U.S. Merit Systems Protection Board

CASE REPORT DATE: May 9, 2008

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BOARD DECISIONS

► **Appellant: Theresa Faye Kohler**
Agency: Department of the Navy
Decision Number: 2008 MSPB 84
Docket Number: AT-0752-07-0272-I-1
Issuance Date: April 9, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Discrimination
Penalty

The appellant petitioned for review of an initial decision that affirmed her removal for excessive absences. The appellant was absent from the workplace from October 5, 2004, until her removal, effective April 23, 2005. In a February 23, 2005 letter to the agency, her physician reported that the appellant was "unable to work in any capacity at the present time," and that "it is not possible for me to establish a time frame in which she could return to work, or to what capacity level." On appeal to the Board, the administrative judge (AJ) found that the agency had proven its charge and that the appellant had not proven her affirmative defenses.

Holdings: The Board granted the appellant's petition for review (PFR), but affirmed the initial decision as modified, still sustaining the appellant's removal:

1. The AJ erred by not addressing the appellant's affirmative defense of retaliation for protected EEO activity. After examining the record evidence, the Board concluded that the appellant failed to establish this affirmative defense.

2. The AJ failed to evaluate the applicable *Douglas* factors in the initial decision or assess the reasonableness of the penalty. After considering the pertinent factors, the Board concluded that the removal penalty was within the bounds of reasonableness.

► **Appellant: Gilberto M. Rodriguez**
Agency: Department of Homeland Security
Decision Number: 2008 MSPB 85
Docket Number: DA-0752-07-0177-I-1
Issuance Date: April 10, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Adverse Action Charges
- Falsification/Fraud

The appellant petitioned for review of an initial decision that sustained his removal for falsifying an official government document and making false statements. The appellant was a senior criminal investigator in the agency's Immigration and Customs Enforcement branch. The agency charged that he falsified an agency form with respect to his handling of an undocumented alien by indicating on a form that Assistant United States Attorney (AUSA) Dan Mills had declined the alien's prosecution. The agency secondly charged that the appellant made 2 false statements that Mills had declined Rangel's prosecution, first to his acting supervisor, and later to an agency investigator. The appellant testified that he called the AUSA duty phone number in order to get declination or approval of the alien's prosecution and left a voicemail message asking the AUSA to call him back. At this time, the appellant said he did not know which of the 7 or 8 AUSAs was on duty that day. He said he received a return call later that day, that he explained the alien's criminal history to the AUSA who returned his call, who then declined the alien's prosecution. The appellant then assembled a temporary file on the alien and handed it to his supervisor, who questioned why the alien was not being prosecuted. The supervisor testified that the declination to prosecute surprised him, and he called the U.S. Attorney's Office to speak to the AUSA on duty about the matter. The supervisor was told that Mills was the duty AUSA that day, but that Mills was unavailable because he was at the hospital with his wife, and that Brown, the office chief, was covering for Mills. The supervisor testified that he then asked the appellant who the AUSA was that he had spoken with and the appellant indicated it was Mills. The appellant testified that he did not pay particular attention to which AUSA had returned his call and declined the alien's prosecution, and that, to comply with his supervisor's demand that he write the AUSA's name on the form, he looked at the AUSA duty roster, noted that Mills was the duty AUSA that day, and put Mills name on the form.

The AJ found that the record established that Mills did not decline the alien's prosecution and that the appellant's assertion that he honestly but mistakenly identified Mills as the declining AUSA was not plausible, and evidenced "at best, a reckless disregard for the truth."

Holdings: The Board granted the appellant's PFR, reversed the initial decision, and ordered the agency to reinstate the appellant to his position:

1. 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.

2. Throughout the proceedings before both the agency and the Board, the appellant has maintained that he received a return call from the U.S. Attorney's office and that the person with whom he spoke informed the appellant that the office declined to prosecute the alien. If an AUSA other than Mills returned the appellant's call and declined to prosecute the alien, the agency has offered no evidence that would justify a finding that the appellant misidentified Mills as the AUSA with the intent to defraud or deceive the agency. If the appellant received such a call, the appellant's misidentification of the caller would appear to be nothing more than an honest mistake. To sustain the charge under these circumstances, it was incumbent on the agency to prove that the appellant did not receive such a call.

