



# U.S. Merit Systems Protection Board

CASE REPORT

DATE: August 1, 2008

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## BOARD DECISIONS

- ▶ **Appellant: Merrick Dixon**  
**Agency: Department of Commerce**  
**Decision Number: [2008 MSPB 153](#)**  
Docket Number: CB-7121-08-0003-V-1  
Issuance Date: July 22, 2008  
Action Type: Arbitration

### **Arbitration/Collective Bargaining-Related Issues**

The appellant requested review of an arbitrator's decision that sustained the agency's removal action.

**Holding:** The Board upheld all aspects of the arbitrator's decision: that the charged conduct occurred; that a nexus existed between the conduct and the efficiency of the service; and that the penalty imposed was reasonable. In so ruling, the Board noted the deference due an arbitrator's decision; the Board will modify or set aside an arbitration decision only where the arbitrator has erred as a matter of law in interpreting civil service law, rule, or regulation. In addition, the Board found that the appellant failed to establish his claim of reprisal for protected EEO activity.

- ▶ **Appellant: Herbert W. Hayes**  
**Agency: Department of the Army**  
**Decision Number: [2008 MSPB 154](#)**  
Docket Number: AT-0330-06-0198-B-1  
Issuance Date: July 28, 2008  
Appeal Type: Reemployment Priority

### **Miscellaneous Topics**

- **USERRA/VEOA/Veterans' Rights**

The appellant petitioned for review of a remand initial decision that dismissed his VEOA complaint as untimely filed. In its previous decision, [2007 MSPB 157](#), 106 M.S.P.R. 132, the Board remanded the appeal to the regional office to make a determination whether equitable tolling was appropriate under *Kirkendall v. Department of the Army*, [479 F.3d 830](#) (Fed. Cir. 2007). On remand, the administrative judge (AJ) ordered the appellant to file evidence and argument showing why the deadline should be equitably tolled, but dismissed the appeal on the basis that the appellant did not respond to her order.

**Holdings:** Contrary to the AJ's finding, the appellant did respond to the AJ's order. Accordingly, the Board remanded the appeal for further adjudication.

► **Appellant:** Larry M. Dow  
**Agency:** General Services Administration  
**Decision Number:** [2008 MSPB 155](#)  
**Docket Number:** SF-3443-02-0159-X-1  
**Issuance Date:** July 29, 2008  
**Appeal Type:** Compliance

### **Compliance**

#### **Miscellaneous Topics**

##### **- USERRA/VEOA/Veterans' Rights**

This case was before the Board on the AJ's Recommendation finding the agency in noncompliance with the final order in the underlying appeal, which found that the agency had violated the appellant's rights under VEOA in connection with filling a job vacancy, and ordered the agency to restructure its selection process in order to afford the appellant his right to compete consistent with law. In his petition for enforcement, the appellant alleged that the agency had not reconstructed the hiring process for the position in question. The agency conceded that it had not fully reconstructed the hiring process, but argued that it complied by offering the appellant priority consideration for the next such position.

**Holdings:** The Board found the agency was not in compliance with its final order, and ordered it to take specific actions to reconstruct the selection process:

1. As the Board held in *Endres v. Department of Veterans Affairs*, [2007 MSPB 301](#), 107 M.S.P.R. 455, once an agency decides to select an applicant for a vacancy, it must comply with veterans' preference requirements, and compliance with VEOA requires the removal of the non-preference eligible selectee from the position in question, the reconstruction of the certificate of eligibles so that it contains at least 3 names for the selecting official, and if the agency wishes to select a non-preference eligible over the appellant, evidence that the agency obtained OPM's approval for a passover under [5 U.S.C. § 3318\(b\)\(1\)](#). Here, the agency has provided no evidence that it has removed selected individuals from the position, or that it fully reconstructed the hiring process.

2. The Board rejected the agency's argument that it could not reconstruct the hiring process because of the lapse of time involved, and the fact that it had destroyed a Certificate of Eligibles. The destruction of the particular certificate

“is of no great consequence” in remedying the appellant’s VEOA rights, as non-preference eligibles on this list would have to be placed behind any preferend-eligible candidates on any list.

3. The Board disagreed with the appellant’s contention that the agency’s attempt to pass him over was in violation of [5 U.S.C. § 3318\(b\)](#). It also disagreed with his contention that it is appropriate to “reinstate” him to the position in question.

► **Appellants: Calvin Phillips, et. al**

**Agency: Department of Transportation (Federal Aviation Administration)**

**Decision Numbers:** [2008 MSPB 156](#); [2008 MSPB 157](#); [2008 MSPB 158](#);  
[2008 MSPB 159](#); [2008 MSPB 161](#); [2008 MSPB 162](#);  
[2008 MSPB 163](#); [2008 MSPB 164](#); [2008 MSPB 165](#);  
[2008 MSPB 166](#); [2008 MSPB 168](#); [2008 MSPB 170](#);  
[2008 MSPB 171](#)

Docket Numbers: AT-0752-07-0603-I-1, et al.

