U.S. Merit Systems Protection Board

CASE REPORT DATE: May 6, 2008

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BOARD DECISIONS

► **Appellant: William L. McKenna**
Agency: Department of the Navy
Decision Number: 2008 MSPB 69
Docket Number: PH-0351-03-0399-A-2
Issuance Date: March 26, 2008
Action Type: Attorney Fee Request

Attorney Fees
- Interest of Justice
- Gross Procedural Error
- Reasonableness

Both parties petitioned for review of an addendum initial decision that awarded attorney fees and expenses in the amount of $161,213.17. This case has an extensive history, including the merits proceeding in which the agency was found to have violated the appellant's rights in conducting a reduction in force, a compliance proceeding that resulted in a remand proceeding, and a previous motion for attorney fees, which was rejected as prematurely filed.

Holdings: The Board denied the agency's petition for review (PFR), granted the appellant's cross-PFR, affirmed the addendum initial decision as modified, and remanded the matter to the regional office for adjudication of one remaining matter:

1. An award of attorney fees was warranted in the interest of justice under *Allen* category 4, that the agency committed a gross procedural error. As the administrative judge (AJ) found, the appellant submitted his résumé and other information to a member of the agency's RIF team, but that member did not forward it to the other members of the team. Because the RIF Team was not in possession of the complete set of materials, the process was "patently unfair" to the appellant, and the agency proffered no excuse for its error.

2. The Board found no basis for disturbing the AJ's findings regarding the reasonableness of the fee award. The AJ is in the best position to determine whether the number of hours expended is reasonable and, absent a specific showing that the AJ's evaluation was incorrect, the Board will not second-guess it.

3. In his cross-PFR, the appellant requested that he be awarded additional attorney fees incurred for the production of 3 Board pleadings. The Board found no error in the AJ's handling of 2 of those matters, but with respect to the appellant's claim for 9 hours spent relating to his May 29, 2007 petition for enforcement, the Board found it appropriate to remand the matter to the regional office for further adjudication.

► **Appellant: Mark A. Deems**
Agency: Department of the Treasury
Decision Number: 2008 MSPB 82
Docket Number: PH-3443-03-0115-A-1
Issuance Date: April 4, 2008
Action Type: Attorney Fee Request

Attorney Fees
- Prevailing Party

The agency petitioned for review of an initial decision that awarded the appellant $44,156.50 in attorney fees and expenses in this VEOA appeal. Because the two Board members could not agree on the appropriate disposition of the PFR, the initial decision became the final decision.

Vice Chairman Rose issued a separate opinion stating that, although she agreed that an award of attorney fees was warranted, she would have reopened the appeal to clarify the standards for awarding attorney fees in VEOA appeals:

1. The AJ stated that he was awarding attorney fees under 5 U.S.C. § 7701(g), finding that the appellant was the "prevailing party" and that the award was "warranted in the interest of justice." Attorney fees in VEOA appeals are awarded under the authority of 5 U.S.C. § 3330c, which does not include a requirement that fees are "warranted in the interest of justice."

2. The appellant was a prevailing party because he achieved the only relief the Board can provide in a VEOA appeal—an order requiring the agency to comply with the law by reconstructing the selection process. A VEOA appellant need not have received an appointment to be considered a prevailing party.

► **Appellant: Stephan D. Evans**
Agency: United States Postal Service
Decision Number: 2008 MSPB 72
Docket Number: SF-0752-06-0193-X-1
Issuance Date: March 28, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Compliance

This case was before the Board on the AJ's Recommendation finding the agency in noncompliance with a final Board order, which directed the agency to cancel its removal action and place the appellant in the next lower-graded non-supervisory position with the least reduction in grade and pay. The agency initially placed the appellant in a part-time flexible carrier position. It placed him in an EAS-16 Safety Specialist position after the appellant filed a petition for enforcement. At issue was the appellant's entitlement to back pay and other benefits during the period from the issuance of the March 17, 2006 initial decision, and the June 11, 2007 date of his assignment to the EAS-16 position. The AJ rejected the agency's argument that making the appellant's appointment retroactive to the date of the initial decision would interfere with a reduction in force (RIF) it was conducting, and be tantamount to giving an employee who has been demoted for misconduct priority consideration over employees who may lose their jobs through a RIF.

