U.S. Merit Systems Protection Board

CASE REPORT DATE: January 25, 2008

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BOARD DECISIONS

► **Appellant: Richard W. Parbs**
Agency: United States Postal Service
Decision Number: 2007 MSPB 302
Docket Number: AT-0752-07-0266-I-1
Issuance Date: December 13, 2007
Appeal Type: Adverse Action by Agency
Action Type: Removal

Adverse Action Charges
- Insubordination
Interim Relief

The agency petitioned for review of an initial decision that reversed the appellant's removal. The agency removed the appellant, a Mail Processing Equipment Mechanic, based on a charge of "Improper Conduct" relating to an incident between him and a Distribution Operations Supervisor. Based on the specification of misconduct, the administrative judge (AJ) determined that the agency had charged the appellant with insubordination, and that the agency failed to prove that charge. The appellant filed a motion to dismiss the petition for review (PFR) on the basis that the agency failed to comply with the AJ's interim relief order.

Holdings:

1. The Board declined to dismiss the agency's PFR for failure to comply with the interim relief order. The Board does not have the authority to review the merits of the agency's determination that the appellant's return would be unduly disruptive and the appropriateness of the work assignment he was given. Minor shortcomings in the agency's certification of compliance are not sufficiently serious to warrant dismissing the PFR.

2. The Board concurred with the AJ's conclusion that the agency had charged the appellant with insubordination, notwithstanding the "Improper Conduct" label.

Although a charge of "improper conduct" has no specific elements of proof, the Board will examine the structure and language in the proposal and decision notices. The structure and language of those notices persuaded the Board that the agency charged the appellant with insubordination. Moreover, the AJ had informed the agency in a pre-decision order that he had determined that the specification involved insubordination, and the agency did not object to this order.

3. A majority of the Board, Member Sapin dissenting, concluded that the agency proved its charge of insubordination, which is the willful and intentional refusal to obey an authorized order of a superior officer which the officer is entitled to have obeyed.

4. The Board concluded that the AJ did not commit prejudicial error in adjudicating the appellant's affirmative defenses. It noted, however, that the AJ should have applied the higher standard of proof set forth in *Warren v. Department of the Army*, 804 F.2d 654 (Fed. Cir. 1986) to the appellant's allegation of retaliation for whistleblowing, instead of the standard contained in the Whistleblower Protection Act, because the WPA does not apply to Postal employees.

5. The Board concluded that removal is a reasonable penalty for the sustained charge of insurbordination.

► **Appellant: Jerry O. Jones**
Agency: Department of the Treasury
Decision Number: 2007 MSPB 304
Docket Number: DA-0752-07-0206-I-1
Issuance Date: December 13, 2007
Appeal Type: Adverse Action by Agency
Action Type: Constructive Adverse Action

Jurisdiction
- Retirement

The appellant petitioned for review of an initial decision that dismissed his appeal of his allegedly involuntary retirement for lack of jurisdiction. The appellant was a Program Manager with the IRS in Dallas, Texas. He received a telephone call from his second-line supervisor, who told the appellant that he was unhappy with the appellant's performance and would be reassigning him immediately. This led to a meeting 2 days later, on July 21, in which the supervisor told the appellant he had "lost confidence" in him and was therefore assigning him to a new post as an Automation Project Manager in New Carrollton, Maryland. The supervisor told the appellant that, if he did not accept the reassignment, he must retire or face removal within 90 days. The supervisor also told the appellant that, if he were to retire by August 3, he could offer the appellant a Voluntary Separation Incentive Payment (VSIP). Because OPM had not given the agency VSIP authority for either the appellant's existing position or the position in Maryland, it was necessary to reassign him to a third position to qualify him for a VSIP. The appellant alleged that, while he was contemplating retirement, the agency

transferred him to this third position without his knowledge. Three days later, he applied for immediate retirement and the VSIP, both of which were approved.

Based on the parties' written submissions, the AJ found that the appellant failed to make a nonfrivolous allegation of jurisdiction, and dismissed the appeal without holding a hearing.

