



U.S. Merit Systems Protection Board

CASE REPORT

DATE: November 9, 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: Ermea J. Russell**
Agency: Equal Employment Opportunity Commission
Decision Number: [2007 MSPB 262](#)
Docket Number: AT-3443-04-0915-B-1
Issuance Date: October 31, 2007

Miscellaneous Topics

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

Jurisdiction

The appellant petitioned for review of a remand initial decision that denied her request for corrective action in this USERRA appeal. The appellant was a Trial Attorney in the agency's Jackson, Mississippi office and a member of the Army Reserve. She took a leave of absence when she was called up for military duty, and when she returned, was assigned to the agency's Birmingham, Alabama office. She filed a grievance under a negotiated grievance procedure, and also filed a complaint with the Department of Labor (DoL), contending that she was entitled to be reemployed in Jackson. The agency denied the grievance, and DoL was unable to resolve the complaint, and the appellant filed a USERRA appeal with the Board. The AJ denied relief on the merits. On petition for review, the Board addressed and rejected the agency's argument that the Board lacked jurisdiction over the appeal on the basis that the grievance procedure was the exclusive means for the appellant to raise her USERRA claim, or on the basis that the appellant made a binding election to pursue a grievance in lieu of a Board appeal. *Russell v. Equal Employment Opportunity Commission*, [2006 MSPB 319](#), 104 M.S.P.R. 14. The Board vacated and remanded, however, finding that the AJ had failed to inform the appellant of appropriate types and burdens of proof in USERRA appeals. On remand the AJ again denied corrective action on the merits.

Holdings:

1. A majority of the Board held that our reviewing court's recent decision in [Pittman v. Department of Justice](#), 486 F.3d 1276 (Fed. Cir. 2007), required the

Board to vacate both the remand initial decision and the Board's previous decision, and dismiss the appeal for lack of jurisdiction. Even though *Pittman* differs from the present case because it concerned an election under [5 U.S.C. § 7121\(e\)](#), and the present case involves section [7121\(a\)](#), the court held that claims of USERRA violations fall within the scope of section 7121, and mandates that the Board hold that it lacks jurisdiction because the collective bargaining agreement constituted the exclusive means for pursuing the appellant's USERRA claim.

2. The Board declined to apply the law of the case doctrine to its previous determination regarding jurisdictional issues in this case. A recognized exception to the doctrine, applicable here, applies when there is a contrary decision of law by controlling authority that applies to the question at issue.

Chairman McPhie issued a dissent arguing that *Pittman* does not foreclose Board jurisdiction and does not warrant departure from the law of the case. *Pittman* discusses and applies [5 U.S.C. § 7121\(e\)](#), which requires an individual covered by a CBA who is affected by an adverse action to elect between a grievance and a Board appeal. *Pittman* does not discuss [5 U.S.C. § 7121\(a\)](#), which generally makes a CBA the exclusive means for challenging matters that fall within its coverage. Moreover, *Pittman* does not discuss or even acknowledge the existence of the Board's earlier precedential decision in this case. Nor does *Pittman* discuss [38 U.S.C. § 4302\(b\)](#), the USERRA provision upon which the Board relied to decline to apply the section 7121(a) exclusivity rule to USERRA cases. Chairman McPhie concluded that *Pittman* is not a contrary decision of law by a controlling authority that applies to the question at issue.

► **Appellant: Vivian J. Blaha**

Agency: Office of Personnel Management

Decision Number: [2007 MSPB 263](#)

Docket Number: DA-0831-07-0068-R-1

Issuance Date: November 8, 2007

Appeal Type: CSRA Retirement - Other Than Initial

Action Type: Retirement/Benefit Matter

Board Procedures

- **Reopening and Reconsideration**

Retirement

- **Survivor Annuity**

The Director of OPM sought reconsideration of the Board's decision in *Blaha v. Office of Personnel Management*, [2007 MSPB 174](#), 106 M.S.P.R. 265. The appellant retired from the U.S. Postal Service in January 2004, at which time she elected an annuity payable only during her lifetime. In February 2006, she sought to change her election to a reduced annuity with a survivor annuity for a person with an insurable interest in her. OPM rejected the request as untimely filed. It was undisputed that, at the time of her retirement, the appellant was told by a Postal Service retirement counselor that she could not elect a survivor annuity for her domestic partner of 15 years, and was not told that her domestic partner would qualify for a survivor annuity as an individual with an insurable interest in the appellant. In its previous Opinion and

Order, the Board held that an agency's affirmative misconduct may preclude enforcement of a deadline under the doctrine of equitable estoppel, and that the Supreme Court's decision in *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990) did not preclude a finding of equitable estoppel because it did not involve a claim for money from the U.S. Treasury in contravention of law. The Board remanded the case to address whether affirmative misconduct by the Postal Service would preclude enforcement of the deadline under the doctrine of equitable estoppel.

In her request for reconsideration under [5 U.S.C. § 7703\(d\)](#), the OPM Director contends that *Richmond* precludes the application of equitable estoppel to the belated election of an insurable interest survivor annuity.

Holding: Because there is as yet no finding on whether the elements of equitable estoppel have been established, including detrimental reliance on information supplied by the agency, it would be premature for the Board to address the Director's argument; doing so would require the Board to issue an advisory opinion, something it may not do.

COURT DECISIONS

- ▶ **Petitioner: Devon Joseph**
Agency: Federal Trade Commission
 Docket Number: [2007-3073](#)
 Issuance Date: November 5, 2007

Miscellaneous Topics

- USERRA/VEOA/Veterans' Rights

The petition sought review of an Opinion and Order, [2006 MSPB 317](#), 103 M.S.P.R. 684, that held that the agency's procedure in filling a vacancy did not deny him his veterans' preference rights. The paralegal vacancy was announced under both a "competitive examination" process, and under a "merit promotion" process. Joseph applied under both procedures. The agency evaluated all of the applicants under both procedures. Joseph, who was ranked first under the competitive examination process, and Thomas were among the four applicants with the highest scores on the merit promotion list. Both were interviewed and considered, but Thomas was selected for the position. On appeal to the court, Joseph argued that, having conducted the open competition process, in which he was at the top of the list after receiving a 10-point veterans' preference, the FTC could not then make its selection from the merit process list, which did not reflect his veterans' preference.

Holding: Unlike the statutes governing open competition applicants, Congress adopted a different approach in dealing with veterans and merit promotion. The statute, [5 U.S.C. § 3304\(f\)\(1\)](#), guarantees a right to apply and an opportunity to compete for such positions, but does not entitle the individual to veterans' preference in the merit promotion process. Joseph was given a right to apply and an opportunity to compete for the paralegal vacancy; the agency's decision not to select him did not violate his rights under VEOA.

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](#).