Holdings: The Board rejected the agency's arguments, found it to be in continued noncompliance, and ordered the agency to provide back pay and holiday pay with interest for the disputed period:

1. Even if the agency was engaged in a proper reorganization, it has not shown that it could not place the appellant in the EAS-16 Safety Specialist position due to the RIF.

2. The agency's claim of possible liability due to a RIF challenge by one or more of the employees who would have been bumped by the appellant's employment is speculative, and thus distinguishes the situation from that in *Lester v. Department of Education*, 18 M.S.P.R. 63 (1983).

3. The Board rejected the agency's argument that an agency undergoing a RIF may ignore a Board order to assign an employee to a lower-graded position until after it has completed the RIF because otherwise the agency would have to give an employee who was demoted for misconduct priority over individuals about to lose their jobs through no fault of their own. Such an argument suggests that the appellant should be subject to an additional penalty beyond that found reasonable by the Board.

► **Appellant: Jennifer Henry**
Agency: Department of Veterans Affairs
Decision Number: 2008 MSPB 77
Docket Number: NY-0752-03-0330-X-2
Issuance Date: March 31, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Compliance

The case was before the Board pursuant to the AJ's Recommendation finding the agency in noncompliance with a final Board order. In the merits proceeding, the AJ found that the appellant was an individual with a disability and that her disability was the reason for her removal. The initial decision, which became the Board's final decision, ordered that the appellant be reasonably accommodated in her program support clerk position or that she be reassigned to a position with duties within her medical restrictions. In her first Recommendation, the AJ found that the agency failed to show that the program support clerk position could not be modified to accommodate the appellant. She further found that placement in a veterans service representative (VSR) position was also possible as a reasonable accommodation. In a published decision, the Board found that the proposed accommodations—having other employees perform the appellant's filing, hiring interns or temporary workers to file for her, or having other workers assist her by lifting files exceeding her limitations and by opening and closing file drawers—were not reasonable. Regarding another proposed accommodation—the installation of automatic door openers—the Board found that the record regarding the existence of undue hardship was not well developed, requiring a remand. The Board further found that it was unable to assess the correctness of the AJ's finding that reassignment to a VSR position was a possible reasonable accommodation. *Henry v. Department of Veterans Affairs*, 100 M.S.P.R. 124 (2005).

On remand, the AJ found that installation of automatic drawer openers would impose an undue hardship on the agency. Because the AJ also found that reassigning the appellant to a VSR position would not impose an undue hardship, she found the agency in continued noncompliance. Subsequent to the second Recommendation, the agency stated that it had accommodated the appellant by permanently placing her in a program support clerk position in a different division than the one in which she was originally employed. The appellant objected to that placement.

Holdings: The Board found that the agency is now in compliance and dismissed the matter as moot:

1. A reassignment is an appropriate accommodation only after it has been determined that there are no effective accommodations that will enable the employee to perform the essential functions of her current position, or all other reasonable accommodations would impose an undue hardship on the agency.

2. The record does not show that the appellant can be accommodated in a program support clerk position in the division where she was originally employed.

a. The appellant has not contested the AJ's finding that the installation of automatic drawer openers would impose an undue hardship on the agency.

b. The appellant's proposed accommodation of an adjustable cart and the use of open shelving units, which the appellant said would eliminate the need to open heavy file drawers, would impose an undue hardship on the agency. The cost of this proposed accommodation would be approximately $50,000, more than 8% of the nonsalary budget for the entire New York Regional Office, and more than the appellant's entire salary for a year.

3. The reassignment to the program support clerk position in the Support Services Division is an appropriate accommodation, and demonstrates compliance with the Board's final order.

4. Because the agency is now in compliance, there is no reason to address the appellant's allegations of other possible accommodations, including a VSR position. An employee is not entitled to the accommodation of her choice.

► **Appellant: Colister Slater**
Agency: Department of Homeland Security
Decision Number: 2008 MSPB 73
Docket Number: SF-0752-06-0805-I-2
Issuance Date: March 28, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Adverse Action Charges
- Physical Inability to Perform

The agency petitioned for review of an initial decision that reversed its action removing the appellant from his position as a Police Officer in the Federal Protective Service for "inability to perform the essential duties of [his] position." This action was based on the medical determination of the agency's Medical Review Officer that the appellant "is not currently able to perform the full range of duties and responsibilities in a safe and efficient manner or without an undue risk of injury to him or others." After a hearing, the AJ found that the agency failed to prove the required nexus between the charge and the efficiency of the service. In so finding, the AJ stated that "the agency must establish a nexus between his medical condition and observed deficiencies in his performance or conduct, or a *high probability of hazard* when his condition may result in injury to him or others because of the kind of work he does," citing *Yates v. U.S. Postal Service*, 70 M.S.P.R. 172, 176 (1996).