Holdings: The Board granted the appellant's petition for review, vacated the initial decision, and remanded the appeal for a jurisdictional hearing:

1. Although a decision to retire is presumed to be voluntary, this presumption can be overcome. An employee's retirement is considered involuntary where an agency threatens a removal action knowing that the removal cannot be substantiated. The Board will consider the totality of the circumstances to determine voluntariness, including undue time pressure on the retirement decision and agency bad faith in encouraging the retirement, as well as unreasonably difficult working conditions caused by the agency.

2. Although the agency alleged that it had legitimate management reasons for reassigning the appellant—that it was going through a reorganization, the appellant was suffering from performance problems in his current position, and that the agency determined that the appellant's talents could best be utilized at the New Carrollton post of duty—the appellant made allegations to rebut these proffered reasons, including that there was no reason to require him to move to New Carrollton to work in the reassigned position, as other employees working on the same project were permitted to work from their respective posts of duty throughout the United States. The AJ erred in crediting the agency's explanation over the appellant's without holding a hearing. Although an AJ may consider an agency's documentary evidence in determining whether the appellant has made nonfrivolous allegations of involuntariness, when the agency's evidence constitutes mere factual contradiction of the appellant's otherwise prima facie showing of jurisdiction, a requested hearing must be held. Here the propriety of the reassignment could not be determined without a hearing.

3. In addition to the threatened removal, the appellant made a nonfrivolous allegation that the agency showed bad faith in encouraging the appellant's retirement by qualifying him for a VSIP for which he was not otherwise eligible, and which exerted additional time pressure on his decision to retire.

► **Appellant: Michael A. Endres**
Agency: Department of Veterans Affairs
Decision Number: 2007 MSPB 301
Docket Number: DE-3443-06-0055-X-1
Issuance Date: December 12, 2007

Compliance

This case was before the Board on a Recommendation of the AJ finding the agency in noncompliance with the final order in the underlying appeal. In the merits appeal concerning the appellant's VEOA claim, the AJ found that the agency violated the

appellant's rights as a veteran when it selected another applicant for the position of Chief Financial Officer (CFO) in its Denver Veterans Affairs Health Administration Center. The appellant was included on the certificate of eligibles with a score of 92 points, which include 10 points for disabled veterans' preference. The certificate of eligibles also included two other individuals, McCorvey and Innis, with scores of 97 and 94 points, each of which included 5 points veterans' preference. Both McCorvey and Innis had the notation "TP" next to their scores, indicating that they had received the status of tentative veterans. Although the certificate forewarned that a selection could not occur without verifying the preference status of all the candidates, the agency selected McCorvey for the position before determining whether he was eligible for veterans' preference. It was later determined that McCorvey was not entitled to veterans' preference status. During the appeal, the agency acknowledged that it had appointed McCorvey without seeking "pass over" authority from OPM, and without giving the appellant an opportunity to respond to the "pass over" in accordance with 5 U.S.C. § 3318. The AJ found that the agency's violation of the appellant's veterans' preference rights was willful because it had neglected to verify whether the selectee was entitled to veterans' preference status despite having been given instructions to do so. As a remedy, the AJ ordered the agency to "appropriately" reconstruct its selection process consistent with the appellant's rights as a compensably disabled veteran.

In its "Agency's Compliance with Order," the agency stated that the reconstructed certificate of eligibles contained only the appellant's name, and argued that it was within its authority not to make any selection from the certificate. It stated that McCorvey would continue to hold the CFO position through a "regularization" of his appointment based on obtaining a variation under 5 C.F.R. § 5.1 to correct the administrative error that led to McCorvey's original selection. The appellant filed a petition for enforcement. Following a hearing, the AJ issued a Recommendation concluding that the agency's reconstruction and its alleged decision to make no selection from the certificate of eligibles was contrary to the facts and did not constitute a selection process consistent with law. The AJ further concluded that McCorvey's non-competitive appointment through an alleged regularization under 5 C.F.R. § 5.1 effectively circumvented the veterans' preference laws, including the requirement that it seek authority from OPM to pass over the appellant in order to hire a candidate who did not have preference eligibility at the time of the selection.

Holdings:

1. The agency did not properly reconstruct the selection process. Under a proper reconstruction, the appellant would have to be entered on the register ahead of McCorvey, who would have had the same score as the appellant, and Innis would have had either 89 or 94 points, depending on whether he was determined to be a preference eligible. To have selected McCorvey for the position, the appointing authority must have received OPM's approval to do so after filing written reasons with OPM for having passed over the appellant, and the agency must also have given the appellant notice of the agency's intent to pass over his candidacy and the opportunity to respond to the agency's reasons. The agency took neither of these actions.

