an appeal has been filed cannot divest the Board of jurisdiction, unless the appellant consents to such divestiture, or unless the agency completely rescinds the action being appealed. Retroactively limiting the appellant's leave without pay to 14 days did not completely rescind the agency's action, and the appellant did not consent to divesting the Board of jurisdiction.

2. An employee's absence for more than 14 days that results in a loss of pay may be a constructive suspension under 5 U.S.C. §§ [7512\(2\)](#) and [7513\(d\)](#). The dispositive issue in determining whether a suspension occurred is who initiated the absence; if the appellant voluntarily initiated the absence, then it is not a constructive suspension. Because the AJ never informed the appellant of what he needed to show in order to establish Board jurisdiction over his appeal as a constructive suspension, the appeal must be remanded to provide the appellant with an opportunity to establish that he was subjected to a constructive suspension.

#### ► Petitioner: William D. Jones

Agency: Office of Personnel Management

Decision Number: [2007 MSPB 255](#)

Docket Number: CB-1205-07-0021-U-1

Issuance Date: October 26, 2007

Appeal Type: Request for Regulation Review

#### Miscellaneous Topics

##### - Regulation Review

The petitioner requested Board review of OPM's regulations or rules that pertain to uniformed service credit for the accrual of annual leave under [5 U.S.C. § 6303\(a\)](#). Specifically, the petitioner objects to OPM's guidance in its [Guide to Processing Personnel Actions](#) and in its [VetGuide](#), which fail to provide service credit for annual leave under section 6303(a) for the entire period of active military service that he performed during the "Vietnam Era," whether or not he was actually serving in the Republic of Vietnam.

**Holdings:** The Board denied the petitioner's request because:

1. The petitioner is not an "interested person" within the meaning of [5 U.S.C. § 1204\(f\)\(1\)\(B\)](#) entitled to file a petition for regulation and/or rule review. OPM's guidance is inapplicable to the petitioner because he is a Postal employee, and 5 U.S.C. Chapter 63 does not apply to the Postal Service.

2. The petitioner has not alleged that the rules in question would, on their face or if implemented by any agency, require any employee to engage in a prohibited personnel practice as set forth by [5 U.S.C. § 2302\(b\)](#).

3. The petitioner's argument that OPM's rules are contrary to the statute's intent is weak in light of precedent. The rules that the petitioner requests the Board to

review have already withstood scrutiny by the Board and the U.S. Court of Appeals for the Federal Circuit.

- ▶ **Appellant: Janice L. Stribling**  
**Agency: Department of Education**  
**Decision Number: [2007 MSPB 261](#)**  
Docket Number: DC-0752-06-0291-I-1  
Issuance Date: October 30, 2007  
Appeal Type: Adverse Action by Agency  
Action Type: Removal

#### **Timeliness**

#### **Discrimination**

##### **- Mixed Case Procedures**

The appellant filed a petition for review of an initial decision that dismissed her appeal without prejudice. The agency removed the appellant from her position as a Secretary based on charges of misconduct. After filing an appeal with the Board, the appellant submitted a request to withdraw the appeal, indicating that she wanted to have her removal investigated by the agency's Equal Employment Opportunity Group. On March 15, 2006, the AJ dismissed the appeal without prejudice to refiling within 30 days after the agency issued a final decision on the EEO complaint, or after 120 days had passed after the filing of the EEO complaint without resolution. On June 27, 2007, the appellant filed a petition for review stating that she was medically unable to file her PFR in a timely fashion.

#### **Holdings:**

- 1. The petition for review is untimely filed with no good cause shown for the delay. The appellant's medical documentation does not address her condition during the period at issue, i.e., between the issuance of the initial decision in March 2006 and the filing of the PFR in June 2007. In addition, the appellant demonstrated the ability to actively participate in other legal proceedings during this period.**
- 2. Although the appellant titled her June 2007 pleading as a petition for review, it is possible that she is actually seeking to refile her removal appeal rather than to challenge the dismissal of her earlier appeal without prejudice. Such a refiling may be timely, depending on whether or when the agency acted on the appellant's EEO complaint. Accordingly, the Board forwarded the case to the regional office for docketing as a refiled appeal of her removal.**

- ▶ **Appellant: Samuel E. Kile, Jr.**  
**Agency: Department of the Air Force**  
**Decision Number: [2007 MSPB 260](#)**  
Docket Number: AT-0752-05-0931-B-1  
Issuance Date: October 30, 2007  
Appeal Type: Adverse Action by Agency  
Action Type: Reduction in Grade/Rank/Pay

#### **Jurisdiction**

##### **- Reduction in Pay/Grade**

The agency filed a petition for review of a remand initial decision that reversed the agency's action appointing him to a GS-7 position, and ordering the agency to restore him to the WG-10 position he formerly held. Although a majority of the Board denied the petition for review without issuing an Opinion and Order, Chairman McPhie issued a dissent. He argued that the initial decision conflicted with the Board's previous [Opinion and Order](#), reported at 104 M.S.P.R. 49 (2006), which had found that the appellant had not be reduced in grade, and that the proper issue was whether the appellant had suffered a reduction in pay, an issue that has still not been resolved.

- ▶ **Appellant: Armanda E. Coles**  
**Agency: United States Postal Service**  
**Decision Number: [2007 MSPB 257](#)**  
Docket Number: AT-0752-05-0486-X-2  
Issuance Date: October 30, 2007  
Appeal Type: Adverse Action by Agency  
Action Type: Removal

#### **Compliance**

##### **- Dismissal on Proof**

The case was before the Board pursuant to the AJ's recommendation finding the agency in partial compliance with a final Board order.

**Holding: The petition for enforcement was dismissed without prejudice in light of the agency's affirmation that it has taken the necessary actions for compliance.**

- ▶ **Appellant: James Ramos, Jr.**  
**Agency: Department of Justice**  
**Decision Number: [2007 MSPB 258](#)**  
Docket Number: SF-315H-01-0499-X-1  
Issuance Date: October 30, 2007  
Appeal Type: Termination of Probationers

**Compliance**  
**- Dismissal on Proof**

The case was before the Board pursuant to the AJ's recommendation finding the agency in partial compliance with a final Board order.

**Holding: Because the agency is now in full compliance with the Board's final order, the petition for enforcement was dismissed as moot.**

### COURT DECISIONS

The U.S. Court of Appeals for the Federal Circuit has not issued any precedential decisions reviewing Board decisions since the previous Case Report. It has, however, issued nonprecedential decisions, which can be accessed at the [court's website](#).