Holdings: The Board granted the agency's PFR and affirmed the initial decision as modified, still reversing the agency's removal action:

1. The AJ erred in applying the "high probability of hazard" standard.

a. The proper standard for evaluating an employee's fitness to perform the duties of his position, for positions with medical standards or physical requirements, or positions subject to medical evaluation programs, is 5 C.F.R. § 339.206, i.e., a history of a particular medical problem may be

the basis of a medical disqualification only if "the condition at issue is itself disqualifying, recurrence cannot be medically ruled out, and the duties of the position are such that a recurrence would pose a reasonable probability of substantial harm."

b. The "high probability of hazard" standard derives from the 1972 edition of the former Federal Personnel Manual. In 1989, however, OPM issued new regulations amending 5 C.F.R. Part 339, and issued a comprehensive revision of chapter 339 of the FPM. Although the Board applied the new standard in *Lassiter v. Department of Justice*, 60 M.S.P.R. 138, 141-42 (1993), it has applied the earlier standard in 5 subsequent decisions, including *Yates*. Those 5 decisions were overruled.

2. Applying the correct standard to the facts of this case, the Board concluded that the agency failed to meet its burden of proof.

► **Appellant: Stephan A. Myles**
Agency: Social Security Administration
Decision Number: 2008 MSPB 74
Docket Number: PH-0752-07-0154-I-1
Issuance Date: March 31, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Jurisdiction
Constitutional Issues/Due Process

The agency petitioned for review of an initial decision that reversed the agency's action terminating the appellant's employment. Because the two Board members could not agree on the disposition of the agency's PFR, the initial decision became the Board's final decision. The appellant was appointed to this position on September 22, 2003, under the Federal Career Intern Program (FCIP). On September 22, 2005, the agency gave him a letter stating that his appointment would expire that date because the agency had determined that his continued employment was not in its best interest. The AJ found that, because the agency did not terminate the appellant's appointment before he completed his 2 years of service, he was an "employee" within the meaning of 5 U.S.C. § 7511(a)(C).

Chairman McPhie issued a separate decision explaining why he believed the initial decision was incorrect. The FCIP was established by Executive Order 13,162, 65 Fed. Reg. 43,211 (2000). FCIP appointments are to positions in Schedule B of the excepted service and are not to exceed 2 years, unless extended by the Federal department or agency, with the concurrence of OPM, for up to 1 additional year. The Executive Order states that "service as a Career Intern confers no rights to further Federal employment in either the competitive or excepted service upon the expiration of the internship period." Regulations promulgated by OPM are in accord. 5 C.F.R. § 213.3202(o)(6)-(7). Because the agency took no action to convert the appellant's employment or to extend it, it expired by operation of law after 2 years, and his termination was not appealable to the Board.

► **Appellant: Christine E. Speck**
Agency: Department of State
Decision Number: 2008 MSPB 75
Docket Number: DC-0842-08-0005-I-1
Issuance Date: March 31, 2008
Appeal Type: FERS - Regular Retirement Benefits

Retirement
- Service Credit

The appellant petitioned for review of an initial decision that affirmed the agency's denial of her application to make a deposit for service credit under FERS. Between June 1, 1989, and June 4, 1997, the appellant was employed in the Foreign Service under a series of temporary appointments. These appointments were not covered by FERS; indeed, it is undisputed that she has never been enrolled in FERS. The appellant applied to obtain service credit based on her temporary appointments pursuant to section 321 of the Foreign Relations Authorization Act (FRAA), Pub. L. No. 107-228, 116 Stat. 1350, 1380-83 (2002). In ruling that the appellant was not entitled to make a deposit under section 321, the AJ relied on 5 C.F.R. § 842.305(j), which provides that an individual is not entitled to participate in the program unless she is a retiree or "current or former employee," and "employee" is defined in 5 U.S.C. § 8401(11) as an individual who is subject to FERS retirement coverage.