2. The agency's purported "regularization" of McCorvey's appointment to the CFO position was not in accordance with law. First, McCorvey's selection cannot be called an "administrative error" because the agency did not verify his preference eligibility status prior to his selection as required. His selection thus involved a violation of law, not an administrative error. Second, there is no evidence that the agency obtained a variation. Because the agency has not shown that McCorvey's appointment was regularized by either a variation or by correcting the illegal component of the appointment, McCorvey's appointment to the CFO position is not valid.

► **Appellant: Armando H. Calvetti**
Agency: Department of the Air Force
Decision Number: 2007 MSPB 306
Docket Number: DA-0752-07-0299-I-1
Issuance Date: December 14, 2007
Appeal Type: Adverse Action by Agency
Action Type: Removal

Timeliness
Whistleblower Protection Act
- Election of Remedies

The appellant petitioned for review of an initial decision that dismissed his appeal of a removal action as untimely filed. The agency removed the appellant from his position effective April 26, 2004. He filed an appeal of that action with the Board on July 5, 2005. In an initial decision that became the Board's final decision, the AJ dismissed the appeal as untimely filed without good cause shown. Doc. No. DA-0752-05-0545-I-1 (Oct. 6, 2005). On November 9, 2006, the appellant sought corrective action from OSC, challenging his removal on the basis of whistleblower retaliation. After OSC informed the appellant that it had terminated its inquiry, the appellant filed an IRA appeal with the Board within 65 days of OSC's notification letter. The AJ interpreted 5 U.S.C. § 1214(a)(3) and 5 C.F.R. § 1209.5(b) to mean that the appellant could choose one of two options for raising his allegations that the agency's removal action was due to whistleblower retaliation: he could seek corrective action from OSC, or he could file an appeal directly with the Board. Since the appellant first sought to challenged the removal action by filing his first appeal directly with the Board, the AJ determined that the time limit for this appeal was governed by 5 C.F.R. § 1201.22(b), rather than the time limit set for in 5 C.F.R. § 1209.5(a). Accordingly, the AJ determined that the appeal was untimely filed without good cause shown.

Holding: Although the Board denied the appellant's PFR, it reopened the appeal to find that the appellant's options were governed by 5 U.S.C. § 7121(g), and that the appeal was timely filed. Under section 7121(g), an employee who is subject to a personnel action that he is entitled to grieve and who alleges a prohibited personnel practice that is not covered by 5 U.S.C. § 2302(b)(1), may elect one of the following remedies: (1) an appeal to the Board under 5 U.S.C. § 7701; (2) the negotiated grievance procedure; or (3) a complaint with OSC which, upon

exhaustion of Special Counsel proceedings, may be followed by an appeal to the Board under 5 U.S.C. §§ 1214 and 1221. Since the appellant was entitled to grieve his removal, he could have elected one of the remedies set forth in section 7121(g). Since the appellant's prior removal appeal was untimely filed, the appellant did not "elect" the Board remedy by filing that appeal. He was therefore free to elect the third remedy, which he has done in a timely manner by filing within 65 days after OSC's termination letter.

► **Appellant: Patricia K. Zelenka**
Agency: Office of Personnel Management
Decision Number: 2007 MSPB 308
Docket Number: PH-831M-07-0316-I-1
Issuance Date: December 17, 2007
Appeal Type: CSRA - Overpayment of Annuity

Retirement
- Annuity Overpayment

The appellant petitioned for review of an initial decision that affirmed OPM's determination regarding an overpayment of annuity benefits. It was undisputed that the appellant, who retired on disability in 1991, was later restored to an earning capacity and was no longer entitled to disability retirement benefits because she exceeded the 80% earnings limit under 5 U.S.C. § 8337(d) and 5 C.F.R. § 831.1209. By the time of OPM's July 2006 notice, the appellant had received an overpayment of $45,341.22, the amount of which was not in dispute. OPM found, and the Board's AJ affirmed on appeal, that the appellant was not entitled to a waiver of the overpayment. The AJ did, however, find that an adjustment in the repayment schedule was appropriate, from $350 per month to $250 per month.

