U.S. Merit Systems Protection Board

CASE REPORT DATE: April 28, 2008

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BOARD DECISIONS

► **Appellant: Jimmie R. Tryon, Sr.**
Agency: United States Postal Service
Decision Number: 2008 MSPB 35
Docket Number: DA-0752-07-0331-I-1
Issuance Date: February 20, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Penalty
- Prior Record

The appellant filed a petition for review (PFR) of an initial decision that sustained his removal from his City Letter Carrier position for unacceptable conduct. The agency alleged that the appellant behaved inappropriately towards a customer, in that he hugged her and kissed her on the check and made inappropriate comments, some of which contained sexual innuendos. Following a hearing, the administrative judge (AJ) found that the customer's account was not credible, instead believing the appellant's testimony that he did not kiss the customer, and that she had initiated hugs with him on some occasions. The AJ also believed the appellant's testimony that he was friendly with his customers and frequently gave them hugs and handshakes. The AJ nevertheless sustained the charge of unacceptable conduct because the appellant admitted hugging this customer and others, finding that hugging any customer is inappropriate behavior for a mail carrier. In determining that the removal penalty was within the bounds of reasonableness, the AJ relied on the fact that the agency had proposed the appellant's removal sometime in the past for similar misconduct.

Holding: Although the Board agreed with the AJ's finding that the agency supported its charge of unacceptable conduct by preponderant evidence, it found that the removal penalty exceeded the bounds of reasonableness, and mitigated the penalty to a 60-day suspension. First, the more serious allegations of misconduct—kissing and inappropriate comments—were not sustained. Second, it was clear

error for the AJ and the deciding official to consider the appellant's alleged prior proposed removal for similar misconduct as a basis for finding the appellant incapable of rehabilitation. A proposed action that was either withdrawn or never finalized cannot be relied upon, as it does not constitute "prior discipline," and it is improper for an agency to enhance a penalty based on misconduct that was not cited in the notice of proposed removal.

► **Appellant: Christine M. Wonsock**
Agency: Office of Personnel Management
Decision Number: 2008 MSPB 36
Docket Number: AT-0831-07-0802-I-1
Issuance Date: February 20, 2008
Action Type: Retirement/Benefit Matter

Jurisdiction

The appellant petitioned for review of an initial decision that affirmed OPM's reconsideration decision, which dismissed as untimely filed the appellant's request for reconsideration of its initial decision denying her a waiver of the requirements for enrolling in the Federal Employees Health Benefits Program (FEHBP) as a retiree. OPM filed a cross-PFR asking the Board to dismiss the appeal for lack of jurisdiction. While a federal employee in 1982, the appellant cancelled her enrollment in the FEHBP with no right to reenroll. She retired on disability in 1988. She later sought to enroll in the FEHBP as a retiree. OPM denied this request in an initial decision dated April 7, 2005, on the ground that she was not enrolled in FEHBP when she retired, she did not meet the requirement for continuous coverage into retirement, and she was not eligible for a waiver. The initial decision informed the appellant of her right to request reconsideration within 30 days. The appellant sought reconsideration in letters to OPM in December 2006 and March 2007. OPM denied her reconsideration request because it was untimely filed and she failed to provide evidence or argument justifying an extension of time for filing. On appeal to the Board, the AJ determined that the Board had jurisdiction over the appeal under 5 U.S.C. § 8347(d) and 5 C.F.R. § 831.110, and affirmed OPM's reconsideration decision because it was not unreasonable or an abuse of discretion.

Holdings: The Board granted the agency cross-PFR, vacated the initial decision, and dismissed the appeal and the appellant's PFR for lack of jurisdiction:

1. The Board's jurisdiction is limited to the matters over which it has been given jurisdiction by law, rule, or regulation. The issue of jurisdiction is always before the Board and may be raised by either party or by the Board itself at any time during a Board proceeding.

2. The AJ's reliance on 5 U.S.C. § 8347(d) and 5 C.F.R. § 831.110 as the basis for jurisdiction was in error. Section 8347(d) gives the Board jurisdiction over an administrative order or action affecting the rights or interests of and individual under 5 U.S.C. chapter 83, subchapter III. This appeal, concerning the appellant's post-retirement eligibility for health coverage, implicates 5 U.S.C. chapter 89 and 5 C.F.R. part 890.