3. The agency failed to meet its burden. Other than verifying that Mills did not decline prosecution, the record is devoid of evidence that would suggest that the agency made any effort to determine whether another AUSA may have spoken with the appellant and declined prosecution. The record does not even indicate that the agency questioned Brown, who was acting for Mills that day.

4. The agency did adduce indirect evidence that might support the proposition that the appellant did not receive a call from an AUSA declining prosecution. Mills testified that, if his office had been made aware that an alien had a prior felony conviction, no one his office would have declined prosecution because that would have been contrary to office policy. The agency failed to establish, however, that the alien in question had a prior felony prosecution.

► **Appellant: Raymon L. Crook**
Agency: United States Postal Service
Decision Number: 2008 MSPB 86
Docket Number: AT-0752-07-1004-I-1
Issuance Date: April 10, 2008
Appeal Type: Adverse Action by Agency
Action Type: Constructive Adverse Action

Timeliness - PFR

The appellant petitioned for review of an initial decision that dismissed his appeal for lack of jurisdiction. The PFR was filed about one month after the deadline for timely filing.

Holding: The Board dismissed the PFR as untimely filed without good cause shown. The appellant said he thought he had 60 days in which to file his petition, having been confused about the language referring to the 60-day deadline for filing a petition with the U.S. Court of Appeals for the Federal Circuit. The Board found, however, that the initial decision clearly informed the appellant of the 35-day deadline for filing a PFR, as opposed to the 60-day deadline for filing a petition for judicial review.

► **Appellant: Mark G. Zysk**
Agency: United States Postal Service
Decision Number: 2008 MSPB 87
Docket Number: CH-0353-07-0439-I-1
Issuance Date: April 10, 2008
Appeal Type: Restoration to Duty
Action Type: After Recovery from Compensable Injury

Miscellaneous Agency Actions
- Restoration to Duty
Jurisdiction
- Furlough
- Constructive Suspension

The appellant petitioned for review of an initial decision that dismissed his appeal for lack of jurisdiction. The appellant, a preference-eligible full-time city letter carrier, submitted workers' compensation claims for injuries suffered in 2001 and 2002, which were approved by OWCP. He worked on limited duty from April 2002 through March 14, 2007. When the appellant reached the limit of his medical restrictions, i.e., 2 hours of walking, the agency would assign other carriers to complete the appellant's route and provide him with alternate work. On March 14, 2007, OWCP terminated the appellant's benefits on the basis that his work-related conditions had resolved. The agency informed the appellant that, thereafter, he would be expected to carry his entire route, but that if he continued to have medical conditions that limited his ability to deliver all of his route he could apply for light duty. The agency no longer assigned the appellant alternative work, and he no longer received 8 hours of work each day. In his appeal to the MSPB, the appellant alleged that the agency constructively suspended him by ordering him to clock out when he reached the limits of the work restriction imposed by his doctor. The AJ dismissed the appeal for lack of jurisdiction, finding that the appellant did not meet the requirements of 5 C.F.R. Part 353, either as a fully recovered individual or as a partially recovered individual. Regarding the appellant's enforced leave claim, the AJ determined that, because the appellant was not suffering from a work-related injury, the agency was not obligated to guarantee the appellant a light-duty assignment of 8 hours per workday or 40 hours per week. For the same reason, the AJ also determined that the appellant's daily part-day absence was not a "furlough" under the Board's jurisdiction.

After filing his PFR, the appellant submitted a copy of an OWCP decision dated November 2, 2007, which set aside its March 14, 2007 decision to terminate the appellant's compensation, retroactively reinstated his benefits, and remanded his case for a new decision addressing whether the appellant still suffers from his work-related injury.

Holdings: The Board reopened the appeal on its own motion, vacated the initial decision, and remanded the appeal to the regional office for further adjudication:

1. Much of the initial decision was based on OWCP's March 14, 2007 decision that terminated the appellant's compensation benefits because his work-related medical

conditions had resolved. That OWCP has rescinded its March 14, 2007 decision, and reinstated the appellant's compensation benefits, calls the basis of the initial decision into question and warrants reopening the appeal. A remand is therefore appropriate to reconsider the appellant's furlough and constructive suspension claims.

2. The new information does not change the jurisdictional status of the appellant's restoration claims. OWCP's reinstatement of the appellant's benefits precludes the appellant from meeting OPM's definition of "fully recovered," and partially recovered employees may not appeal an allegedly improper restoration.