Holdings: The Board granted the PFR, affirmed the initial decision as to the amount of the overpayment, reversed the decision with regard to the finding that the appellant was at fault in causing the overpayment, vacated the decision with regard to the determination to adjust the repayment schedule, and remanded the appeal to the regional office for further adjudication:

1. Under 5 U.S.C. § 8346(b) and 5 C.F.R. § 831.1401, recovery of an overpayment will be waived when the annuitant is without fault and recovery would be against equity and good conscience. A recipient of an overpayment is without fault if she has performed no act or commission or omission that resulted in overpayment. 5 C.F.R. § 831.1402. Although the appellant was on notice of the 80% income limitation, and could have located the relevant salary table on the Internet, it was not her responsibility to do this. Her responsibility was to submit accurate earned income reports to OPM, which she did. It was OPM's responsibility to advise her when she exceeded the limit. The appellant was therefore without fault in the creation of the overpayment.

2. To date, the appellant has failed to establish that recovery is against equity and good conscience on the ground that it would cause financial hardship. Although the appellant argues that the AJ erred in this regard, she has failed to provide

evidence to support this argument; the evidentiary record supports a finding that the margin available for debt collection is well under OPM's proposed monthly installments of $350.

3. After the AJ issued her decision, the Board issued its decision in *Fearon v. Office of Personnel Management*, 2007 MSPB 252, 107 M.S.P.R. 122, which held that the Board lacks the authority to address the appellant's possible entitlement to an adjustment.

4. A remand is appropriate for further development of the record on the issue of financial hardship. OPM's guidelines allow for the possibility of a partial waiver of the overpayment, the appellant's financial information is now a year old, and additional information regarding her alleged "extraordinary" recurring expenses required for her husband would be helpful.

► **Appellant: Kurt Heiter**
Agency: Office of Personnel Management
Decision Number: 2007 MSPB 305
Docket Number: AT-0831-07-0435-I-1
Issuance Date: December 13, 2007
Appeal Type: CSRA Retirement - Other Than Initial

Retirement
- Recovery from Disability

The appellant petitioned for review of an initial decision that affirmed OPM's decision terminating his disability retirement benefits on the basis that he had recovered from his disability. In 1990, the appellant began receiving disability retirement from his position as a mail distribution clerk for the Postal Service because of back problems. In 2007, OPM determined that the appellant had recovered from his disability based on an investigation that showed that the appellant had worked part-time as a Federal Express delivery driver, a position that required comparable physical requirements. OPM also relied on an interview with the appellant's treating physician in which the physician alleged indicated that the appellant's condition was stable enough that he could return to work as a distribution clerk. After conducting a hearing, the AJ affirmed OPM's decision.

Holdings: Based on clinical findings, expert medical opinion and testimony, plus the appellant's own subjective evidence, the Board found that the appellant proved his continuing entitlement to disability retirement benefits. The appellant's physician testified, inter alia, that the appellant's MRI showed degenerative changes, that his back was in worse condition now than when he retired, that the appellant should not have worked for Federal Express, that he would not advise the appellant to go back to work, and that his condition would prevent him from lifting more than 20 to 30 pounds (OPM had found that the Federal Express position required him to lift 70 pounds, the same as his previous Postal position). The appellant testified, inter alia, that, his 5 months of work with Federal Express caused his back pain to worsen and forced him to quit the position.

► **Appellant: Lawrence A. Morin**
Agency: Office of Personnel Management
Decision Number: 2007 MSPB 309
Docket Number: DA-0831-07-0406-I-2
Issuance Date: December 18, 2007
Appeal Type: CSRA Retirement - Other Than Initial

Jurisdiction
Retirement
- Service Credit for Post-1956 Military Service

The appellant petitioned for review of an initial decision that dismissed his appeal for lack of jurisdiction. OPM determined that the appellant's CSRS retirement annuity must be reduced because he was eligible for Social Security benefits and he had not made a deposit for his post-1956 military service. In his appeal to the Board, the appellant requested that his military service be credited, and claimed that "retirees in similar circumstances have been allowed to retire with their military time being counted." OPM later issued a letter rescinding its reconsideration decision, advised the appellant that he would be given an opportunity to complete the deposit for his post-1956 military service, and requested dismissal of the appeal. Responding to the AJ's show-cause order, the appellant explained that "paying the deposit would set the retiree substantially back financially." He also proffered that OPM had other options it could offer him, be failed to identify any. The AJ dismissed the appeal for lack of jurisdiction on the ground that OPM had completely rescinded its reconsideration decision.