3. Under section 8905(b) and 5 C.F.R. § 890.301(a)(1), the appellant was not eligible to elect health coverage under FEHBP after she became an annuitant unless OPM granted her a waiver. The statute gives OPM sole discretion to make this waiver determination, and its determination is not reviewable by the Board.

► **Appellant: Charles R. McCoy**
Agency: United States Postal Service
Decision Number: 2008 MSPB 37
Docket Number: DA-0752-07-0263-I-1
Issuance Date: February 28, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Timeliness
Discrimination
- Mixed Case Procedures
Jurisdiction
Arbitration/Collective Bargaining-Related Issues
- Election of Remedy

The appellant petitioned for review of an initial decision that dismissed his appeal of a removal action as untimely filed. The appellant, a preference-eligible postal employee, was removed from his Custodian position effective November 15, 2005. He filed a timely MSPB appeal in December 2005 (Doc. No. DA-0752-06-0137-I-1). That appeal was dismissed as withdrawn in February 2006 after the appellant's representative indicated that the appellant would be pursuing a grievance. The appellant filed the present appeal in March 2007, asserting that the removal action was based on discrimination. The AJ dismissed the second-filed appeal as untimely filed without good cause shown.

Holdings: The Board granted the PFR, reversed the initial decision, and remanded the appeal for adjudication on the merits:

1. The second-filed appeal was timely filed as a mixed-case appeal under 5 C.F.R. § 1201.154(b).

a. It is generally appropriate to consider a second petition for appeal as a new, late-filed appeal and to determine whether good cause exists for the filing delay under 5 C.F.R. § 1201.22(b). Under this regulation, the second-filed appeal would be untimely filed.

b. Under 5 C.F.R. § 1201.154(b), if an appellant has filed a timely formal complaint of discrimination with his agency, an appeal must be filed within 30 days after he receives the agency's final decision on the discrimination issue or, if the agency has not issued a final decision within 120 days, at any time thereafter. Here, the record shows that the appellant filed a formal discrimination complaint on October 10, 2006, and there is no indication the agency has issued a final decision regarding that complaint. Accordingly, the appeal is timely filed under 5 C.F.R. § 1201.154(b).

c. The Board noted that an agency may dismiss a discrimination complaint that fails to comply with applicable time limits under 29 C.F.R. § 1614.107(a)(2), and that the Board defers to a final agency decision that a complaint was untimely filed when that decision is not appealed to the EEOC, and to a final EEOC decision finding a complaint untimely filed. Here, however, there is no indication that the agency dismissed the appellant's complaint as untimely filed, and the Board noted that the appellant alleged that he did not become aware of the underlying events that caused him to believe the agency had discriminated against him until June 2006, and he sought counseling in July 2006.

2. The election requirement set forth at 29 C.F.R. § 1614.302(b) does not bar the appeal. When an appellant has been subjected to an action that is appealable to the Board, and alleges that the action was effected because of prohibited discrimination, he may initially filed a mixed-case complaint with his employing agency, or a mixed-case appeal with the Board, but not both, and whichever is filed first is deemed to be an election to proceed in that forum. Even though the appellant filed a Board appeal before filing a mixed-case complaint with his agency, the appellant did not allege discrimination in his first Board appeal, and he has alleged that the facts underlying his discrimination claim did not come into existence until after he withdrew his Board appeal. Under these circumstances, the election requirement of § 1614.302 does not apply.

3. The election requirement set forth at 5 U.S.C. § 7121(d) does not bar the appeal. Generally, an individual affected by a personnel action that is both appealable to the Board and covered by a negotiated grievance procedure may contest the action before the Board or via a grievance, but not both. Section 7121(d) does not apply to postal employees, however, who have the right to grieve and to appeal actions directly to the Board.

4. Although the Board has jurisdiction over the appeal as a mixed case, some of the issues might be precluded under the doctrine of collateral estoppel. The Board noted that this doctrine has long been applied to arbitration decisions involving postal employees, and that the arbitrator's decision found that the appellant's termination was fully warranted.

► **Appellant: Louis R. Garofalo**
Agency: Department of Homeland Security
Decision Number: 2008 MSPB 38
Docket Number: AT-0351-07-0401-I-1
Issuance Date: February 29, 2008
Appeal Type: Reduction In Force

Reduction in Force

The appellant petitioned for review of an initial decision that affirmed his separation by reduction in force (RIF). The appellant was a Screening Manager employed by the Transportation Security Administration (TSA). He was separated pursuant to the agency's Human Capital Management (HCM) Policy No. 351-3, which

contains the agency's procedures for separations by RIF. Under that policy, determining which employees within a particular job group will be identified for separation requires that employees with a job group be ranked. The ranking is based on a competency assessment process consisting of a structured interview and/or the review of documentation. Pursuant to HCM Policy No. 351-3, the appellant was selected to separation, and he filed an appeal with the MSPB. After holding a hearing, the AJ issued an initial decision affirming the appellant's separation.

