U.S. Merit Systems Protection Board

CASE REPORT DATE: March 11, 2008

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: William Luther**
Agency: Department of Commerce
Decision Number: 2008 MSPB 7
Docket Number: CB-7121-07-0023-V-1
Issuance Date: January 17, 2008
Appeal Type: Arbitration Appeals/Grievances

Arbitration

The appellant filed a request for review of an arbitration decision that affirmed his removal for misconduct.

Holdings: The Board sustained the arbitrator's decision:

1. The matter is within the Board's jurisdiction because the subject matter of the grievance (a removal action) is one over which the Board has jurisdiction, and the appellant alleged that the action at issue constitutes discrimination on a basis covered by 5 U.S.C. § 2302(b)(1).

2. The scope of the Board's review of arbitrators' decision is limited; the Board will modify or set aside an arbitration decision only where the arbitrator has erred as a matter of law in interpreting civil service law, rule, or regulation. The appellant has shown no such error in this case.

► **Appellant: Susan FitzGerald**
Agency: Department of Homeland Security
Decision Number: 2008 MSPB 17
Docket Number: CB-7121-07-0014-V-1
Issuance Date: January 29, 2008
Appeal Type: Arbitration Appeals/Grievances

Arbitration

The appellant requested review of an arbitrator's decision that found that the agency removed her for just cause on grounds that she falsified applications for federal

employment. The agency alleged that the appellant falsified 14 applications for promotion based on her answers to two questions on Optional Form 612, which asked applicants to list the highest level of education attained. In response to the first question, the appellant indicated that she completed a Bachelor's degree and wrote, "I completed my degree and received a Bachelor of Science in Criminal Justice from Hamilton University. April 2002." In response to the second question, she wrote, "B.S. in Criminal Justice Hamilton University April 2002." The agency charged that these responses were false, in that "you knew Hamilton University was not accredited by an accrediting institution recognized by the U.S. Department of Education and that your degree was not legitimate." While the appellant's grievance of the removal action was pending, an EEOC AJ issued a decision finding that the agency had discriminated against the appellant in regard to several applications for promotion.

The arbitrator found that the appellant was guilty of the falsification charge, and that removal penalty was reasonable. The arbitrator also rejected the appellant's affirmative defense that the agency retaliated against her for protected EEO activity.

Holdings: A majority of the Board, Chairman McPhie dissenting, granted the appellant's request for review, reversed the arbitration decision, and ordered the agency to reinstate the appellant with back pay and other benefits:

1. The appellant satisfied the requirements for Board jurisdiction: (1) the subject matter of the grievance (a removal) is one over which the Board has jurisdiction; (2) the grievant alleges discrimination under 5 U.S.C. § 2302(b)(1) in connection with the underlying action; and (3) a final decision has been issued in the grievance. The Board rejected the agency's argument that the Federal Labor Relations Authority was the appropriate avenue for review.

2. The arbitrator erred in finding that the agency had just cause to remove the appellant for falsifying applications for federal employment. To sustain a falsification charge, the agency must prove by preponderant evidence that the employee knowingly supplied incorrect information with the intention of defrauding the agency. The appellant argued that she did not supply incorrect information at all as she did, in fact, earn a bachelor's degree in criminal justice from Hamilton University in April 2002, and that the arbitrator had improperly focused on the value of that degree. The Board found the facts in the instant case similar to those in *Guerrero v. Department of Veterans Affairs*, 2007 MSPB 132, 105 M.S.P.R. 617. Based on its holding in *Guerrero*, the Board found that the appellant established that the arbitrator erred in interpreting civil service law when considering the merits of the charge.

3. The arbitrator erred in finding that the agency did not retaliate against the appellant for protected EEO activity. The majority observed that the arbitrator did not cite *any* legal standard when he evaluated the evidence, and his analysis did not follow the framework of *Warren v. Department of the Army*, 804 F.2d 654, 656-58 (Fed. Cir. 1986). The Board found that this legal error permitted the Board to make its own findings. Applying *Warren*, *Simien v. U.S. Postal Service*, 99 M.S.P.R. 237, ¶ 28 (2005), and *Troupe v. May Dept. Stores Co.*, 20 F.3d 734, 737 (7th Cir. 1994), to the facts of this case, the Board concluded that the appellant

established that the removal action was taken in reprisal for protected EEO activity.