► **Appellant: Terese A. Durden**
Agency: Department of Homeland Security
Decision Number: 2008 MSPB 88
Docket Number: DC-0752-07-0231-I-1
Issuance Date: April 10, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Discrimination
- Sex Discrimination

The appellant petitioned for review of an initial decision that sustained her removal for physical inability to perform the duties of her position as an Aircraft Mechanic with the U.S. Coast Guard. In January 2005, the appellant's physician supplied a letter to the agency recommending that she "avoid any cramped, awkward, strained positions," and that she "limit her carrying to approximately 25 lbs . . . ." The appellant underwent significant neck surgery in November 2005, and she requested accommodation of her medical condition in January 2006. Her doctor submitted a letter outlining restrictions very similar to the ones under which the appellant worked before the surgery. The agency proposed her removal in July 2006, which was effected in November. The decision stated that the appellant's "physical inability to perform [her] duties place[d] an administrative burden on the agency," because she held "a full time position and the [agency's] need is to have a person performing the full duties [of the aircraft mechanic position] in a full time capacity." In her appeal to the Board, the appellant alleged, inter alia, that she was the victim of sex discrimination. She alleged that she received worse treatment than a similarly situated male aircraft mechanic, Tom Doshen, who, like her, was unable to perform some of the essential functions of the aircraft mechanic position, but whom the agency accommodated by giving him unofficial light duty assignments within his perceived restrictions. The AJ found, however, that the appellant and Doshen were not similarly situated.

Holdings: The Board granted the appellant's PFR, reversed the initial decision, and ordered the agency to cancel the appellant's removal and restore her to employment, finding that the agency had engaged in sex discrimination:

1. The appellant's PFR fails to establish her contentions regarding harmful procedural error, disability discrimination, and the conduct of the hearing below.

2. The Board found that the appellant established by preponderant evidence that the agency treated the appellant disparately from Doshen, a similarly situated employee outside the appellant's protected group, thereby committing sex discrimination.

a. In a case like this, where the record is complete and a hearing has been held, it unnecessary to follow the burden-shifting framework of *McDonnell Douglas*; the inquiry proceeds directly to whether the appellant has demonstrated by a preponderance of the evidence that the agency's reason for its action was a pretext for discrimination. The agency, under the circumstances presented, may have properly removed the appellant for her physical inability to perform the duties of her position, but only if the same criteria are applied to men and women alike.

b. Potential comparators' respective situations do not have to be perfectly identical to be considered similar and comparable for discrimination purposes.

c. While the AJ correctly noted several differences between the appellant and Doshen, those differences obscure the basic similarity of their situations. Both were physically incapable of performing some of the essential functions of the aircraft mechanic position. Yet the agency allowed Doshen to work light-duty for an indefinite period of time, until he eventually found a position with less demanding physical requirements, and the appellant was removed for her physical inability to perform the essential functions of her position.

► **Appellant: Vincent E. May**
Agency: United States Postal Service
Decision Number: 2008 MSPB 89
Docket Number: SF-0752-00-0046-I-1
Issuance Date: April 11, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Timeliness - PFR

The appellant petitioned for review of an initial decision issued in 2000 that dismissed his appeal without prejudice to refiling.

Holdings:

1. The Board dismissed the PFR as untimely filed without good cause shown. The appellant explained that the "mailing address was not correct on the address that was given to the MSPB in 1999/2000," and that he did not receive the initial decision "because of the wrong address." The 8-year length of the delay in filing militates against waiving the filing deadline, and the appellant does not claim that he acted with due diligence by forwarding his mail through the Postal Service or by contacting the Board to update his mailing address.

2. The Board also declined to exercise its discretion to reopen the appeal.

► **Appellant: Kendra L. Drain**
Agency: Department of Justice
Decision Number: 2008 MSPB 90
Docket Number: AT-0752-07-0820-I-1
Issuance Date: April 11, 2008
Appeal Type: Adverse Action by Agency
Action Type: Suspension - Indefinite

Miscellaneous Agency Actions
- Indefinite Suspension

The agency petitioned for review, and the appellant filed a cross-PFR, of an initial decision that reversed the continuation of the appellant's indefinite suspension. In July 2006, the agency indefinitely suspended the appellant from her position as a Correctional Treatment Specialist pending investigation into allegations that the appellant committed a crime by introducing contraband into the prison complex where she was employed. The indefinite suspension was to remain in effect pending disposition of any criminal charges against the appellant, or until there was sufficient evidence either to return her to duty or to support subsequent administrative action that may be warranted. About 10 months later, the appellant requested that the agency end her suspension and return her to work. When the agency denied the request, she filed a Board appeal. The AJ found that the continuation of the suspension was improper on the ground that suspending an employee for a period in excess of 1 year is not temporary because it has no ascertainable end.