Holdings: A majority of the Board, Chairman McPhie dissenting, granted the appellant's PFR, vacated the initial decision, and remanded the appeal for further adjudication:

1. As it recently held in *Wilke v. Department of Homeland Security*, 2007 MSPB 45, 104 M.S.P.R. 662, the Board has jurisdiction over an appeal challenging the RIF separation of an excepted service employee of TSA.

2. The appellant objected that the agency failed to use any of the available alternatives set forth in HCM Policy No. 351-3: implementing hiring freezes, encouraging resignations or retirements, and offering employees the opportunity to volunteer for involuntary workforce reductions separations. Because these options were not mandatory under HCM Policy No. 351-3, however, the agency's failure to use them was not a violation. The same reasoning applies to the appellant's claim that he should have been offered reassignment to a vacant position in lieu of separation.

3. A majority of the Board agreed with the appellant's contention that the AJ improperly denied him the opportunity to challenge the scoring of the structured interviews that led to his separation. An agency is accorded wide discretion in conducting a RIF, and the Board will not upset an agency's RIF decision absent a clear abuse of that discretion. To show a clear abuse of discretion, an appellant must show that the agency's decision was arbitrary or irrational. The requested testimony of the members of the interview panel was relevant to the question of whether the scoring of the structured interviews was arbitrary or irrational, and the AJ abused his discretion by denying the appellant's request to call the panel members as witnesses.

4. On the basis of the evidence before the AJ, the Board agreed that the appellant failed to prove either of his affirmative defenses (age discrimination and retaliation). If the interview panel members are unable to articulate a rational basis for the scores given to the appellant and his colleague, the AJ should determine whether that fact alters his analysis of the appellant's affirmative defenses.

In his dissenting opinion, Chairman McPhie expressed his agreement with the AJ that allowing the appellant to delve into the thought processes of the panel members, and requiring them to explain their reasoning, goes beyond the scope of the Board's review and turns this RIF appeal into something it is not—a failure to hire situation. The Chairman expressed the view that the Board's authority is limited to considering whether the agency underwent a valid reorganization and whether it properly applied its

own workforce reduction regulations to the appellant. He agreed with the AJ that the agency did both, and the RIF separation should therefore be sustained.

► **Appellant: Claire Gabriel**
Agency: Department of Labor
Decision Number: 2008 MSPB 39
Docket Number: CB-7121-07-0029-V-1
Issuance Date: March 4, 2008
Action Type: Arbritration

Arbitration/Collective Bargaining-Related Issues
Reduction in Force

The appellant requested review of an arbitrator's decision that dismissed her grievance of her separation via reduction in force. Through her union, the appellant grieved her separation, contending, inter alia, that the agency invoked RIF procedures to abolisher her position for reasons personal to her, i.e., because of retaliation for prior union activity and discrimination based on national origin, race, and color. The arbitrator found that the appellant's separation was a RIF, and that the grievance was procedurally defective in that it followed the procedures for adverse actions instead of the procedures for RIFs. The arbitrator conclued that he lacked the authority to hear the grievance and dismissed it.

Holdings: The Board granted the request for review under 5 U.S.C. § 7121(d), affirmed the arbitrator's decision to the extent that it found that the appellant's RIF grievance was not arbitrable, and remanded the matter to the arbitrator for further adjudication:

1. The Board has jurisdiction under § 7121(d), as the subject matter of the grievance is one over which the Board has jurisdiction, the grievant alleged discrimination under 5 U.S.C. § 2302(b)(1), and a final decision has been issued.

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. As a matter of civil service law, a RIF taken for reasons personal to an employee is an adverse action. If the appellant is able to show that the RIF was taken for reasons personal to her, then her election of the grievance procedure applicable to adverse actions was correct and the grievance was arbitrable.

► **Appellant: Jack Neuman**
Agency: United States Postal Service
Decision Number: 2008 MSPB 40
Docket Number: DE-0752-05-0291-I-3
Issuance Date: March 4, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Penalty
Interim Relief

The agency petitioned for review of an initial decision that mitigated the appellant's removal to a demotion. After holding a hearing, the AJ found that the agency had proved only one of its four charges—failure to follow proper procedures—and mitigated the penalty to a demotion.

