



U.S. Merit Systems Protection Board

CASE REPORT

DATE: June 6, 2008

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BOARD DECISIONS

- ▶ **Appellant: Carolyn G. Davis**
Agency: Office of Personnel Management
Decision Number: [2008 MSPB 114](#)
Docket Number: DC-831M-07-0811-I-1
Issuance Date: June 2, 2008
Appeal Type: CSRA - Overpayment of Annuity
Action Type: Retirement/Benefit Matter

Retirement **- Annuity Overpayment**

Both parties petitioned for review of an initial decision that affirmed in part OPM's reconsideration decision finding that the appellant had received overpayments of \$5,329.98 and \$8,877.42, and was not entitled to a waiver of recovery. Under the terms of the divorce between the appellant and her husband (Mr. Davis), the appellant was to receive 27.12% of his gross annuity, and Mr. Davis was to provide a former spouse annuity of either the maximum amount or 27.12%, at the appellant's option, with the deposit to be deducted from her share of Mr. Davis's gross annuity. After Mr. Davis retired in 2000, OPM awarded the appellant 27.12% of Mr. Davis's gross annuity, and proceeded to reduce her apportionment in order to provide for a survivor annuity. The appellant objected to the reduction, arguing that she had not been provided the opportunity to choose between the maximum survivor annuity and the lesser amount. Three years later, OPM responded, finding that the appellant should have been provided with an election, and the appellant thereafter elected the maximum former spouse survivor annuity. OPM determined that the appellant had received two overpayments during the 3-year interim before the correct amounts were finally established, \$5,329.98 for her share of Mr. Davis's annuity, and \$8,877.42 for an underpayment of survivor annuity deposits.

On appeal to the MSPB, the administrative judge (AJ) found that OPM had established the existence and amount of the overpayment. The AJ further determined

that the appellant was without fault in the creation of the overpayment, but that she was not entitled to a waiver as she had failed to establish that recovery would be against equity and good conscience. The AJ nevertheless ordered OPM to reduce the repayment schedule to monthly installments of \$50.

Holdings: The Board found that OPM has failed to establish the existence of the \$5,329.98 overpayment and that the appellant is entitled to a waiver of the remaining \$8,877.42:

1. OPM incorrectly calculated the appellant's apportionment of Mr. Davis's annuity. Under a correct calculation, the appellant did not receive an overpayment of \$5,329.98.
2. The Board affirmed OPM's determination that the appellant received an overpayment of \$8,877.42, because insufficient deductions were taken for her former spouse survivor annuity.
3. The appellant is entitled to a waiver of the \$8,877.12 overpayment.
 - a. The Board disagreed with OPM's contention that, because the debt was the result of a deposit for the provision of a survivor annuity, it is not subject to the waiver provisions of [5 U.S.C. § 8346\(b\)](#), relying on its regulation at [5 C.F.R. § 831.661\(a\)](#). The Board agreed with the appellant's contention that this regulation did not apply to this case, as the election to provide her with a survivor annuity was not made pursuant to any of the regulations cited therein.
 - b. The Board concurred with the AJ's finding that the appellant was without fault in causing the overpayment. The Board further determined that recovery would be against equity and good conscience on the grounds of financial hardship, as the appellant's Financial Resources Questionnaire shows a negative income/expense margin of \$3,800 per month.

► **Appellant: Richard H. Tate**
Agency: Office of Personnel Management
Decision Number: [2008 MSPB 115](#)
Docket Number: SF-0831-07-0705-I-1
Issuance Date: June 4, 2008
Action Type: Retirement/Benefit Matter

Retirement
- Deposits

OPM petitioned for review of an initial decision that reversed its determination that the appellant was not entitled to make a deposit for his service as a national guard technician. The appellant was employed as a national guard technician from 1954 to 1965. He later was employed by, and retired from, the Department of the Navy in 2003. The appellant filed an application to make a deposit for his technician service in 1992, and was informed that of the amount of the deposit that would have to be made, but he did not submit a check for this purpose until 2005, more than 2 years after his retirement. OPM determined that the deposit could not be accepted because it was

received more than 30 days after the date on which the appellant received his first regular monthly annuity payment. On appeal to the Board, the AJ agreed with OPM that the appellant's deposit was untimely, but found that the failure to make a timely deposit had been caused by the failure of OPM and the appellant's employing agency to respond to the appellant's requests for information about how to do so, and that this failure estopped OPM from enforcing the deadline.