Chairman McPhie issued a dissenting opinion in which he disagreed with the majority on both the falsification charge and the affirmative defense of retaliation for protected EEO activity. On the former, he concluded that the majority improperly exceeded the scope of the narrow review that should be applied to arbitration decisions, and engaged in de novo review of the arbitrator's findings of fact. Regarding the affirmative defense, he contended that the arbitrator did undertake the appropriate analysis under *Simien*, weighing all the evidence and making a finding on the ultimate issue of whether the appellant met her overall burden of proving retaliation.

► **Appellant: Michael Dwyer**
Agency: Department of Veterans Affairs
Decision Number: 2008 MSPB 10
Docket Number: CB-7121-07-0024-V-1
Issuance Date: January 22, 2008
Appeal Type: Arbitration Appeals/Grievances

Arbitration
Discrimination
- Retaliation for EEO Activity

The appellant requested review of an arbitrator's decision that reversed his removal under 5 U.S.C. chapter 75, but found unproven his affirmative defense of retaliation for prior equal employment opportunity activity.

Holding: The Board sustained the arbitrator's decision. Per the standards summarized above in the *FitzGerald* appeal, the Board found that it had jurisdiction, but that the appellant had failed to establish that the arbitrator had erred as a matter of law in adjudicating his retaliation claim.

► **Appellant: Erick D. Taylor**
Agency: Department of the Army
Decision Number: 2008 MSPB 11
Docket Number: CB-7121-07-0025-V-1
Issuance Date: January 23, 2008
Appeal Type: Arbitration Appeals/Grievances

Arbitration
Discrimination

The appellant requested review of an arbitrator's decision the sustained his removal on misconduct charges. Although the arbitrator dismissed two charges, he sustained two of the three specifications of the charge of sexual harassment, and found that removal was an appropriate penalty for this sustained charge.

Holdings: The Board sustained the arbitrator's decision:

1. Per the standards summarized above in the *FitzGerald* appeal, the Board found that it had jurisdiction. The agency's contention that the Board lacks jurisdiction over the appellant's claim of gender discrimination, because the collective bargaining agreement provides that such claims cannot be raised as a grievance, is without merit. The terms of the collective bargaining agreement cannot divest the Board of the jurisdiction granted by law.

2. The Board will modify or set aside an arbitration decision only where the arbitrator has erred as a matter of law in interpreting civil service law, rule, or regulation. The appellant failed to make any showing of such error in this case.

► **Appellant: Daniel U. Antonio**
Agency: Department of the Air Force
Decision Number: 2008 MSPB 9
Docket Number: SF-0752-07-0581-I-1
Issuance Date: January 22, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Jurisdiction
Mootness

The appellant petitioned for review of an initial decision that dismissed his removal appeal as moot. After the appellant filed his appeal, the agency presented evidence that it had canceled the appellant's removal, reinstated him to his original position, and provided him with back pay. In dismissing the appeal as moot, the AJ stated that any claim that the agency did not actually provide status quo ante relief could be raised in a future petition for enforcement.

Holdings: Although the Board denied the appellant's PFR, it reopened the appeal on its own motion, vacated the initial decision, and remanded the appeal to the regional office for further adjudication:

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 divesture or unless the agency completely rescinds the action being appealed.

2. The AJ erred in stating that an appeal is moot if the employee has been "placed, as nearly as possible, in the same situation that he would have been in if the action had never occurred." That standard was overruled in *Fernandez v. Department of Justice*, 2007 MSPB 99, ¶ 5, 105 M.S.P.R. 443. The correct test is whether the employee has received all of the relief that he could have received if the matter had been adjudicated and he had prevailed. Here, the appellant had claimed national origin discrimination, and may have a claim for compensatory damages.

3. Following issuance of the initial decision, the Board overruled the case law cited by the AJ for the proposition that the appellant could file a petition for enforcement after the appeal was dismissed as moot if the agency failed to follow

through with rescinding his removal. The Board lacks the authority to adjudicate a petition for enforcement when an appeal has been dismissed as moot because the Board has been divested of jurisdiction.