Holding: After the issuance of the initial decision, the Board issued *Flannery v. Department of State*, 2007 MSPB 298, 107 M.S.P.R. 441, which held that section 321 of the FRAA reflects the intent of Congress to permit qualified individuals to obtain FERS credit regardless of whether they have had FERS-covered service. The Board ordered the agency to approve the deposit if the appellant still wishes to make it.

► **Appellant: Jaime Nazario**
Agency: Department of Justice
Decision Number: 2008 MSPB 76
Docket Number: DC-0752-08-0002-I-1
Issuance Date: March 31, 2008
Appeal Type: Adverse Action by Agency
Action Type: Suspension - More than 14 Days

Board Procedures/Authorities
- Withdrawal of Appeal

The appellant petitioned for review of an initial decision that dismissed his appeal as withdrawn. His appeal challenged his indefinite suspension pending a final decision concerning the revocation of his security clearance.

Holding: The Board granted the appellant's PFR, vacated the initial decision, reinstated the appeal, and remanded the appeal for adjudication:

1. An appellant's withdrawal of an appeal is an act of finality and, in the absence of unusual circumstances such as misinformation or new and material evidence, the Board will not reinstate an appeal once it has been withdrawn.

2. In a declaration made under penalty of perjury, the appellant stated that he withdrew the appeal because of misinformation by the AJ during an ex parte communication, viz., that the AJ advised that the case would result in a certain loss for the appellant, with his name being posted on the MSPB's public website, which was considered a derogatory issue and would make it harder for him to find employment. Since this declaration is unrebutted, the Board found it appropriate to remand the appeal to the regional office for additional supplementation of the record and the issuance of an initial decision on the merits.

► **Appellant: William D. DeLoach**
Agency: Department of the Air Force
Decision Number: 2008 MSPB 78
Docket Number: AT-0752-07-0675-I-1
Issuance Date: April 3, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Settlement
- Validity

The appellant petitioned for review of an initial decision that sustained the agency's removal action. With his PFR, the appellant submitted a copy of the settlement agreement that had been the subject of negotiations. The only mention of this document or any settlement negotiations in the record is the AJ's statement that the appellant had "rejected the oral agreement that was reached on August 29, 2007."

Holdings: The Board denied the appellant's PFR, but reopened the case on its own motion to consider whether a binding settlement agreement was reached during the regional office proceeding. The case was remanded for further adjudication.

1. The submitted settlement and the AJ's statement raise the question whether the parties reached a binding oral settlement agreement. If so, and if the parties did not require that the agreement be memorialized in writing, the appellant's post-settlement dissatisfaction with the agreement would not be sufficient to set the settlement aside.

2. The submitted settlement, which was signed by both the agency's representative and the appellant's representative, also raises the issue whether the written settlement agreement itself is a valid and binding settlement.

a. While a representative may not settle his client's case without express authority to do so, a representative of record is presumed to have this authority. Here, the appellant's designation of representative form signed by the appellant states specifically that the representative had the authority to settle the appeal on the appellant's behalf.

b. The terms of the settlement agreement also indicate that the appellant's signature was not necessary for the agreement to be valid.

3. Despite the above, a remand is necessary to determine whether a valid settlement was reached, whether written or oral. That neither party objected to the AJ's statement that the appellant rejected the agreement raises the possibility that the parties did not intend any agreement to be effective until the appellant signed the written agreement, or that the appellant indicated during negotiations that he would not agree to the settlement before the representatives executed the agreement.

4. It is appropriate for the Board to raise the matter of whether a binding settlement was reached on its own motion. The written settlement agreement required the appellant to withdraw his appeal. The withdrawal of an appeal removes the appeal from the Board's jurisdiction, and the issue of Board jurisdiction may be raised at any time during a proceeding.

► **Appellant: Phyllis Ann Cirella**
Agency: Department of the Treasury
Decision Number: 2008 MSPB 79
Docket Number: PH-0752-07-0579-I-1
Issuance Date: April 3, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Arbitration/Collective Bargaining-Related Issues

The appellant filed two pleadings: a PFR of an initial decision that dismissed her appeal of a removal action for lack of jurisdiction; and a request for review of an arbitrator's decision that sustained her removal. The appellant was a GS-9 Bankruptcy Specialist with the Internal Revenue Service. The agency removed her, effective May 26, 2005, based on a charge that she willfully threatened to audit a taxpayer for the purpose of extracting personal gain or benefit in violation of section 1203(b)(10) of the Restructuring and Reform Act (RRA) of 1998, 26 U.S.C. § 7804. On January 19, 2007, an arbitrator issued a decision upholding the removal. In August 2007, the appellant filed a Board appeal. In response to the AJ's orders on jurisdiction and timeliness, the appellant stated that she was asking for a de novo review of her removal as well as a review of the arbitrator's decision. The AJ found that, by filing the grievance, the appellant had made a binding election that precluded a Board appeal. The AJ further stated that any request for review of an arbitrator's decision should be submitted to the Board.