Holdings: The Board granted OPM's petition, vacated the initial decision, and remanded the case to OPM for a new determination:

1. The initial decision seems to indicate that [5 U.S.C. § 8339\(i\)](#) and [5 C.F.R. § 831.303\(a\)](#) apply to the service period at issue here, and that the period is creditable, even in the absence of a timely deposit, for purposes of determining the length of the appellant's creditable federal service. In fact, however, the appellant's service as a national guard technician is not creditable at all in the absence of a deposit.

2. Because of its error in computing the appellant's annuity by giving the appellant credit for his national guard technician service in the absence of a deposit, OPM has asked the Board to vacate the initial decision and remand the case to it for a new decision consistent with applicable laws. The Board did so. OPM's new determination will be appealable to the Board.

- ▶ **Appellant: Randall L. Wilson**
Agency: United States Postal Service
Decision Number: [2008 MSPB 116](#)
 Docket Number: AT-0752-08-0100-I-1
 Issuance Date: June 4, 2008
 Appeal Type: Adverse Action by Agency
 Action Type: Removal

Jurisdiction

The appellant petitioned for review of an initial decision that dismissed his appeal for lack of jurisdiction. The agency removed the appellant from his position as EAS-16 Health and Resource Management Specialist based on charges of misconduct, and he filed an appeal with the MSPB. The agency moved to dismiss the appeal for lack of jurisdiction based on its assertion that the appellant was not preference eligible and his position was not one that would afford him a right to appeal to the Board under [39 U.S.C. § 1005\(a\)](#). Without affording the appellant a hearing, the AJ dismissed the appeal for lack of jurisdiction. On review, the appellant argues that his position is a supervisory, non-bargaining position over which the Board has jurisdiction.

Holdings: The Board granted the appellant's petition for review (PFR), vacated the initial decision, and remanded the appeal for further adjudication:

1. A Postal Service employee may file an adverse action appeal only if he is covered by [5 U.S.C. § 7511\(b\)\(8\)](#) or [39 U.S.C. § 1005\(a\)](#), i.e., he must be a preference eligible, a management or supervisory employee, or an employee engaged in personnel work in other than a purely non-confidential capacity.

2. An appellant must receive explicit information on what is required to establish an appealable jurisdictional issue. The AJ failed to provide such information. Such a failure can be cured if the agency's pleadings fully inform the appellant of the jurisdictional issues. Here, the agency's motion to dismiss informed the appellant generally about the jurisdictional issue of whether his position entitled him to appeal rights, but it provided no specific information of what he must allege. A remand to the regional office is therefore necessary.

- ▶ **Appellant: Sandra R. Garside**
Agency: Office of Personnel Management
Decision Number: [2008 MSPB 117](#)
Docket Number: DC-0831-07-0658-I-1
Issuance Date: June 4, 2008
Action Type: Retirement/Benefit Matter

Timeliness - PFR

The appellant filed a petition for review of an initial decision that affirmed OPM's determination that she was not entitled to a civil service survivor annuity based on the federal service of her late spouse. The PFR was filed almost 3 months after the deadline for timely filing, and the appellant did not respond to the notice from the Clerk of the Board on the timeliness issue.

Holding: The Board dismissed the PFR as untimely filed without good cause shown.

