U.S. Merit Systems Protection Board

CASE REPORT DATE: March 3, 2008

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BOARD DECISIONS

► **Appellant: Samuel Valenzuela**
Agency: Department of the Army
Decision Number: 2007 MSPB 313
Docket Number: DA-0752-07-0143-I-1
Issuance Date: December 21, 2007
Appeal Type: Adverse Action by Agency
Action Type: Removal

Adverse Action Charges
- Absence-Related
- Falsification
Penalty

The appellant petitioned for review of an initial decision that affirmed his removal.

Holdings: The Board affirmed the initial decision with respect to the charge of AWOL and failure to follow leave procedures, reversed the initial decision with respect to the charge of providing false or misleading evidence, and affirmed the removal penalty for the sustained charge.

1. The agency established AWOL, which requires a showing that the employee was absent, and that his absence was not authorized or that his request for leave was properly denied. The agency also established that discipline was appropriate based on the appellant's failure to follow leave procedures.

2. By finding that the agency failed to prove that the appellant intended to deceive or mislead the agency by the medical documentation he provided, but sustaining the charge upon finding that the agency proved that the appellant provided misleading but not false information, the administrative judge (AJ) improperly split the charge that the appellant "provided false or misleading information not consistent with medical documentation as reason for not being at work" on specified dates. Falsification requires proof of intent to deceive.

3. Removal was a reasonable penalty for the sustained charge.

► **Appellant: Dean J. Balouris**
Agency: United States Postal Service
Decision Number: 2008 MSPB 1
Docket Number: PH-0752-06-0495-I-1
Issuance Date: January 4, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Penalty
- Assault/Violent Conduct

The agency petitioned for review of an initial decision that mitigated the appellant's removal to a 60-day suspension. The removal action, based on a charge of "Unacceptable Conduct/Assault," related to an incident between the appellant and another letter carrier, Sullivan. The agency charged that, after heated words between the two were exchanged, the appellant punched Sullivan in the side of the face. The AJ, however, believed the appellant's testimony that he reflexively pushed Sullivan away after Sullivan had spit on him and, in doing so, accidentally hit Sullivan in the face. The AJ also found that Sullivan instigated the altercation by referring to the appellant as an "a**hole" in a telephone conversation with a third party within the appellant's hearing. In light of these findings, and that (1) Sullivan suffered only minor injuries, (2) Sullivan was only issued a letter of warning, and (3) the appellant had 15 years of satisfactory service with no previous disciplinary record, the AJ found that the removal penalty exceeded the bounds of reasonableness and mitigated the penalty to a 60-day suspension.

Holding: A majority of the Board, Member Sapin dissenting, granted the agency's PFR and reinstated the removal penalty. Although the majority found no error in the AJ's finding that the appellant did not intentionally strike Sullivan, it concluded that the deciding official had weighed the relevant *Douglas* factors and that the removal penalty was within the bounds of reasonableness.

Relying on the same factors as did the AJ, Member Sapin concluded that the removal penalty exceeded the bounds of reasonableness, and would have affirmed the mitigation to a 60-day suspension.

► **Appellant: Sylvester Christopher**
Agency: Department of the Army
Decision Number: 2008 MSPB 2
Docket Number: AT-0752-07-0092-I-1
Issuance Date: January 8, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Adverse Action Charges
- Falsification/Fraud
Penalty

The agency petitioned for review of an initial decision the appellant's removal to a 14-day suspension. The agency removed the appellant from his position as a Metal

Worker Welder based on 3 charges: (1) inappropriate comments in the workplace; (2) false statement on his Declaration for Federal Employment; and (3) violation of the agency's policy on violence in the workplace. Both the first and third charges were based on a statement to a co-worker that, if he did not receive a promotion to a leader's position, "he would go out to [his] car, get [his] gun and shoot the place up and shoot somebody." The second charge was based on the appellant's response to a question that asked whether, during the last 10 years, he had been convicted, imprisoned, or placed on probation or parole and, if so, required him to provide details of all such occurrences. The appellant answered this question in the affirmative, and in the explanation portion wrote: "My wife and I had a domestic squabble between 96 and 97. I was placed on probation but all that has been taken care of." The agency charged that this answer was false, in that the appellant failed to disclose that he was arrested, charged, and convicted of assault on 4 separate occasions between December 1994 and November 1999, for which he was sentenced to and served periods of incarceration, and that he was charged and convicted of contempt of court in 2001.