Holdings: A majority of the Board, Member Sapin dissenting, granted the agency's PFR, reversed the initial decision with respect to Charge 3 and as to the penalty, and sustained the appellant's removal:

1. The Board exercised its discretion not to dismiss the agency's PFR on the basis that it had failed to provide the appellant all of pay he was due for the interim period, as the agency had presented evidence that it had paid the contested portion of the interim relief period.

2. The Board reversed the AJ's finding that the agency failed to prove Charge 3, Appearance of Impropriety.

3. Based on the two sustained charges, the Board found that the removal penalty was within the bounds of reasonableness.

Member Sapin issued a dissenting opinion explaining why she believed the AJ was correct in not sustaining Charge 3, and in mitigating the penalty to a demotion.

► **Appellant: Valerie K. Scott**
Agency: Department of Agriculture
Decision Number: 2008 MSPB 41
Docket Number: DE-0752-07-0128-X-1
Issuance Date: March 4, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Compliance

This case was before the Board on the AJ's Recommendation, which found that the agency had not fully complied with the parties' settlement agreement. There were three outstanding issues: (1) whether the appellant is entitled to Denver locality pay; (2) whether her annual and sick leave balances have been properly restored; and (3) whether her TSP account has been properly restored. Regarding the first issue, the

parties had agreed that the appellant's duty station would be in Denver, but that she would perform her duties from her home in Kentucky.

Holdings:

1. The agency has provided evidence that it restored the appellant's leave balances and made the proper contributions to her TSP account. The agency is therefore in compliance as to those matters.

2. The Board determined that the appellant's official worksite is in Kentucky, and that she is therefore not entitled to Denver locality pay. Locality pay is governed by 5 U.S.C. § 5304 and 5 C.F.R. Part 531. The first step in ascertaining an employee's locality rate is to determine her "official worksite," which means the official location of an employee's position of record under 5 U.S.C. § 531.605. The general rule is that an employee's position of record is "where the employee regularly performs his or her duties." Here, it is undisputed that the appellant performs her duties at her home in Kentucky.

► **Appellant: Darriel K. Caston**
Agency: Department of the Interior
Decision Number: 2008 MSPB 42
Docket Number: SF-0752-04-0058-X-1
Issuance Date: March 4, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Compliance

This case was before the Board based on the AJ's Recommendation, which found that the agency had breached the confidentiality provision of the parties' settlement agreement, and recommended that the Board grant the appellant's petition for enforcement (PFE), rescind the settlement agreement, and reinstate the appellant's initial appeal. In so finding, the AJ found that both parties had breached the settlement agreement, but that the agency's failure to file a PFE regarding the appellant's breach precluded it from arguing that the appellant's own actions caused the agency's breach, or that the agency's breach was immaterial.

Holding: The Board agreed that both parties had violated the confidentiality provisions of the settlement agreement. It concluded that the AJ erred in finding that the agency's failure to file a petition for enforcement precluded consideration of the appellant's breaches. It is well established that a material breach of a contractual promise by one party discharges the other party from its contractual duty to perform what was exchanged for the promise. Here, the appellant's breach of the settlement agreement was a material one that discharged the agency from its obligation to perform. The petition for enforcement was dismissed.

► **Appellant: Matthew Evensen**
Agency: Department of the Treasury
Decision Number: 2008 MSPB 43
Docket Number: PH-315H-07-0237-I-1
Issuance Date: March 4, 2008
Action Type: Probationary Termination

Jurisdiction
- Probationers
Miscellaneous Agency Actions
- Suitability

A majority of the Board denied the appellant's PFR of an initial decision that sustained the agency's action terminating his employment during his probationary period. The basis for the termination was that the appellant had allegedly omitted pertinent information from his Declaration for Federal Employment (OF 306), a form used to determine an applicant's acceptability for federal employment. Specifically, the agency alleged that the appellant failed to disclose that he had left a job with a company by mutual agreement because of specific problems.

Chairman McPhie issued a dissent in which he argued that the agency was required by 5 C.F.R. § 731.103(a) to obtain OPM's approval before terminating the appellant's employment, that it did not do so, and that the Board therefore lacks jurisdiction over the appeal. The Chairman expressed the view that the Board has issued inconsistent guidance on this issue in *Saunders v. Department of Justice*, 95 M.S.P.R. 38 (2003), and *Harris v. Department of the Navy*, 99 M.S.P.R. 355 (2005), concluding that the reasoning in *Saunders* was preferable to the reasoning in *Harris*, and that *Harris* should be overruled to the extent that it is inconsistent with *Saunders*.