Holdings: The Board denied the appellant's PFR, granted the request for review of the arbitrator's decision, and sustained the arbitration decision:

1. The appellant's PFR does not provide a basis for Board review of the initial decision.

2. The Board has jurisdiction over the appellant's request for review of the arbitrator's decision because: (1) The Board has jurisdiction over the subject

matter of the grievance (a removal); (2) she has alleged that the action at issue constitutes discrimination under 5 U.S.C. § 2302(b)(1) (retaliation for filing previous or current EEO complaints); and (3) the arbitrator has issued a final decision.

3. The appellant has not shown that the arbitrator erred as a matter of law in sustaining the charge, and a nexus exists between the conduct and the efficiency of the service.

4. The appellant failed to show that the agency discriminated against her.

5. The appellant has not shown that the arbitrator erred as a matter of law in determining the penalty.

► **Appellant: Mai C. Alford**
Agency: Office of Personnel Management
Decision Number: 2008 MSPB 70
Docket Number: DC-844E-07-0920-I-1
Issuance Date: March 28, 2008
Appeal Type: FERS - Employee Filed Disability Retirement

Timeliness - PFA

The appellant petitioned for review of an initial decision that dismissed her appeal as untimely filed. In 2003, OPM issued a reconsideration decision denying the appellant's application for disability retirement. The appellant appealed that decision to the MSPB more than 3 years after the deadline for timely filing. The AJ issued an order directing the appellant to file evidence and argument concerning the untimeliness of the appeal, but she did not respond.

Holding: Because the appellant indicated in her PFR that the delay in filing resulted from illness, the Clerk of the Board provided the notice outlined in *Lacy v. Department of the Navy*, 78 M.S.P.R. 434, 438 (1998). After considering the appellant's response, the Board affirmed the initial decision as modified, still dismissing the appeal as untimely filed without good cause shown.

► **Appellant: Abdel A. Innocent**
Agency: Office of Personnel Management
Decision Number: 2008 MSPB 71
Docket Number: NY-0731-07-0274-I-1
Issuance Date: March 28, 2008
Appeal Type: Suitability

Timeliness – PFR

The appellant petitioned for review of an initial decision that dismissed his appeal as untimely filed.

Holdings: The Board dismissed the appellant's PFR as untimely filed (by 23 days) without good cause shown.

► **Appellant: James N. Brockman**
Agency: Department of Defense
Decision Number: 2008 MSPB 80
Docket Number: SF-0752-98-0473-I-1
Issuance Date: April 4, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Timeliness - PFR

The appellant petitioned for review of an initial decision that affirmed his removal from Federal service. The initial decision was issued on September 8, 1998.

Holding: The Board dismissed the appellant's PFR as untimely without good cause shown.

► **Appellant: Richard Erickson**
Agency: United States Postal Service
Decision Number: 2008 MSPB 81
Docket Number: AT-3443-07-0016-I-2
Issuance Date: April 4, 2008

Miscellaneous Topics
- USERRA/VEOA/Veterans' Rights

The appellant petitioned for review of an initial decision that denied him relief under USERRA. The agency filed a cross-PFR. The appellant was removed from his position as a Distribution Clerk in April 2000, based on a charge of being absent from his civilian position on military leave for more than 5 years, with no intention to return to his civilian position. He filed this USERRA appeal in February 2007. The AJ found that the agency violated USERRA by removing the appellant from his position, but denied the appellant any relief based on a determination that the appellant subsequently waived his reemployment rights under USERRA by abandoning his civilian employment in favor of a military career.