► **Appellant: John M. Hope**
Agency: Department of the Army
Decision Number: 2008 MSPB 13
Docket Number: DA-3443-06-0597-I-1
Issuance Date: January 28, 2008

Jurisdiction
- Probationers
Defenses and Miscellaneous Claims
- Harmful Error

The agency petitioned for review of an initial decision that reversed its termination of the appellant's employment during his probationary period due to pre-appointment reasons. The agency appointed the appellant to the position of Optometrist. Less than 3 months later, it cancelled the appointment based on its determination that he did not meet the qualifications required for the position, namely, a Doctor of Optometry degree and a current state license to practice optometry. On appeal to the Board, the appellant contended that the agency failed to give him written notice and an opportunity to respond, as required by 5 C.F.R. § 315.805. The appellant contended that this error was harmful because, if he had been allowed to respond, the agency would have concluded that he was qualified for the position. Specifically, he adduced evidence that he is certified by the American Board of Ophthalmology and licensed to practice medicine in Arkansas and Oklahoma. The AJ agreed with these contentions, finding jurisdiction under 5 C.F.R. § 315.806(c), finding procedural error in the failure to provide notice and an opportunity to respond, and that the error was harmful. The AJ ordered the agency to cancel its termination action and to reinstate the appellant to his position.

Holdings: The Board granted the agency's PFR, affirmed the initial decision insofar as it found jurisdiction and that the agency committed procedural error, vacated the initial decision insofar as it found the agency's procedural error to be harmful, and remanded the appeal to the regional office for further adjudication:

1. The Board rejected the agency's argument that it lacks jurisdiction because the appointment was illegal and the appellant was never an employee. The appellant was appointed and entered into duty under the criteria of 5 U.S.C. § 2105(a).

2. The Board also rejected the agency's contention that the appellant's appointment was subjected to an absolute prohibition by 10 U.S.C. § 1094(a)(1), the Qualifications Standards Operating Manual, and Army Regulation 40-68. None of these acts as an absolute prohibition because they all concern professional qualifications for a specific position. Such qualification requirements may prohibit an appointment under a certain set of circumstances, but they cannot act as an absolute bar to the appellant's appointment in the civil service in all circumstances.

3. That the agency committed procedural error was not in dispute, as the agency admitted that it failed to provide the appellant with the written notice and opportunity to respond required by 5 C.F.R. § 315.805. The remaining question is whether that error was harmful to the appellant. In resolving this question in the affirmative, the AJ relied primarily upon evidence outside the record—the appellant's medical licensure in Oklahoma and that state's scheme for licensure of Optometrists—of which he took official notice. While the appellant's license to practice medicine in Oklahoma can be verified, the effect of Oklahoma's statutory scheme is something that may be subject to reasonable dispute and should not have been taken as proven. Moreover, the agency was given no opportunity to refute the facts of which the AJ took official notice. A remand is therefore required.

► **Appellant: Uche O. Elendu**
Agency: Office of Personnel Management
Decision Number: 2008 MSPB 12
Docket Number: PH-844E-07-0473-I-1
Issuance Date: January 28, 2008
Appeal Type: FERS - Employee Filed Disability Retirement

Retirement
- Disability Retirement

The appellant petitioned for review of an initial decision that affirmed OPM's final decision denying his application for disability retirement benefits under FERS. The appellant resigned from his position with the U.S. Postal Service effective January 27, 2006. OPM received his FERS disability retirement application on February 27, 2007. In both its initial and final decisions, OPM rejected the application on the basis that it was untimely filed, as it was received more than a year after his separation from federal employment. On appeal to the Board, the AJ affirmed for the same reason.

Holdings: The Board granted the appellant's PFR, reversed the initial decision and OPM's final decision, and remanded the case to OPM for further proceedings:

1. Under 5 U.S.C. § 8453, a FERS disability retirement application may be allowed only if it "is filed with [OPM] before the employee . . . is separated from the service or within 1 year thereafter." OPM's regulation at 5 C.F.R. § 844.201(a)(1) clarifies that an application will be considered on its merits "if the application is filed with an individual's former employing agency or with OPM prior to or within 1 year of the individual's separation from federal service." Under 5 C.F.R. § 841.109, when the last day of a filing period falls on a weekend or legal holiday, the period for timely filing extends to the next business day. Finally, 5 C.F.R. § 844.201(a)(2) provides that the filing date for an application that is filed via facsimile is the date of the facsimile.

2. Because January 27, 2007, fell on a Saturday, the appellant's application was timely filed if it was filed with either OPM or the U.S. Postal Service no later than Monday, January 29, 2007. The undisputed evidence is that the appellant's retirement application was faxed to the Postal Service on that date. Accordingly, it was timely filed, and OPM must issue a new decision on the merits.