► **Appellant: Robert S. Brodsky**
Agency: Office of Personnel Management
Decision Number: 2008 MSPB 44
Docket Number: DC-0831-07-0583-I-1
Issuance Date: March 4, 2008
Action Type: Retirement/Benefit Matter

Retirement
- Survivor Annuity

OPM petitioned for review of an initial decision that reversed its reconsideration decision and ordered OPM to grant the appellant's request that he be permitted to elect a survivor annuity for his former spouse. When the appellant retired from the federal service in 1979, he elected to have his retirement annuity reduced in order to provide a survivor benefit to his wife. The appellant and his wife divorced in 1991. He remarried in 1995 and subsequently elected to provide a survivor annuity to his second wife. He and his second wife divorced in April 2006, and the court that issued the divorce decree subsequently issued an order purportedly awarding the second wife a former spouse survivor annuity under the CSRS." OPM determined that the second wife was

ineligible for survivor benefits either under a court order or by voluntary election. In his appeal to MSPB, the appellant indicated that he was contesting only OPM's refusal to permit him to elect a survivor annuity for his second wife, and not its finding that the court order could not be approved. Relying on his interpretation of 5 C.F.R. § 831.631(b)(5), the AJ ruled that the appellant was entitled to elect a survivor annuity for his second wife.

Holdings: The Board granted OPM's PFR and reversed the initial decision. The appellant's request that he be permitted to provide a survivor annuity for his former spouse was denied.

1. This case is governed by the provisions of the Civil Service Spouse Equity Act (CSRSEA) of 1984. Section 2(3)(A) of the CSRSEA provided that an employee could elect a reduced retirement annuity in order to provide a survivor annuity for a former spouse, but that any such election was to "be made at the time or retirement or, if later, within 2 years after the date on which the marriage . . . dissolved."

2. The provisions of the CSRSEA do not have universal application. Section 4(a)(1) provides that the amendments in section 2 apply only to two categories of individuals: (A) any individual who, on or after May 7, 1985, is married to an employee who, on or after that date, retires, dies, or applies for a refund of CSRS contributions; and (B) any individual who, as of such date, is married to a retired employee. Because the second wife did not marry the appellant until 1995, she does not fall within category (B); she does not fall within category (A) because the appellant did not retire on or after May 7, 1985.

3. The Board rejected the appellant's argument that he is entitled to elect a survivor annuity for his second wife under section 4(b)(1) of the CSRSEA, which provides that notwithstanding the provisions of section 4(a)(1), a former spouse of an employee who retired before May 7, 1985, is entitled to a survivor annuity if the employee has made a written election and met other requirements specified in section 4(b)(1). The election described in section 4(b)(1) is one that must be made within 18 months after the enactment of CSRSEA, i.e., within 18 months after November 8, 1984.

4. The Board rejected the AJ's reliance on a "plain language" reading of OPM's regulation as being entitled to *Chevron* deference. First of all, when Congress has directly spoken to the precise question at issue, and Congressional intent is clear, that is the end of the matter, since an agency must give effect to the unambigously expressed intent of Congress. As discussed above, the Board found the statute unambigous. Second, the Board concluded that, properly construed, OPM's regulation was consistent with the statute.

► **Appellant: Gabriel R. Vega**
Agency: United States Postal Service
Decision Number: 2008 MSPB 45
Docket Number: SF-0752-07-0385-I-1
Issuance Date: March 4, 2008
Appeal Type: Adverse Action by Agency
Action Type: Reduction in Grade/Rank/Pay

Jurisdiction
- Reduction in Grade/Pay

The appellant petitioned for review of an initial decision that dismissed his reduction-in-pay appeal for lack of jurisdiction. The appellant suffered an on-the-job compensable injury in 2004. On December 21, 2006, the appellant accepted the agency's offer to return to limited duty. The modified duty offer stated that the appellant's position title would remain the same and his salary would be "current." In his appeal to the MSPB, the appellant alleged that the agency had retroactively reduced his pay from grade/step 00/04, with a base salary of $51,123, to grade/step 00/03, with a base salary of $44,088. The agency conceded that the appellant's base salary was $51,123 per year on December 21, 2006, and that it reduced the appellant's salary to $44,088. It asserted, however, that it was required to take this action pursuant to a memorandum of understanding (MOU) under the applicable collective bargaining agreement, and the agency's Complement Management System (CMS), a "system for managing the payroll and salary history of Agency employees." The agency explained that the higher salary was based on an evaluation of the appellant's route at 44 hours per week, but it was re-evaluated at 40 hours per week. Based on the written record, the AJ dismissed the appeal for lack of jurisdiction, concluding that the appellant failed to establish that his base salary had been reduced.