Holdings: The Board granted the agency's PFR, denied the appellant's cross-PFR, reversed the initial decision, and sustained the continuation of the indefinite suspension:

1. An indefinite suspension must have an ascertainable end, which is a determinable condition subsequent that will bring the suspension to a conclusion. An indefinite suspension may extend through the completion of both a pending investigation and any subsequent administrative action.

2. Here, the indefinite suspension was proper when effected because it had an ascertainable end—the disposition of any criminal charges, or a determination whether to return the appellant to duty or to take a subsequent administrative action. The Board found no support that the passage of 1 year, by itself, renders an otherwise properly effected indefinite suspension improper.

3. The Board considered new evidence submitted by the agency that shows that a grand jury indicted the appellant on November 28, 2007, for 2 counts of violating federal law by introducing contraband into the prison facility, and that, as of January 24, 2008, these criminal matters had not been finally resolved. Because the condition subsequent that would end the appellant's indefinite suspension has not yet occurred, the continuation of the suspension is proper.

► **Appellant: Eric Williams**
Agency: Department of the Air Force
Decision Number: 2008 MSPB 91
Docket Number: AT-3443-06-0118-I-2
Issuance Date: April 15, 2008

Miscellaneous Agency Actions
- VEOA/Veterans' Rights

The appellant petitioned for review of an initial decision that ordered corrective action in this VEOA appeal. The appellant applied for a GS-07 Contract Specialist position under vacancy announcement WR383583 in July 2005. OPM forwarded 2 certificates of eligible candidates to fill 13 positions. The appellant's name appeared on one list as a 10-point preference eligible veteran; his name did not appear on the second certificate, which was for Outstanding Scholars. The appellant was interviewed, but not selected. After filing a complaint with the Department of Labor, the appellant filed a VEOA appeal with the Board. While that appeal was pending, the agency stated that it had become aware of the Board's decision in *Dean v. Department of Agriculture*, 99 M.S.P.R. 533 (Aug. 5, 2005), which held that the Outstanding Scholar Program cannot be used as a hiring method to avoid the competitive examination process when veterans' preference rights are at issue. The agency stipulated that the appellant would have been hired as a GS-07 Contract Specialist in 2005 but for the agency's use of the Outstanding Scholar Program, and offered to place him in a GS-07 Contract Specialist position with back pay and benefits. The appellant argued that he should be placed at the GS-11 level because most people hired as a result of the 2005 vacancy announcement have been promoted to GS-09 or GS-11 by this time. He also argued that the agency's VEOA violation was willful and that he is therefore entitled to damages. The AJ found that the appellant violated the appellant's veterans' preference rights and ordered the agency to place the appellant in a GS-07 Contract Specialist position with appropriate back pay and benefits.

Holdings: The Board denied the appellant's PFR, reopened the appeal on its own motion, affirmed the initial decision as modified, and forwarded the appellant's request for lost wages, benefits, and liquidated damages to the regional office for adjudication:

1. The Board denied the appellant's request for interim relief. Even assuming that a VEOA appeal is subject to the interim relief provisions of 5 U.S.C. § 7701, it was not an abuse of discretion for the AJ to decline to order interim relief.

2. The agency violated 5 U.S.C. § 3304(b), a statute related to veterans' preference, when it improperly selected non-preference eligibles instead of the appellant by using the Outstanding Scholar Program to fill vacancies under the 2005 announcement.

3. The appropriate remedy is not an automatic and retroactive appointment to the GS-07 Contract Specialist position. Rather, the agency must reconstruct the selection process and comply with the applicable veterans' preference laws. If, after the agency reconstructs the hiring process, the appellant is placed at a grade

level with which he disagrees, he may file a petition for enforcement with the office that issued the initial decision.

3. Regarding the appellant's request for damages, the law provides that, "If the Board . . . determines that such violation was willful, it shall award an amount equal to backpay as liquidated damages." 5 U.S.C. § 3330c(a). The Board has interpreted the term "willful" as meaning that the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by VEOA. There is a question whether the agency's violation was willful, as the relevant selections in this case took place approximately 5 weeks after the Board issued *Dean*. Since the appellant has already filed a request for lost wages, benefits, and liquidated damages, the Board found it appropriate to forward that request to the regional office for adjudication.