The AJ merged the first and third charges into a single charge, as they both related to the same alleged misconduct, and found that the agency proved it by preponderant evidence. The AJ did not sustain the second charge, finding that the appellant lacked the intent to deceive the agency. Based on the single sustained charge, the AJ found that the removal penalty exceeded the bounds of reasonableness, and mitigated the penalty to a 14-day suspension. The AJ also order the agency to provide interim relief.

Holdings: The Board granted the agency's PFR and reinstated the removal penalty:

1. The Board rejected the appellant's argument that the agency's PFR should be rejected for lack of compliance with the interim relief order. The agency certified that it timely took appropriate administrative action to result in the issuance of pay to the appellant for the interim relief period, and the appellant's evidence shows that he is receiving pay and benefits from the agency during the interim period.

2. Based on the totality of the evidence, the Board concluded that the agency proved is falsification charge by a preponderance of the evidence.

3. Based on the sustained charges, the removal penalty was reasonable.

► **Appellant: Cheryl W. Nevins**
Agency: United States Postal Service
Decision Number: 2008 MSPB 4
Docket Number: PH-0353-07-0280-I-1
Issuance Date: January 11, 2008
Appeal Type: Restoration to Duty After Recovery from Compensable Injury

Jurisdiction
Miscellaneous Agency Actions
- Restoration to Duty
Timeliness

The appellant petitioned for review of an initial decision that dismissed her restoration appeal for lack of jurisdiction. The appellant experienced a work-related injury to her eyes in 1991. In 1997, the agency offered the appellant a limited-duty assignment, which she refused to accept, and resigned from her federal employment. There was extensive litigation between the appellant and the Department of Labor, including the Office of Workers' Compensation Programs (OWCP) and Employees' Compensation Appeals Board (ECAB), starting in 1998, and concluding on February 26, 2006, when the ECAB found that the appellant did not have any permanent residual affect from the employment injury, and affirmed OWCP's action terminating compensation in 2004.

Holdings: The Board granted the appellant's PFR, reversed the initial decision, and remanded the appeal to the regional office for adjudication on the merits:

1. Where an employee fully recovers from a compensable injury after more than a year, MSPB jurisdiction requires nonfrivolous allegations that: (1) the appellant was separated because of a compensable injury; (2) she has fully recovered more than a year after the date she became eligible for OWCP benefits; (3) she requested restoration within 30 days after the cessation of OWCP compensation; and (4) she believes that the agency violated her reemployment priority rights.

2. The first and fourth elements are satisfied, as there is no dispute that the appellant's OWCP compensation benefits were terminated in 2004, and that the agency has not subsequently entered the appellant on its reemployment priority list.

3. OWCP eventually determined that it did not make a valid work suitability determination with regard to the limited-duty position offered to the appellant in 1997, and she has alleged that her resignation arose in the context of rejecting the same limited-duty position. The appellant thereby made a nonfrivolous allegation that this separation resulted from, or was substantially related to, her compensable injury, satisfying the first element of the jurisdictional standard.

4. With regard to the third jurisdictional element—a timely request for restoration—the Board found that the appellant has raised a sufficient factual dispute as to require a hearing. A remand is therefore required.

► **Appellant: Richard A. Froom**
Agency: Office of Personnel Management
Decision Number: 2008 MSPB 6
Docket Number: AT-0831-07-0536-I-1
Issuance Date: January 11, 2008
Appeal Type: CSRA Retirement - Other Than Initial
Action Type: Retirement/Benefit Matter

Retirement
- Deposits/Refunds

The appellant petitioned for review of an initial decision that affirmed OPM's denial of his request for a refund of his discretionary CSRS military service credit deposit.

Holding: The Board granted the appellant's PFR, reversed the initial decision, and ordered OPM to refund the appellant's deposit. In making the deposit, the appellant had reasonably relied on incorrect information supplied to him by OPM and the Social Security Administration. Under these circumstances, OPM must grant the appellant's request for a refund.