- ▶ **Appellant: Miroslaw G. Stanaszek**
Agency: United States Postal Service
Decision Number: [2008 MSPB 118](#)
Docket Number: CH-0752-08-0125-I-1
Issuance Date: June 5, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Jurisdiction

- Last-Chance Settlement Agreement

The appellant petitioned for review of an initial decision that dismissed his appeal of a removal action for lack of jurisdiction. The agency proposed the appellant's removal in July 2006. The appellant filed a grievance, which was resolved by a last-chance settlement agreement that reduced the proposed removal to a long-term suspension, but also provided that the appellant's failure to comply with the terms and conditions of the agreement, which included a requirement to maintain satisfactory attendance, would result in removal based on his violation of the agreement. The agreement further provided that, in that event, "the only issue to be litigated" was whether the appellant violated the terms and conditions of the agreement. In November 2007, the agency removed the appellant for violating the agreement, alleging that he had incurred 11 unscheduled absences during a period of less than 6-months. On appeal to the Board, the appellant argued that he had not violated the agreement, as his

absences were on days he was not properly scheduled to work. Without holding the hearing requested by the appellant, the AJ dismissed the appeal for lack of jurisdiction, finding that he had waived his appeal rights in the last-chance agreement.

Holding: The Board granted the appellant's PFR, vacated the initial decision, and remanded the case to the regional office for adjudication. The appellant did not completely waive his appeal rights in the last-chance settlement agreement. The agreement specifically provided for a retention of appeal rights, but limited the scope of a Board appeal to the issue of whether the appellant violated the terms of the agreement.

- ▶ **Appellant: Krag N. Yoshimoto**
Agency: Office of Personnel Management
Decision Number: [2008 MSPB 119](#)
Docket Number: DE-844E-07-0435-I-1
Issuance Date: June 5, 2008
Appeal Type: FERS - Employee Filed Disability Retirement

Retirement

- Disability Retirement

The appellant petitioned for review of an initial decision that affirmed OPM's determination that she was not entitled to disability retirement benefits. The appellant is a Window Clerk with the U.S. Postal Service. She claimed that she was subjected to a hostile working environment over the last several years of her employment, which led to mental disorders that, despite treatment and medical supervision, became chronic and severe. She stopped reporting for work in February 2006, and is in an absent-without-leave status. She applied for disability retirement in June 2006, claiming that she suffered from post-traumatic stress disorder, anxiety, panic attacks, depression, trouble sleeping, nightmares, and trouble concentrating and staying awake. In denying the application, OPM found that there was insufficient documentation to show a disabling medical condition. OPM also found a lack of evidence showing that the appellant's conditions were not amenable to ongoing treatment and therapy. On appeal to the Board, the AJ affirmed OPM's reconsideration decision, finding that the medical evidence failed to establish that the appellant could not perform the essential functions of her position in general, but instead indicated that her disability was "situational."

Holdings: The Board granted the appellant's PFR, reversed the initial decision, and ordered OPM to award the appellant disability retirement benefits:

1. After reviewing the extensive medical evidence, the Board concluded that OPM improperly discounted the probative value of the medical evidence, which demonstrates that, while employed in a covered position, the appellant became disabled due to her psychiatric condition, which resulted in a deficiency in her attendance and is incompatible with useful and efficient service and retention in her position, and which precludes her from working in any capacity for the Postal Service.

2. The Board disagreed with the AJ's determination that the appellant is not entitled to disability retirement because her medical condition was merely

“situational.” The record establishes that job-related stress precipitated and exacerbated the appellant’s psychiatric condition, which was itself disabling. The cause of the condition is not relevant in determining an employee’s entitlement to disability retirement; the relevant issue is whether the condition prevents the employee from rendering useful and efficient service in her position.

3. The appellant established that her disability cannot be controlled or accommodated.

4. The Board noted that the Social Security Administration and Office of Workers’ Compensation Programs have denied her applications for benefits. The Board considered these determinations, but they are not binding on the Board and they do not outweigh the evidence supporting a finding that the appellant is entitled to a disability retirement annuity.