► **Appellant: Cindy M. Smedley**
Agency: Office of Personnel Management
Decision Number: 2008 MSPB 20
Docket Number: SF-831E-07-0116-I-1
Issuance Date: January 30, 2008
Appeal Type: CSRA - Employee Filed Disability Retirement
Action Type: Retirement/Benefit Matter

Retirement
- Disability Retirement

The appellant petitioned for review of an initial decision that affirmed OPM's final decision denying her application for disability retirement benefits. The appellant filed an application for disability retirement based on medical conditions resulting from an automobile accident, including neck pain, headaches, severe depression, post-traumatic stress disorder, anxiety with associated panic attacks, and agoraphobia. The Postal Service removed the appellant from her position as a Mail Processing Clerk for physical inability to perform the duties of her position. The AJ determined that the appellant's removal entitled her to a presumption that she was entitled disability retirement benefits under *Bruner v. Office of Personnel Management*, 996 F.2d 290, 294 (Fed. Cir. 1993), but only as to her physical condition, not her psychological conditions. He found that OPM rebutted the *Bruner* presumption, in that the appellant failed to show that her physical condition could not be controlled by medication, therapy, or other reasonable means. As to the appellant's psychological conditions, the AJ found that the appellant was disqualified from disability retirement benefits because she failed to follow her physicians' repeated recommendations to seek psychiatric care.

Holdings: A majority of the Board, Member Sapin dissenting, granted the appellant's PFR, but affirmed the initial decision as modified, still sustaining OPM's reconsideration decision:

1. The AJ erred by not applying the *Bruner* presumption to the appellant's psychological conditions as well as her physical conditions. The Board has often noted and relied on the causal or exacerbating effect of one of an appellant's conditions on another, including both the psychological effect of a physical cause and the physical effects of a psychological cause, as well as on the aggravating effect on a mental condition of a failure to work that is attributable to the condition.

2. The AJ's determination that the appellant failed to follow her physicians' recommendations to receive treatment from a pain specialist or to seek psychiatric treatment should not have been applied to the period after November 26, 2004, because the appellant's limited finances did not allow her to obtain specialized treatment.

3. OPM's evidence is nonetheless sufficient to rebut the *Bruner* presumption. An appellant's voluntary refusal to accept facially reasonable treatment will bar entitlement to disability retirement benefits. Here, the appellant submitted no evidence or argument addressing why she did not obtain the recommended facially reasonable treatment from 1999 through mid-2004.

In her dissent, Member Sapin reviewed the evidence and concluded that the appellant did reasonably comply with her doctors' recommendations. She noted that it was not until September 2003 that the appellant's doctor diagnosed her with post-traumatic stress disorder and referred her to a psychiatrist and, although the appellant did not see that psychiatrist, she did follow up on treatment for her psychological condition.

► **Appellant: Harold W. Taylor**
Agency: Office of Personnel Management
Decision Number: 2008 MSPB 14
Docket Number: SF-0831-07-0501-I-1
Issuance Date: January 28, 2008
Appeal Type: CSRA Retirement - Other Than Initial

Retirement
- Service Credit
- Deposits – Post-1956 Military Service

The appellant petitioned for review of an initial decision that affirmed OPM's final decision recomputing and reducing the amount of his CSRS retirement annuity. The appellant retired in 1997 at age 52. Before his retirement, he received notice that his retirement annuity might be reduced at age 62 if he failed to make a deposit for his post-1956 military service. When the appellant reached at 62, OPM recomputed and reduced his retirement annuity by $235 per month. On appeal to the Board, the appellant argued that he was not given specific information concerning the amount of his military deposit and that, because he was accepting an early retirement, there was very little time between when he made the decision to retire and the effective date of his retirement to obtain information about this. The AJ determined that the appellant received adequate notice of the requirement that he make a deposit for his post-1956 military service, and that the appellant failed to show that his failure to pay the deposit was the result of administrative error.