► **Appellant: Eric Williams**
Agency: Department of the Air Force
Decision Number: 2008 MSPB 92
Docket Number: AT-3443-07-0858-I-1
Issuance Date: April 15, 2008

Miscellaneous Agency Actions
- USERRA/ Veterans' Rights

The appellant petitioned for review of an initial decision that dismissed his URERRA appeal for lack of jurisdiction. As in the previously reported decision, this appeal involves the appellant's non-selection for a GS-07 Contract Specialist position with the agency under vacancy announcement WR383583. While the VEOA appeal was pending before the Board on PFR, the AJ dismissed the USERRA appeal, finding that the appellant failed to make a nonfrivolous allegation of jurisdiction.

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

1. Although the Board ordinarily lacks jurisdiction over an agency's failure to hire an applicant, USERRA (38 U.S.C. § 4311(a)) provides that a person who performs or has performed uniformed military service "shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment" because of his military service.

2. To establish Board jurisdiction over a USERRA appeal, the appellant must nonfrivolously allege that he: (1) performed uniformed military service; (2) was denied initial employment; and (3) the denial of initial employment was due to the performance of uniformed military service. A claim under USERRA should be broadly and liberally construed in determining whether it is nonfrivolous.

3. Here, the first two elements are undisputed, and the appellant claimed that the agency denied him the Contract Specialist position due to his veteran status and that his military service was a substantial or motivating factor in his nonselection. These allegations are sufficient to establish jurisdiction.

4. On remand, the appellant should be afforded a hearing. In addition, the AJ shall also address the appellant's reemployment claims.

► **Appellant: Susan L. Holland**
Agency: Department of Labor
Decision Number: 2008 MSPB 93
Docket Number: DA-0752-07-0564-I-1
Issuance Date: April 29, 2008
Appeal Type: Adverse Action by Agency
Action Type: Suspension - More than 14 Days

Board Procedures/Authorities
- Sanctions

The appellant petitioned for review of an initial decision that dismissed her appeal of a 30-day suspension for failure to prosecute. Following the issuance of the acknowledgment order, the agency served the appellant with discovery request. When the appellant failed to respond, the agency file a motion to compel discovery. During a conference call 2 days later, the appellant explained that she had not responded because she had been ill and was attempting to retain an attorney. The AJ granted the agency's motion to compel and ordered the appellant to respond to the discovery requests no later than October 29, 2007, and advised the appellant that failure to comply would result in sanctions under 5 C.F.R. § 1201.43. On November 8, the agency filed a second motion to compel, asserting that the appellant failed to respond to its discovery by the deadline, and that she had failed to file a prehearing submission. Also on November 8, the appellant failed to participate in a scheduled prehearing telephonic conference. The AJ ordered the appellant to contact her no later than November 13 as to how she wished to proceed, and advised the appellant that failure to comply may result in the imposition of sanctions, possibly including dismissal of the appeal for failure to prosecute. The appellant did not respond by the deadline, and the AJ issued an initial decision on November 15 dismissing the appeal for failure to prosecute.

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 for further adjudication:

1. Sanctions, including dismissal for failure to prosecute an appeal may be imposed as necessary to serve the ends of justice. 5 C.F.R. § 1201.43. The severe sanction of dismissal with prejudice for failure to prosecute should not be imposed against a pro se appellant who has made incomplete responses to the Board's orders, but has not exhibited bad faith or evidenced any intent to abandon her appeal.

2. Although the appellant has not been diligent in pursuing her appeal and did not comply with the AJ's October 24 order regarding discovery, her actions do not exhibit bad faith or evidence an intent to abandon her appeal. She participated in the October 24 conference call, appeared for her scheduled deposition the same day, and stated that she had given responses to interrogatories.

3. The appellant's failure to respond to the AJ's November 8 order within the 5-day time limit does not show a lack of diligence or negligence. The 5-day

deadline included 3 consecutive days that the Board was closed for business. The AJ's order thus allowed only 2 days for the order to reach the appellant and for her response to be received. The appellant's hand-delivered November 19 letter to the AJ, which was forwarded to the Clerk of the Board as a PFR, may have been the appellant's response to the AJ's November 8 order.