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

1. Although the Board generally has jurisdiction over appeals of reductions in pay under 5 U.S.C. §§ 7512(4) and 7513(d), a reduction in pay "from a rate contrary to law or regulation" is not an appealable adverse action. 5 C.F.R. § 752.401(b)(15). If an agency reduces an appellant's pay to correct what it believes was a pay setting error, the agency bears the burden of proving that it set the employee's pay at a rate contrary to law or regulation.

2. The appellant made a prima facie showing of jurisdiction by establishing that his rate of basic pay was reduced.

3. The agency failed to establish that it reduced the appellant's pay to correct a pay rate that was contrary to law or regulation. There is nothing in the record that shows that CMS Update 96:102, upon which the agency relied, is a "law or regulation" of any kind. Although the Board does sometimes treat provisions of a collective bargaining agreement in the same manner as agency regulations, the MOU does not specify the correct base pay for an employee working limited duty while awaiting a permanent modified job assignment.

► **Appellant: Anthony J. Adams**
Agency: United States Postal Service
Decision Number: 2008 MSPB 46
Docket Number: AT-0752-07-0473-I-1
Issuance Date: March 5, 2008
Appeal Type: Adverse Action by Agency
Action Type: Constructive Adverse Action

Jurisdiction
- Resignation/Retirement

The agency petitioned for review of an initial decision finding that the appellant's resignation was involuntary due to mental incapacity. After postal inspectors observed the appellant, a rural carrier, discarding mail, the agency placed him in an off-duty status without pay pending further investigation. The appellant then submitted his resignation for personal reasons. Shortly thereafter, he was diagnosed with a benign brain tumor. He also sought to rescind his resignation. Dr. Levitt, the neurosurgeon who treated the appellant, opined that the tumor caused the appellant's misconduct in discarding the mail. Based on Dr. Levitt's opinion, the AJ found that the appellant had established that his brain tumor "seriously impaired" his ability to make a rational decision to resign, and that his resignation was involuntary.

Holdings: A majority of the Board, Member Sapin dissenting, granted the agency's PFR, vacated the initial decision, and dismissed the appeal for lack of jurisdiction:

1. An employee-initiated action such as a resignation is presumed to be voluntary, but an involuntary resignation is tantamount to a removal, which is within the Board's jurisdiction. When an appellant claims that his resignation was involuntary due to mental incapacity, the test is whether, at the time he submitted his resignation, he was capable of making a rational decision to resign.

2. The majority stated that none of the documents authored by Dr. Levitt addressed the critical question in this appeal—whether the appellant was capable of making a rational decision to resign on March 31, 2006. Dr. Levitt supported the conclusion that the appellant's brain tumor caused him to discard mail on March 7, but because he did not explain how the appellant's tumor could have affected his ability to make a rational decision to resign, his evidence was not particularly persuasive on that issue.

3. The majority found the sworn declaration from Dr. Butler, an agency employee, more persuasive than Dr. Levitt, even though he did not examine the appellant. Dr. Butler analyzed the available medical evidence, and reasoned that the appellant's act of discarding only advertising mail, as opposed to first class mail, was an indication that he was thinking rationally at that time because the absence of such mail would be less likely to be reported by customers.

In her dissent, Member Sapin expressed her opinion that the AJ correctly gave more weight to Dr. Levitt's opinion under the four-prong test of *Lassiter v. Department of Justice*, 60 M.S.P.R. 138, 143 (1993).

► **Appellant: Michael P. Randazzo**
Agency: United States Postal Service
Decision Number: 2008 MSPB 47
Docket Number: PH-0752-07-0460-I-1
Issuance Date: March 5, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Timeliness – PFR
Board Procedures/Authorities
- Reopening and Reconsideration

The appellant petitioned for review of an initial decision that dismissed his appeal as moot. The appellant appealed his removal to the Board as well as grieving the matter. During the processing of the MSPB appeal, the appellant prevailed in his grievance, with the agency directed to restore the appellant to duty and make him whole for all losses incurred due to the removal. The AJ ordered the parties to show cause why the appeal should not be dismissed as moot. Neither party responded, and the AJ issued an initial decision dismissing the appeal as moot. The decision informed the parties that it would become final on October 22, 2007, unless a party filed a PFR. The appellant filed an untimely PFR on November 9, 2007. The appellant explained that he did not file his petition by the deadline because he was acting in good faith to afford the agency additional time to provide him with his back pay.