Holdings: The Board granted the appellant's PFR, reversed the initial decision, and ordered OPM to allow the appellant an opportunity to make a deposit for his post-1956 military service:

1. An annuitant who retires after September 7, 1982, is entitled to receive credit for active duty military service performed after 19856 only if he deposits an amount equal to 7% of his total post-1956 military pay with Civil Service Retirement and Disability fund. This deposit must be made before the employee's separation from service, unless an administrative error has occurred such that the employee was not given proper notice or opportunity to make the deposit before separation. 5 C.F.R. § 831.2107(a)(1). In *McCrary v. Office of Personnel Management*, 459 F.3d 1344, 1349 (Fed. Cir. 2006), the Board's reviewing court held that, when an employee asks for information regarding the amount of the military deposit or the consequences of failing to make the deposit, the government commits administrative error if its response either misrepresents the dollar amounts in question, or is so indirect, inaccurate, or incomplete as to confuse or mislead the

employee as to the amount of the deposit or the effect of any failure to make the deposit on the annuity recalculation.

2. Here, the undisputed evidence indicates that the employing agency's human resources employee told the appellant that she did not know how to determine the amount required to pay the deposit, misinformed him that he could wait until he was 62 years old to file an appeal with the Board, and rushed him to complete the retirement process within a short period of time. Under these circumstances, the Board concluded that the information provided by the appellant's employing agency was indirect, inaccurate, and incomplete under the *McCrary* standard and therefore constituted administrative error.

► **Appellant: Edward J. Simpkins**
Agency: Department of Labor
Decision Number: 2008 MSPB 15
Docket Number: DC-3443-07-0674-I-1
Issuance Date: January 28, 2008

Miscellaneous Topics
- USERRA/VEOA/Veterans' Rights

The appellant petitioned for review of an initial decision that dismissed his VEOA appeal for lack of jurisdiction. The appellant sought to make a deposit so that he would be entitled to retirement service credit for his post-1956 military service. He alleges that he thought that deductions for this purpose were taking place, but later learned they were not. As relief, he requested that the agency pay the deposit for him or the "difference in accrued interest" on the deposit to be paid which the delay had caused. When the agency declined to provide this relief, the appellant sought help with the Department of Labor, and then filed a VEOA appeal with the Board's regional office. The AJ found that, while the appellant exhausted his remedy with DOL, he failed to make a nonfrivolous allegation that the agency violated his rights under a statute or regulation relating to veterans' preference, and dismissed the appeal for lack of jurisdiction.

Holdings: The Board denied the PFR, reopened the appeal on its own motion, reversed the initial decision, and dismissed the appeal for failure to state a claim upon which relief may be granted:

1. The appellant's allegation that the agency violated his veterans' preference rights by preventing him from exercising his right to make a deposit for his post-1956 military service was a nonfrivolous allegation that his veterans' preference rights were violated. The AJ therefore erred in dismissing the appeal for lack of jurisdiction.

2. By law, interest is due on the deposit to be paid, and there is no provision in the relevant statute or regulations allowing waiver of interest in the appellant's case. Furthermore, the pertinent statutory and regulatory provisions do not stand in some relation to, or have a bearing on, concern, or have a connection with veterans' preference rights. Even if the agency erred in processing his request to have deductions taken from his paycheck and credited toward a deposit for his

post-1956 military service, he is not entitled to relief under VEOA. Accordingly, the appellant's VEOA claim must be dismissed for failure to state a claim upon which relief can be grated.

► **Appellant: Joe D. Cameron Jerusalem**
Agency: Department of the Air Force
Decision Number: 2008 MSPB 16
Docket Number: AT-0752-88-0195-I-1
Issuance Date: January 28, 2008
Appeal Type: Adverse Action by Agency

Timeliness

The appellant sought to reopen an appeal of a removal action that was resolved in an initial decision, issued in 1988, that dismissed the appeal pursuant to a written settlement agreement. The appellant asserts that he was mentally incompetent at the time of the settlement and that he was taken advantage of by his representative. He further asserts that his 19-year delay in contesting the settlement agreement should be excused because of mental incompetence.

Holding: The Board found that the appellant failed to prove that he was impaired from filing his PFR for the entire period of his delay. To the extent that the appellant's filing could be construed as a request to reopen his appeal, the appellant declined to exercise its discretion to do so.

► **Appellant: Furnando L. Keith**
Agency: Department of the Air Force
Decision Number: 2008 MSPB 8
Docket Number: DA-0752-04-0569-I-1
Issuance Date: January 22, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Timeliness

The appellant petitioned for review of an initial decision that affirmed the agency's removal action. The initial decision was issued and became final in 2004. The petition for review was received in August 2007.