4. Under all the circumstances, the extreme sanction of dismissal for failure to prosecute does not serve the ends of justice, and the appeal was remanded for further adjudication.

► **Appellant: Robert J. Johnson**
Agency: Department of the Treasury
Decision Number: 2008 MSPB 95
Docket Number: CH-3443-07-0517-I-1
Issuance Date: April 29, 2008

Board Procedures/Authorities
- Sanctions

The appellant petitioned for review of an initial decision that dismissed his appeal for failure to prosecute. In this USERRA appeal, the appellant alleged that the agency improperly charged him with military leave on non-work days, causing him to use annual leave, sick leave, or leave without pay (LWOP)to perform military service. In his acknowledgment order and several subsequent orders, the AJ directed the appellant to identify the dates on which he was charged military leave for non-work days, and the dates on which he performed military duty and was forced to use annual leave or LWOP because the agency charged him military leave on non-work days. After many pleadings, orders, and telephone conferences, the AJ dismissed the appeal for failure to prosecute on the ground that the appellant had failed to comply with this directive.

Holdings: The Board granted the appellant's PFR, reversed the initial decision, and remanded the appeal for further adjudication:

1. Sanctions, including dismissal for failure to prosecute an appeal may be imposed as necessary to serve the ends of justice. 5 C.F.R. § 1201.43. In the absence of bad faith or evidence that an appellant intends to abandon his appeal, however, a timely-filed appeal should not be dismissed for failure to prosecute. Once an AJ imposes a sanction, the Board will not disturb such a determination unless it is shown that the AJ abused her discretion or that her erroneous ruling adversely affected a party's substantive rights.

2. Although the appellant's response to the orders that he produce the specific dates in question was late, his exhibits did directly reference each date that the appellant was allegedly mischarged military leave and identifies the dates that he was forced to use annual leave or LWOP to perform military service. Accordingly, he had fully complied with the AJ's orders and the agency's discovery requests prior to the decision dismissing the appeal for failure to prosecute.

► **Appellant: David V. Hawley**
Agency: Social Security Administration
Decision Number: 2008 MSPB 96
Docket Number: NY-3443-07-0101-I-1
Issuance Date: April 29, 2008

Timeliness - PFR

The appellant petitioned for review of an initial decision that dismissed his appeal as settled. The initial decision became the Board's final decision on March 29, 2007. On November 6, 2007, the appellant filed a pleading in which he alleged that the agency committed fraud by altering the settlement agreement before submitting it to the AJ. In response to a notice on timeliness, the appellant asserted that he did not become aware of the change in the settlement agreement until he received a copy of it on July 12, 2007, and that he thereafter attempted, unsuccessfully, to resolve the discrepancy with the agency before filing his pleading with the Board.

Holdings:

1. The Board dismissed the appellant's PFR as untimely filed (by more than 7 months) without good cause shown. Even if the appellant's assertions as to the reasons he delayed are accepted as true, he waited nearly 4 months after learning of the alleged alteration of the settlement agreement before filing, and more than 2 months after his attempts to resolve the discrepancy with the agency had ended. These delays demonstrate that the appellant failed to exercise due diligence and ordinary prudence in pursuing this petition for review.

2. The Board forwarded the appellant's allegations of agency noncompliance with the settlement agreement to the New York Field Office for docketing and consideration as a petition for enforcement.

► **Appellant: Sandra H. Morales**
Agency: Social Security Administration
Decision Number: 2008 MSPB 97
Docket Number: SF-3443-08-0076-I-1
Issuance Date: April 29, 2008

Jurisdiction
- Discrimination Complaints/Mixed Cases
Whistleblower Protection Act
- Exhaustion of Remedy

The appellant petitioned for review of an initial decision that dismissed her appeal for lack of jurisdiction. The action complained of was the appellant's non-selection for a promotion, which she alleged resulted from retaliation for protected whistleblowing activity and unlawful discrimination. The appellant noted that she had filed a complaint with the Office of Special Counsel approximately a week before filing her Board appeal. The AJ dismissed the appeal for lack of jurisdiction, finding that the Board lacked jurisdiction of the non-selction as an otherwise appealable matter, and that the

appeal was prematurely filed as an IRA appeal, because OSC had not completed its investigation and 120 days had not elapsed.