Holding: A majority of the Board, Member Sapin dissenting, dismissed the PFR as untimely filed without good cause shown, stating that waiting for an agency to complete the actions required to make him whole does not constitute a reasonable excuse for an untimely filed PFR.

In her dissenting opinion, Member Sapin argued that the Board should have exercised its authority to reopen the case on its own motion. She pointed out that a request to reopen must be filed with a reasonable period of time, measured in weeks, which was the case here, and that reopening may be warranted where the initial decision contains clear and material errors that prejudice the appellant's substantive rights, or where there is an intervening change in controlling law. She pointed out that, after the AJ issued the initial decision, the Board overruled the line of precedent upon which the AJ had relied, ruling that it is error to dismiss an appeal as moot without first determining whether the agency has actually completed the actions required to provide the appellant with all of the relief to which he is entitled, citing *Slocum v. U.S. Postal Service*, 107 M.S.P.R. 129, ¶ 12 (2007), and *Haskings v. Department of the Navy*, 106 M.S.P.R. 616, ¶¶ 15-20 (2007). Member Sapin also pointed out that the agency's alleged failure to provide back pay cannot be cured in a compliance proceeding because the Board lacks jurisdiction over a petition for enforcement concerning an initial decision that dismissed as appeal as moot.

► **Appellant: Sharon Douglas**
Agency: Department of Defense
Decision Number: 2008 MSPB 48
Docket Number: DC-0752-07-0416-I-1
Issuance Date: March 5, 2008
Appeal Type: Adverse Action by Agency
Action Type: Constructive Adverse Action

Jurisdiction
- Resignation/Retirement

The appellant petitioned for review of an initial decision that dismissed her involuntary retirement claim for lack of jurisdiction. The appellant was employed as an Accounting Technician at the agency's Defense Finance and Accounting Service (DFAS) in Norfolk, Virginia. The agency notified DFAS employees at this location that the site was scheduled for closure, and informed them of various options, including registering for placement with the agency's Priority Placement Program, relocating to another DFAS location and, for those who qualified, taking a separation incentive under the terms of the Voluntary Separation Incentive Program (VSIP). The appellant elected this last option, signing a VSIP Agreement and retiring effective January 31, 2007. She filed an appeal with the MSPB claiming that her retirement was involuntary. She asserted that, just 3 days after the deadline for electing a VSIP separation, the agency announced that it would retain 15 positions at the Norfolk DFAS that would be filled through RIF procedures. She contended that, had she been aware that 15 positions would be retained at Norfolk DFAS, she "would not have elected to retire and would have had sufficient seniority to have obtained a position through the RIF." She also contended that, shortly before her retirement became effective, she met with Captain Gunther, who "implied that the management had known for months that some of these jobs were going to remain in Norfolk and that they would be filled through RIF procedures." Without conducting a hearing, the AJ determined that the appellant had failed to make a non-frivolous allegation that her retirement was involuntary, and dismissed the appeal for lack of jurisdiction.

Holdings: A majority of the Board, Chairman McPhie dissenting, granted the appellant's PFR, vacated the initial decision, and remanded the appeal for further adjudication:

1. An employee-initiated action such as a retirement is presumed to be voluntary, and not within the Board's jurisdiction, unless an appellant shows that her retirement was obtained through duress or coercion, or that a reasonable person would have been misled by the agency. The majority found that the appellant made a non-frivolous allegation of jurisdiction when she asserted that the agency misled her into believing there were to be no positions remaining at the Norfolk DFAS and no opportunity to be placed there through RIF procedures, even though the agency was aware that a number of positions would be retained and filled via RIF procedures, but postponed announcing this until 3 days after the closure date for VSIP elections.

2. When an employee withdraws a commitment to retire prior to its effective date, even if previously agreed to through a valid VSIP agreement, the burden is on the agency to demonstrate a valid reason for refusing to permit the withdrawal. On remand, the AJ should determine whether the appellant's meeting with Captain Gunther, and her immediate subsequent appeal to Senator Warner prior to the effective date of her retirement, were attempts to withdraw her commitment to retire and, if so, whether the agency had a valid reason for refusing to permit the withdrawal.