Holding: The Board dismissed the PFR as untimely filed without a showing of good cause for the delay.

► **Appellant: Jerry L. Hopkins**
Agency: United States Postal Service
Decision Number: 2008 MSPB 18
Docket Number: DC-0752-07-0796-I-1
Issuance Date: January 30, 2008
Appeal Type: Adverse Action by Agency

Timeliness

The appellant petitioned for review of an initial decision that dismissed his appeal of a removal action as untimely filed without good cause shown. After the appellant was removed effective June 3, 2005, he filed a grievance, which was resolved by a July 31, 2006 settlement agreement. The agreement provided that the removal would be held in abeyance for a period not to exceed November 1, 2006, in order to give the appellant an opportunity to apply for retirement. The appellant filed an appeal with the Board's regional office prior to November 1, 2006, but it was rejected as prematurely filed. On January 11, 2007, the agency processed the appellant's removal, effective the following day. The appellant filed a new appeal on July 26, 2007. In dismissing the appeal, the AJ found that the appellant was required to file his Board appeal no later than 30 days after June 3, 2005, the effective date of the removal action, and that his appeals filed in August 2006 and July 2007 were untimely filed by more than 1 and 2 years, respectively. The AJ found that the appellant failed to establish good cause for this delay in filing.

Holdings: The Board denied the appellant's PFR, but reopened the appeal on its own motion to vacate the initial decision and remand the appeal to the regional office for further adjudication:

1. The Board has viewed the removal of a Postal Service employee, who is retained on the agency's rolls in a non-pay status until the final disposition of a grievance, as being constructively effective on the effective date contained in the agency's decision notice, rather than on the date when the employee is eventually separated from the Postal Service's rolls. The Board has nevertheless found that a settlement agreement reached during a grievance could serve to change the employment status of an employee who has been kept on the agency's rolls in a non-pay status after a removal, and thereby alter the general rule that the effective date of a removal is the date set forth in the decision letter.

2. It is not clear from the existing record whether the exception to the general rule should apply in this case, necessitating a remand. On remand, the AJ will accept further evidence and argument on the timeliness issues, including the submission of any applicable collective bargaining agreement, and any evidence relating to when the agency first informed the appellant of the January 12, 2007 removal.

► **Appellant: Joyce A. Barrett**
Agency: United States Postal Service
Decision Number: 2008 MSPB 19
Docket Number: CH-0353-07-0566-I-1
Issuance Date: January 30, 2008
Appeal Type: Restoration to Duty
Action Type: Restore After Recovery from Compensable Injury

Miscellaneous Agency Actions
- Restoration to Duty

The appellant petitioned for review of an initial decision that dismissed her appeal for lack of jurisdiction. In her appeal, the appellant claimed that the agency improperly

failed to provide partial restoration to her after compensable on-the-job injury. Without holding a hearing, the AJ dismissed the appeal for lack of jurisdiction.

Holdings: The Board denied the appellant's PFR, but reopened the appeal on its own motion to reverse the initial decision and remand the appeal to the regional office for further adjudication:

1. In order to establish Board jurisdiction over a restoration claim as a partially recovered employee, an appellant must allege facts that would show, if proven, that: (1) She was absent from her position due to a compensable injury; (2) she recovered sufficiently to return to duty on a part-time basis, or to return to work in a position with less demanding physical requirements than those previously required of her; (3) the agency denied her request for restoration; and (4) the denial was "arbitrary and capricious."

2. The appellant made nonfrivolous allegations as to each of these elements. As to the last, the appellant's treating psychologist determined that the appellant could return to work on a part-time basis, but that such return must be to the same facility where she previously worked where she "still has her support network of husband, relatives and friends." Her doctor also stated that the appellant should perform her duties "seated in a chair with back support." After a meeting was held between the appellant, her union representative, and agency officials, the agency denied the request to return to work, stating that her request included "an environment free of noise and interaction," unlimited access to family members for comfort and support," and "limited or no supervision." The appellant responded to this, stating, "At no time was a request made for UNLIMITED ACCESS to family member for comfort and support, limited or no supervision, and an environment free of noise and interaction." Given that the agency based its denial, at least in part, on restrictions that were clearly beyond the scope of those set forth by the appellant and her doctor, the Board found that the appellant had made a nonfrivolous allegation that the agency's denial of partial restoration was arbitrary and capricious.