► **Appellant: Tracy A. Baldwin**
Agency: Office of Personnel Management
Decision Number: 2007 MSPB 311
Docket Number: CH-0845-07-0209-I-1
Issuance Date: December 19, 2007
Appeal Type: FERS - Collection of Overpayment

Retirement
- Annuity Overpayment

The appellant petitioned for review of an initial decision that affirmed OPM's determination that she was not entitled to an adjustment of the recovery schedule for repaying an overpayment of annuity benefits. A majority of the Board denied the PFR. Member Sapin issued a dissenting opinion in which concluded that the repayment schedule should be reduced from $50 per month to a nominal amount of $5 per month. She found the facts of the present case similar to several others in which the Board reduced the repayment schedule.

► **Appellant: Ervine E. Rumph**
Agency: Office of Personnel Management
Decision Number: 2008 MSPB 3
Docket Number: AT-844E-07-0839-I-1
Issuance Date: January 9, 2008
Appeal Type: FERS - Employee Filed Disability Retirement

Retirement
Jurisdiction

The appellant petitioned for review of an initial decision that dismissed his appeal for lack of jurisdiction. During a telephone conference, the appellant told the AJ he was actively seeking OPM's reconsideration of the decisions reflected in an OPM letter to him. The administrative judge dismissed the appeal without prejudice on the ground that OPM had not yet issued a final decision that was appealable to the Board.

Holding: Although the initial decision was correct when issued, OPM has now issued a final decision subject to Board jurisdiction. Accordingly, the appeal was remanded to the regional office for adjudication.

► **Appellant: Mark A. Deems**
Agency: Department of the Treasury
Decision Number: 2008 MSPB 5
Docket Number: PH-3443-03-0115-X-1
Issuance Date: January 11, 2008
Appeal Type: Compliance

Compliance
Board Procedures
- Reopening and Reconsideration

This case was before the Board based on the AJ's Recommendation finding the agency in noncompliance with the Board's final decision in *Deems v. Department of the Treasury*, 100 M.S.P.R. 161 (2005). In that decision, the Board ordered the agency to reconstruct the selection process for three File Clerk positions. The AJ found that the agency, by utilizing the Clerical and Administrative Support Positions assessment tool in reconstructing the selection for two of the three positions, again made choices that were non-competitive and did not take into account the appellant's veterans' preference rights. The AJ found, however, that the agency adequately demonstrated that its selection of another person for the third position was based on a legitimate exception to the required examination process, 5 C.F.R. § 213.3102(u) (2006), and was authorized by Executive Order 12125. In addition to filing a response to the AJ's Recommendation, the agency moved for reconsideration decision of the Board's final decision.

Holdings: The Board denied the agency's motion for reconsideration and remanded the case to the regional office for further adjudication:

1. The agency's argument that the Board lacks jurisdiction over the appellant's VEOA claim is based on the mistaken assumption that 5 U.S.C. § 3304(b) is not a statute relating to veterans' preference-eligible, an argument that was rejected in *Dean v. Department of Agriculture*, 2006 MSPB 1, 104 M.S.P.R. 1, ¶¶ 8-10 (2006).

2. The Board now believes that there are shortcomings in the factual record that are material to the outcome of the compliance issue, making a remand to the regional office appropriate.

► **Appellant: Carlos M. Rivera**
Agency: United States Postal Service
Decision Number: 2007 MSPB 312
Docket Number: NY-0752-05-0345-X-1
Issuance Date: December 20, 2007
Appeal Type: Compliance

Compliance

The case was before the Board on the AJ's Recommendation finding that the agency was in noncompliance with the Board's final order. The merits proceeding in this removal action was resolved by settlement. In his petition for enforcement, the appellant alleged numerous violations of the agreement. Most were resolved during the

compliance proceeding, but the AJ found the agency in noncompliance as to is obligations to pay interest on back pay and with respect to its obligation to credit the appellant with the appropriate amounts of leave.

Holding: The Board found the agency to be in continued noncompliance with its obligations to pay interest on back pay and to credit the appellant with appropriate leave, and ordered the agency to provide this. The Board found that additional allegations of noncompliance raised by the appellant should be determined in a new compliance proceeding, as they had not been raised in the existing action.