Holdings:

1. The Board lacks jurisdiction over a direct appeal of the appellant's non-selection. It is well-settled that the Board lacks jurisdiction under 5 U.S.C. § 7512 over an individual's non-selection for a position, and a discrimination claim under 5 U.S.C. § 2302(b)(1) is not an independent source of Board jurisdiction.

2. A non-selection for a promotion is appealable to the Board as an IRA appeal under 5 U.S.C. § 1221, subject to the requirement that the appellant first seek corrective action from OSC as required by 5 U.S.C. § 1214(a)(3), which requires that OSC have terminated its investigation, or that 120 days have elapsed since filing the OSC complaint. The AJ correctly found that the Board lacked IRA jurisdiction over her non-selection when the appeal was filed. It is the Board's practice, however, to adjudicate an appeal that was premature when it was filed but becomes ripe while pending before the Board. The appellant is now ripe for adjudication, and the appeal was remanded to the regional office.

► **Appellant: Marianna Mohammed**
Agency: Office of Personnel Management
Decision Number: 2008 MSPB 98
Docket Number: CH-0831-08-0135-I-1
Issuance Date: May 6, 2008
Action Type: Retirement/Benefit Matter

Timeliness - PFA

The appellant petitioned for review of an initial decision that dismissed her appeal of OPM's reconsideration decision as untimely filed. OPM's reconsideration decision, issued on February 21, 2007, informed the appellant that she had the right to file an appeal with the Board within 30 days after receipt of the decision. The appellant's pro se appeal was received in the Board's regional office on November 15, 2007. With the appeal, the appellant submitted a copy of OPM's reconsideration decision bearing a handwritten notation that it was received on March 7, 2007, and a copy of a Postal Service customer receipt documenting that she had mailed something to OPM on April 3, 2007. The AJ issued an acknowledgment order directing the appellant to submit evidence and argument on timeliness, but the appellant did not respond. The AJ issued an initial decision dismissing the appeal as untimely filed without good cause shown. In so ruling, the AJ found that the appellant had received the reconsideration decision on March 7, 2007, that the date for timely filing was April 6, 2007, and that the appellant was filed on November 10, 2007, more than 7 months after the deadline.

In her PFR, the appellant asserted for the first time that she mailed a letter of appeal of OPM's reconsideration decision to OPM on April 3, 2007, and that she put her request to OPM in letter form instead of using the MSPB appeal form provided by OPM "because she did not understand the forms" due to her limited education. She submitted a copy of the letter she submitted to OPM on April 3.

Holdings: The Board denied the appellant's PFR, but reopened the appeal on its own motion; it reversed the initial decision, found good cause for the delay in filing, and remanded the appeal to the regional office for adjudication on the merits:

1. The acknowledgment order did not inform the appellant of the dates on which the AJ intended to rely in making the timeliness determination. This was error. For that reason, the Board considered the appellant's late-filed evidence and argument regarding the timeliness of her appeal.

2. Although OPM's reconsideration decision instructed the appellant that she should file her appeal with the Board's regional office, and the Board generally holds that an appellant's failure to follow explicit instructions does not constitute good cause for a delay, it has recognized an exception in cases where appellants have timely but mistakenly sent appeals of OPM reconsideration decisions to OPM rather than to the Board, where the following conditions have been met: The delay was caused in part by the appellant's failure to follow the directions in the reconsideration decision and in part by OPM's failure to direct an otherwise timely appeal to the Board; the appellant clearly intended to seek further review of the reconsideration decision; the appellant was pro se; and there was no showing of prejudice to OPM by granting the waiver. Because these conditions were met in this case, the Board found good cause for the delay in filing, and remanded the case to the regional office for adjudication.

► **Appellant: Ernest Hooper**
Agency: Office of Personnel Management
Decision Number: 2008 MSPB 99
Docket Number: AT-0831-07-0933-I-1
Issuance Date: May 7, 2008
Action Type: Retirement/Benefit Matter