In his dissent, Chairman McPhie argued that the AJ properly concluded that the appellant was aware, at the time she submitted her retirement papers, that the agency might retain some individuals, but she chose to retire, and that she failed to show that the agency had already formulated final plans to reestablish the 15 positions in Norfolk prior to her buyout request. Chairman McPhie secondly argued that, in directing the AJ to consider whether the appellant attempted to withdraw her commitment to retire, the majority was ignoring binding Federal Circuit precedent in *Green v. General Services Administration*, 220 F.3d 1313, 1317 (Fed. Cir. 2000), which held that a formal agreement to separate from the government on a specified date, supported by consideration, is a valid reason for an agency to deny an employee's request to withdraw his resignation.

► **Appellant: Philip Uresti**
Agency: Office of Personnel Management
Decision Number: 2008 MSPB 49
Docket Number: CH-831M-07-0427-I-1
Issuance Date: March 5, 2008
Appeal Type: CSRA - Overpayment of Annuity

Retirement
- Annuity Overpayment

The appellant petitioned for review of an initial decision that affirmed an OPM reconsideration decision that determined that the appellant had received an annuity overpayment of $75,642.25, that he was not entitled to a waiver of the overpayment, and that he was not entitled to readjustment of the overpayment schedule. The appellant received a discontinued service annuity when the position was abolished in a RIF in 1988. In 1990, he was appointed to a new position in the Department of Justice. His application for that position incorrectly stated that he had never applied for a received a pension or retirement pay based upon his Federal service. When the appellant applied for immediate retirement in 2001, OPM discovered that the appellant had improperly received his discontinued service annuity while employed with DOJ from 1990 through 2001, resulting in an annuity overpayment of $75,642.25, which was to be repaid in 101 installments. On appeal to the Board, the AJ affirmed the existence and amount of the overpayment, and found that the appellant was not entitled to waiver because he did not show that he was without fault in creating the overpayment. As to the repayment schedule, the AJ noted various discrepancies in the appellant's Financial Resources Questionnaire (FRQ), and afforded the appellant the opportunity to supplement the record. The appellant did not respond, and the AJ issued an initial

decision finding that the appellant was not entitled to an adjustment based upon financial hardship.

Holdings:

1. The Board affirmed the AJ's findings as to the existence and amount of the overpayment, and that waiving the overpayment was not warranted because the appellant was not without fault in its creation.

2. Although the Board generally does not consider evidence submitted for the first time on review, the Board considered the appellant's updated financial information because he submitted evidence showing that his failure to provide the information below resulted from his hospitalization following an automobile accident. Because the updated financial information shows that the appellant's gross monthly income exceeds his expenses by $625.53, the Board adjusted the repayment scheduled to include 121 monthly payments.

► **Appellant: Margaret Ann Fouchia**
Agency: Office of Personnel Management
Decision Number: 2008 MSPB 50
Docket Number: PH-831E-07-0493-I-1
Issuance Date: March 5, 2008
Appeal Type: CSRA - Employee Filed Disability Retirement

Timeliness - PFA

The appellant petitioned for review of an initial decision that dismissed her appeal as untimely filed. OPM issued its reconsideration decision denying the appellant's application for a disability retirement annuity on May 24, 2007, and informed the appellant that she had 30 days in which to filed an appeal with the MSPB. The appellant filed an appeal via U.S. mail, which the regional office received on July 9, 2007, in an envelope without a postmark. The appeal form stated that the appellant received OPM's final decision on June 3, 2007, and the appellant's signature on the form was dated July 3, 2007. The AJ issued an order stating that the appeal was presumed to have been filed on July 2, which was outside the 30-day time limit for specified in OPM's reconsideration decision. After considering the appellant's response, the AJ issued a decision finding that the appeal was untimely without good cause shown.

Holding: The Board found that the appeal was timely filed. When an appellant submits an appeal form that includes a certification that the statements therein are true, the allegations in the form may serve as evidence to rebut any presumption regarding the date that the appellant received a mailing from the agency. In this case, the appellant stated that she did not receive OPM's final decision until June 3, and this assertion is unrebutted. The filing deadline was therefore July 3, 2007, the 30th day after June 3, 2007. The Board found that the appeal was filed on July 3, 2007, the date of the appellant's signature.