



U.S. Merit Systems Protection Board

CASE REPORT

DATE: November 16, 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: Connell Dones**
Agency: United States Postal Service
Decision Number: [2007 MSPB 268](#)
Docket Number: DC-0752-07-0192-I-1
Issuance Date: November 14, 2007
Appeal Type: Adverse Action by Agency
Action Type: Suspension - More than 14 Days

Miscellaneous Agency Actions - Indefinite Suspensions Jurisdiction

The appellant petitioned for review of an initial decision that dismissed his constructive suspension claim for lack of jurisdiction. The appellant, a Mail Processing Clerk, suffered a work-related injury in 2000. The agency's medical staff and the appellant's own physician cleared the appellant for limited duty in October 2006, but he was not returned to duty until January 10, 2007. On appeal to the Board, the appellant indicated that he was appealing an improper restoration. During a status conference, the administrative judge (AJ) indicated that the appellant had raised a constructive suspension claim. In the initial decision, the AJ dismissed the appeal, finding, inter alia, that the appellant was not entitled to OWCP benefits during the relevant time period.

Holdings:

1. When an employee requests work within his medical restrictions, and the agency is bound by policy, regulation, or contractual provision to offer available work to the employee, but fails to do so, his continued absence for over 14 days constitutes an appealable constructive suspension. The AJ erred in finding that the appellant was not entitled to OWCP benefits during the relevant time period; the appellant has shown that he in fact had an open OWCP claim at all times relevant to this appeal.

2. The Board cannot determine on the present record whether the appellant was constructively suspended because it is unclear to what extent the appellant's approved OWCP claim may have entitled him to limited duty work, and the record is silent as to whether limited duty work was available on the relevant dates. In addition, it is unclear as to the starting date of the alleged constructive suspension. The case was remanded for further adjudication.

- **Appellant: William D. Lynch**
Agency: Department of the Army
Decision Number: [2007 MSPB 267](#)
Docket Number: DE-3443-06-0256-M-1
Issuance Date: November 13, 2007

Miscellaneous Topics

- USERRA/VEOA/Veterans' Rights

This case was on remand from a decision by the U.S. Court of Appeals for the Federal Circuit, [No. 2007-3114](#), that reversed the Board's final decision finding against the appellant on the merits of his VEOA claim. After considering the results of a medical examination, the agency had withdrawn a tentative job offer it had extended the appellant, a 30% disabled preference-eligible veteran. The court found that the agency had failed to comply with [5 U.S.C. § 3312\(b\)](#), which provides that, when an agency determines that a preference eligible who has a compensable service-connected disability of 30% or more is not able to fulfill the physical requirements of the position, the agency shall notify OPM of its determination, and that OPM, before the selection of any other person for the position, shall make a final determination on the physical ability of the preference eligible to perform the duties of the position.

Holding: The Board directed the agency to reinstate the appellant's tentative job offer and complete the hiring process in accordance with the requirements of [5 U.S.C. § 3312\(b\)](#).

- **Appellant: Raymond Marshall**
Agency: Department of Health and Human Services
Decision Number: [2007 MSPB 269](#)
Docket Number: AT-3443-06-0811-B-1
Issuance Date: November 14, 2007

Miscellaneous Topics

- USERRA/VEOA/Veterans' Rights

The agency petitioned for review of a remand initial decision that ordered it, as corrective action in a VEOA appeal, to appoint the appellant to the job position at issue from the date that the initial selection was made in June 2004 up to the time that the appellant declined the position when it was subsequently offered to him in 2006. The agency did not dispute the AJ's determinations that the Board has jurisdiction over this VEOA appeal, that the agency violated the appellant's veterans' preference rights, and that corrective action was therefore appropriate.

Holding: Automatic and retroactive appointment to the position in question is not the appropriate remedy for a VEOA violation. Rather, the agency must comply by reconstructing the hiring process in compliance with applicable laws. The Board ordered the agency to do that in this case.

- **Appellant: Robert J. Leach**
Agency: Department of Veterans Affairs
Decision Number: [2007 MSPB 266](#)
Docket Number: DA-0752-07-0142-I-1
Issuance Date: November 13, 2007
Appeal Type: Adverse Action by Agency
Action Type: Removal

Adverse Action Charges
- Absence-Related
Penalty

The appellant petitioned for review of an initial decision that affirmed his removal base on charges of failure to follow supervisory instructions and for being absent without leave (AWOL) for about 2½ months. The Board denied the PFR, but affirmed the initial decision as modified, affirming the removal on the basis of the AWOL charge alone.

Holdings:

- 1. The appellant's approved absence expired August 31, 2006, but he continued to be absent from September 1 through the date of his removal and did not submit a leave request. Although the appellant's physician signed a statement that the appellant was released to return to work as of September 1, the appellant never reported or attempted to report for duty, and there is no evidence that the agency prevented him from returning to work. Under these circumstances, the AWOL charge was sustained.**
- 2. The agency's deciding official considered the *Douglas* factors most relevant to this case and reasonably exercised management discretion in selecting the removal penalty. Accordingly, the Board found the removal penalty to be within the tolerable limits of reasonableness.**

- ▶ **Appellant: Harold A. Merian**
Agency: Department of the Navy
Decision Number: [2007 MSPB 265](#)
Docket Number: SF-315H-07-0674-I-1
Issuance Date: November 13, 2007
Appeal Type: Termination of Probationers
Action Type: Probationary Termination

Jurisdiction
- Probationers

The appellant petitioned for review of an initial decision that dismissed his appeal for lack of jurisdiction. The appellant's employment was terminated during his probationary period. On appeal, the AJ issued a show-cause order explaining that probationary employees have limited appeal rights before the Board, and ordering the appellant to show that his appeal was within the Board's jurisdiction. When no response had been received, the AJ issued an initial decision dismissing the appeal for lack of jurisdiction.

Holding: The appellant had in fact submitted a timely response to the show-cause order that was postmarked prior to the filing deadline. The Board therefore considered this pleading on PFR. Nevertheless, the appellant did not allege that his termination was based on partisan political reasons or marital status, or that the termination was based on reasons arising prior to his appointment. The Board therefore dismissed the appeal for lack of jurisdiction.

- ▶ **Appellant: Velma Y. Lock**
Agency: General Services Administration
Decision Number: [2007 MSPB 264](#)
Docket Number: SF-0752-04-0183-I-6
Issuance Date: November 9, 2007
Appeal Type: Adverse Action by Agency
Action Type: Removal

Penalty

Both parties petitioned for review of an initial decision that sustained 2 of the 6 specifications of misconduct, and remanded the case to the agency so that "it can reevaluate the appropriateness of the penalty by considering only the specification[s] that [the administrative judge] sustained." The Board denied both parties' petitions as not meeting the standard of review specified in [5 C.F.R. § 1201.115](#). The Board reopened the appeal on its own motion, however, to modify the remand order language.

Holding: The Board remanded the appeal to the agency to select an appropriate penalty in light of the misconduct sustained in the initial decision. The agency must complete its proceedings and issue a new decision within 60 days. Upon issuance of that decision, the appellant may file an appeal with the Board's regional office, including a hearing, but this appeal would be limited to the reasonableness of the newly-imposed penalty.

COURT DECISIONS

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

NOTICE

In light of the Thanksgiving holiday, there will be no Case Report next week. The next Case Report is expected to be issued November 30, 2007.