Holdings: The Board granted the PFR, vacated the initial decision, and affirmed OPM's final decision:

1. Once OPM completely rescinds a reconsideration decision, the Board no longer retains jurisdiction over the appeal in which that decision is at issue. Even though OPM purported to rescind its reconsideration decision, it is clear that OPM will not issue another decision. Under these circumstances, the rescission letter constitutes OPM's final decision to reduce the appellant's annuity if he does not make the deposit for his post-1956 military service, and the rescission letter does not divest the Board of jurisdiction.

2. If an annuitant who retires after September 7, 1982 does not make a deposit for his post-1956 military, OPM is required by law to recompute and reduce the annuity when the retiree becomes eligible for Social Security benefits. The appellant's position that he should be credited for his post-1956 military service without making the requisite deposit is not supported by any statute, regulation, or decision, and it does not matter whether others are receiving benefits improperly. The appellant must decide whether to make the deposit and receive credit for his military service or forego the deposit and not receive the credit.

► **Appellant: Salvador I. Guerrero, Jr.**
Agency: Department of Veterans Affairs
Decision Number: 2007 MSPB 307
Docket Number: AT-0752-06-0144-X-1
Issuance Date: December 17, 2007
Appeal Type: Adverse Action by Agency
Action Type: Removal

Compliance
- Dismissal on Proof

This case was before the Board on a Recommendation by the AJ finding the agency in noncompliance with the final order which reversed the agency's removal action. During this compliance proceeding, it was agreed that the agency had complied with regard to cancelling the appellant's removal, his cost of living and within-grade-increases, providing his back pay, and reinstating his health benefits retroactively. The AJ found, however, that the appellant was entitled to be reimbursed for the $1,100 he paid for his job search following his removal, and that the agency had not paid the appellant this amount.

Holding: The agency has submitted evidence that it has now paid the appellant $1,100 for his job search expenses. The petition for enforcement was therefore dismissed as moot.

► **Appellant: Leslie J. Gregory**
Agency: Department of the Navy
Decision Number: 2007 MSPB 303
Docket Number: PH-1221-07-0119-W-1
Issuance Date: December 13, 2007
Appeal Type: Individual Right of Action (IRA)

Whistleblower Protection Act
- Protected Disclosure

The appellant petitioned for review of an initial decision that dismissed his IRA appeal for lack of jurisdiction on the basis that the appellant failed to establish that he had made disclosures protected by the Whistleblower Protection Act. A majority of the Board denied the PFR by short-form Final Order. Member Sapin issued a dissenting opinion concluding that the appellant made a nonfrivolous allegation of a violation of law, rule, or regulation in that he reasonably believed that a supervisor engaged in excessive use of overtime. She noted that the Board has held in the context of claims of alleged time and attendance violations that there is no de minimis exception for this category of protected disclosure.

► **Appellant: Elpidia L. Braza**
Agency: Office of Personnel Management
Decision Number: 2007 MSPB 310
Docket Number: DC-0831-07-0165-I-1
Issuance Date: December 18, 2007
Appeal Type: CSRA Retirement - Other Than Initial

Retirement
- Survivor Annuity

The appellant petitioned for review of an initial decision that affirmed OPM's reconsideration decision, which denied the appellant's request for a survivor annuity based on the service of her deceased husband. A majority of the Board denied the PFR by short-form Final Order. Member Sapin issued a dissenting opinion in which she agreed with the AJ that, although the facts of this case are similar to those in *Steele v. Office of Personnel Management*, 57 M.S.P.R. 458 (1993), *aff'd*, 50 F.3d 21 (Fed. Cir. 1995) (Table), she agreed with the AJ's belief that *Steele* was wrongly decided and ought to be overruled. She would have ruled that the appellant's consent to waiving her survivor rights was not valid because she was not sufficiently educated to understandv the effect of her actions when she signed the SF-2801.