Retirement
- Service Credit
- Post-1956 Military Service

The appellant petitioned for review of an initial decision that affirmed OPM's reconsideration decision reducing his CSRS annuity benefits by eliminating service credit for his post-1956 military service. The appellant retired in 1995 at age 50. Because he had more than 9 years of post-1956 military service, he was given information about making a deposit in order to continue receiving credit for his military service if and when he became eligible to receive Social Security benefits. After receiving notice that his CSRS annuity might be reduced at age 62 if he failed to make such a deposit, the appellant elected not to make a deposit. When he turned 62, OPM notified him that his monthly annuity was being reduced by over 40% because he had not make the deposit. On appeal to the Board, the appellant asserted, in a declaration made under the penalty of perjury, that the retirement counselor at his employing agency incorrectly told him that the amount of the reduction in his CSRS benefits at age 62 would be made up by the amount of Social Security benefits he would receive at that

time. The AJ affirmed OPM's reconsideration decision, finding that the appellant received adequate notice of the requirement that he make a deposit for his post-1956 military service to avoid a reduction in his annuity at age 62, and that the appellant failed to prove that his failure to pay the deposit was the result of administrative error.

Holdings: The Board denied the appellant's PFR, but reopened the appeal on its own motion, reversed the initial decision, and directed OPM to allow the appellant an opportunity to make a deposit for his post-1956 military service:

1. Under circumstances like those in this case, OPM is required by law to recompute annuity payments when the retiree becomes eligible for Social Security benefits at age 62 to exclude credit for the post-1956 military service. An individual will be allowed to make a post-separation deposit for such service only if he shows that OPM or his employing agency made an administrative error that caused his failure to timely make the deposit.

2. Under *McCrary v. Office of Personnel Management*, 459 F.3d 1344, 1349 (Fed. Cir. 2006), an employing agency commits administrative error if its response to an employee's questions 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.

3. Here, the appellant's unrebutted assertions regarding his conversation with his employing agency's retirement counselor establish that the agency committed administrative error by failing to fully inform him regarding the consequences of not paying the deposit when he turned 62.

► **Appellant: Salvador I. Guerrero, Jr.**
Agency: Department of Veterans Affairs
Decision Number: 2008 MSPB 100
Docket Number: AT-0752-06-0144-A-1
Issuance Date: May 7, 2008
Action Type: Attorney Fee Request

Attorney Fees
- Prevailing Party
- Reasonableness

The agency petitioned for review of an addendum initial decision that ordered the agency to pay attorney fees fees in the total amount of $10,155.50. In the merits proceeding, the Board reversed the agency's removal action. *Guerrero v. Department of Veterans Affairs*, 2007 MSPB 132, 105 M.S.P.R. 617. Thereafter, the appellant filed a petition for enforcement, in which the agency was ordered to pay the appellant $1,100 for job search expenses.

Holdings:

1. The reasonableness of the fees awarded in the compliance proceeding must be remanded for further adjudication.

a. The AJ found that the agency was not in compliance with the Board's final order until it paid $1,100 to the appellant for job search expenses. In light of this, the AJ found that the appellant clearly prevailed on the enforcement issue and awarded fees. The agency argues, however, that the AJ should have limited the award of fees to those related to the appellant's success on this issue.

b. In addition to the job search expenses, the appellant argued that the agency should reimburse him for family medical expenses, and he requested that the agency add performance evaluations to his employment file showing satisfactory performance. These claims were resolved without an enforceable order from the AJ or the Board. But the mere absence of such an order does not necessarily bar a claim for attorney fees.

c. Even where an appellant is the "prevailing party" as to a particular claim, the Board will not award attorney fees for hours spent on unsuccessful claims that are distinct and unrelated to his successful claim. Because the AJ failed to make any explicit findings on these matters, and the existing record is insufficiently developed to decide the issue, remand is necessary.

2. The reasonableness of the fees awarded in the merits proceeding must be remanded for further adjudication.

a. The agency does not dispute that the attorney rendered legal services in the merits proceeding, that the appellant was a prevailing party in that proceeding, and that an award of attorney fees is warranted in the interests of justice. It disputes the reasonableness of those fees, especially considering the absence of an affidavit from the attorney.

b. Even in the absence of a specific challenge from the agency, the Board must ensure that only reasonable fees are awarded. Proper consideration of the reasonableness of an attorney fees request begins with an analysis of 2 objective variables: the attorney's customary billing rate; and the number of hours reasonably devoted to the case. In order to establish the appropriate hourly rate, the record must contain evidence of any fee agreement, as well as evidence of the attorney's customary billing rate for similar work.

c. Here, the record does not contain evidence of the fee agreement between the appellant and the attorney or evidence or her customary billing rate for similar work. Nor is there any evidence regarding the attorney's qualifications and relevant experience. Under these circumstances, a remand for further adjudication is necessary.