Holdings: The Board denied the appellant's PFR, granted the agency's cross-PFR, and affirmed the initial decision as modified:

1. The appellant failed to establish his discrimination complaint under 38 U.S.C. § 4311(c)(1).

a. An agency violates USERRA if an employee's military service is a motivating factor in the agency's action. An appellant bears the initial burden of showing that his military service was a substantial or motivating factor in the agency's adverse action; the agency then has the opportunity to produce evidence that it would have taken the adverse action for a valid reason anyway.

b. The appellant failed to carry his initial burden. The agency's removal notice makes clear that the real reason for the removal was the appellant's continued absence, regardless of its cause. Even if the appellant had met

his initial burden, the agency showed that it had a valid reason to take the adverse action. At the time of his removal, the appellant was serving his 5th consecutive voluntary re-enlistment. When an agency official talked to him by telephone about his intentions in early 2000, the appellant said he would be on full-time active duty until at least the end of 2000, and said that he did not like working for the agency and liked working for the military better. The Board has long held that a prolonged absence with no foreseeable end constitutes just cause for removal.

2. The appellant failed to establish his reemployment claim.

a. An employee whose absence from his civilian position is necessitated by military service is entitled to reemployment rights and benefits under USERRA if: (1) The employee or the military provided the employer with advance notice; (2) the cumulative absence does not exceed 5 years; and (3) the employee requests reemployment in the prescribed manner and timeframe, in this case no later than 90 days after the completion of his military service.

b. There is no evidence that the appellant submitted an application for reemployment within 90 days after the completion of his military service on December 31, 2005. Indeed, there is no evidence that he has ever submitted a reemployment application. Even if the appellant were to request reemployment, he is no longer entitled to reemployment rights because his cumulative absence from his civilian position has far exceeded the 5-year limit of 38 U.S.C. § 4312(a)(2).

► **Appellant: Logan Johnson**
Agency: United States Postal Service
Decision Number: 2008 MSPB 83
Docket Number: CH-0752-06-0177-B-1
Issuance Date: April 7, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Jurisdiction
- Arbitration/CBA-Related issues

The agency petitioned for review of a remand initial decision that reversed the appellant's removal. The agency proposed the appellant's removal in 1998 for medical unfitness. The appellant's union filed a grievance on his behalf and requested arbitration. On June 14, 1999, the parties entered into a pre-arbitration settlement agreement, which provided that the appellant would be allowed 10 days to "clear through the medical unit" and be found fit for full duty without restrictions. If he did not meet this requirement, the requirement provided that "the grievance will be considered closed." The agency subsequently removed the appellant, effective October 24, 2000. The appellant filed a Board appeal almost 6 years later, which was dismissed by the AJ as untimely filed. The Board vacated and remanded on the ground

that the agency had not provided the appellant with notice of appeal rights. *Johnson v. U.S. Postal Service*, 2007 MSPB 135, 105 M.S.P.R. 654.

On remand, the AJ acknowledged a presumption that Board appeal rights are waived when the other procedural avenue is a grievance, and settlement of that grievance does not specifically reserve the right to file a Board appeal, citing *Hanna v. U.S. Postal Service*, 101 M.S.P.R. 461 (2006). She found, however, that the appellant overcame this presumption because the agency did not remove him until 2000, and it removed him for reasons not set forth in the original proposal, i.e., "medical unfitness," but instead based on a new charge of being "not fit for duty." The AJ further found that the removal action must be reversed because the agency denied the appellant minimum due process in effecting his removal. Finally, she rejected as unproven the appellant's affirmative defense of disability discrimination.

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

1. Under *Hanna*, the settlement agreement resolving the appellant's grievance divested the Board of jurisdiction over a removal appeal if it provided for the appellant's removal if he was not cleared by the medical unit and found fit for duty, and if the appellant was removed based on the charge that was the subject of the settlement agreement.

2. The Board rejected the agency's argument that the settlement agreement unambiguously provided that the appellant would be removed if he did not meet the specified condition. The settlement agreement does not refer to the appellant's "removal."

3. Because the settlement agreement was ambiguous, it was appropriate to look at parol (extrinsic) evidence to determine whether the settlement agreement should be construed to provide for the appellant's removal if he did not meet the conditions set forth in the agreement, and whether the appellant was removed based on the charge that was the subject of the settlement agreement. After considering the surrounding circumstances, the Board resolved both of these questions in the affirmative. The routing slip in 2000 requesting a PS Form 50 Notice of Removal identified the removal infraction as "attendance/awol," and cited the authority for the action as the "notice of proposed removed – dated October 20, 1998 (not fit for duty)." Under "remarks," it stated that "per pre-arbitration settlement dated June 14, 1999, if not found fit-for-duty as a mailhandler, grievance is considered closed."