- ▶ **Appellant: Danial M. Farooq**
- Agency: Corporation for National and Community Service**
- Decision Number: [2008 MSPB 120](#)**
- Docket Number: CH-0752-07-0617-I-1
- Issuance Date: June 5, 2008
- Appeal Type: Adverse Action by Agency
- Action Type: Constructive Adverse Action

Jurisdiction

Timeliness - PFA

The appellant petitioned for review of an initial decision dismissing his appeal for lack of jurisdiction. The appellant was a GS-12 Grants Management Specialist. The agency issued a reduction in force (RIF) notification informing him that he would be separated 60 days later, but that he was eligible to retire in lieu of separation. The agency also informed him that he could grieve the separation under the collective bargaining agreement (CBA). The appellant retired “in lieu of involuntary action.” Two months later, he filed a Board appeal in which he alleged that the agency used an improper RIF procedure to coerce his retirement. Specifically, he alleged that the agency considered the retirement eligibility status of its employees in deciding to consolidate five of its service centers, and that this was tantamount to age discrimination. The agency moved to dismiss the appeal, arguing that the CBA provided the exclusive forum for grieving such actions, and that the appellant was therefore precluded from bringing his appeal to the Board under [5 U.S.C. § 7121](#) and [5 C.F.R. § 1201.3\(c\)\(1\)](#). The AJ issued a show-cause order, informing the appellant that his CBA may preclude the Board from taking jurisdiction over his appeal in the absence of a discrimination claim, and directing the appellant to file evidence and argument to show that the appeal is within the Board’s jurisdiction. The appellant stated in a later pleading that “this is not a plea [regarding] Age discrimination,” although the appellant indicated that he was pleading “the issue of [the agency’s] decision making process and specifically the factors they used to force involuntary retirement.” This pleading quoted an e-mail exchange between the appellant and his former supervisor, in which the former supervisor stated that “I believe that the

[agency] may have used age as a basis of determining the decision to move staff and close Service Center Offices.” The AJ found that, because the appellant was attempting to appeal a RIF action that was covered by the CBA and the appellant specifically stated that he was not pleading age discrimination, the Board lacks jurisdiction over the appeal.

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

1. Although a separation by RIF is ordinarily appealable to the Board, when an employee is covered by a CBA that does not specifically exclude RIF actions, the negotiated grievance procedures are generally the exclusive procedures for resolving RIF actions. However, an aggrieved employee who alleges that he has been affected by discrimination prohibited under [5 U.S.C. § 2302\(b\)\(1\)](#) may elect to file an appeal with the Board concerning an action otherwise exclusively covered by the negotiated grievance procedures.

2. Despite the fact that the appellant stated that he was not pleading age discrimination, his actions, including those within the submission in which he made this statement, were inconsistent with this statement and indicate that he may have been confused regarding the jurisdictional implications of his age discrimination claim. Construing the appellant’s claims liberally, as the Board is required to do when an appellant represents himself, the Board found that the appellant made an allegation of age discrimination that he did not intend to abandon. Accordingly, the Board has jurisdiction over the appeal.

3. When, as here, an agency has subjected an appellant to an appealable action without notifying him of his appeal rights, the appellant must demonstrate that he was diligent in exercising his appeal rights once he learned of them, regardless of whether he was diligent in discovering his appeal rights. As the AJ did not inform the appellant of this timeliness standard, evidence on this issue must be taken on remand.

COURT DECISIONS

- ▶ **Petitioner:** Gomez-Perez
- Respondent:** Potter
- Court:** United States Supreme Court
- Docket Number: [06-1321](#)
- Issuance Date: May 27, 2008

Discrimination

Holding: The Age Discrimination in Employment Act, [29 U.S.C. § 633a](#), prohibits retaliation against a federal employee who complains of age discrimination.

► **Petitioner: Wilfredo Romero**
Agency: Department of Defense
Court: U.S. Court of Appeals for the Federal Circuit
Docket Number: [2007-3322](#)
Issuance Date: June 2, 2008

Adverse Action Charges
- Security Clearance Determinations

The petitioner was removed from his position as an auditor for the Office of Inspector General for failing to maintain his security clearance. The Board affirmed the action, holding that it could not review the merits underlying a security clearance revocation.

Holding: Because the Board did not address whether the agency complied with its own procedures when revoking Mr. Romero's security clearance, the Court vacated the Board's decision and remanded the case for the Board to determine whether Mr. Romero can show harmful error resulting from any failure by the agency to follow its own procedures.