Issuance Date: July 29-31, 2008

Appeal Type: Adverse Action by Agency

Action Type: Constructive Adverse Action

**Jurisdiction**

**- Suspensions**

All of these cases involve facts and issues of law similar to those in *Hart v. Department of Transportation*, [2008 MSPB 149](#). The appellants are Air Traffic Controllers (ATCs) with the Federal Aviation Administration (FAA), who were temporarily medically disqualified from performing their ATC duties for significant periods of time, and whose requests for assignment to administrative duties were denied by the agency, resulting in their having to use annual or sick leave, or be in a leave without pay status, for periods exceeding 14 days.

**Holdings:** In each appeal, the Board found, as it did in [Hart](#), that the appellant has sustained an appealable suspension, but remanded the case for further adjudication:

1. The appellants had not presented a persuasive reason for modifying prior Board precedent holding that the Back Pay Act does not apply to the FAA.
2. The appellants had sustained suspensions that were appealable to the Board, as they were involuntarily placed in a non-pay non-duty status for more than 14 days.
3. Because the FAA is not covered by chapter 75 of Title 5 of the United States Code, it is not required to follow the procedures of [5 U.S.C. § 7513\(b\)](#).
4. A remand is necessary to determine whether the agency followed its internal procedures before it suspended the appellants and, if not, whether the agency committed harmful procedural error under its own rules.

► **Appellant: Timothy A. Moore**  
**Agency: Department of Veterans Affairs**  
**Decision Number: [2008 MSPB 160](#)**  
Docket Number: AT-0752-05-0396-M-1  
Issuance Date: July 30, 2008  
Appeal Type: Adverse Action by Agency  
Action Type: Removal

### **Mootness**

The appellant petitioned for review of a remand initial decision that dismissed his appeal as moot. In its previous decision, [2006 MSPB 248](#), 102 M.S.P.R. 689, the Board found that the appeal of this removal action was moot on the basis of a settlement agreement between the parties under which the appellant voluntarily accepted a demotion. On appeal to the Federal Circuit, the court agreed with some aspects of the Board's ruling, but found that there still existed a live controversy as to whether the agency's back pay computation was correct as it pertained to health insurance deductions, retirement credits, and sick and annual leave. [245 F. App'x. 961](#) (Fed. Cir. 2007). On remand to the regional office, the agency agreed to take certain actions, but stated that OPM would not allow repayment of the retirement contributions that the appellant withdrew while he was separated. The AJ found that the agency's back pay computation was correct and dismissed the appeal as moot.

**Holdings: The Board granted the petition for review (PFR), reversed the remand initial decision, and remanded the appeal to the regional office for adjudication on the merits:**

- 1. For an appeal to be deemed moot, the appellant must have received all of the relief he could have received if the matter had been adjudicated and he had prevailed.**
- 2. The agency's explanation that it could not restore the appellant's retirement was consistent with statute, regulation, and OPM guidance, which makes clear that payment of a refund of FERS deductions permanently voids and retirement rights based on the period of FERS service that the refund covers. Nevertheless, if the appellant had prevailed on the merits of his removal appeal, a refund of retirement contributions could have been rescinded.**
- 3. Where, as here, an appeal is not truly moot despite cancellation of the action under appeal, the proper remedy is for the Board to retain jurisdiction and to adjudicate the appeal on the merits.**

► **Appellant: Anthony D. Cunningham**  
**Agency: U.S. Postal Service**  
**Decision Number: [2008 MSPB 167](#)**  
Docket Number: CH-0752-07-0532-I-1  
Issuance Date: July 30, 2008  
Appeal Type: Adverse Action by Agency  
Action Type: Removal

### **Penalty**

### **Defenses**

#### **- Self-Defense**

The agency petitioned for review of an initial decision that mitigated its removal penalty to a 30-day suspension. The appellant was removed from his Mail Handler position on a charge of Improper Conduct/Violation of Zero Tolerance Policy after the appellant engaged in a physical altercation with a co-worker on Postal property. Following a hearing the AJ sustained the charge, but found that the appellant had acted in self-defense. She further determined that the deciding official believed the agency's zero tolerance policy required removal and that he abused his discretion in imposing the removal penalty without weighing or considering the relevant mitigating factors under *Douglas*.

**Holdings: The Board granted the agency's PFR, reversed the initial decision, and sustained the appellant's removal:**

**1. The Board found that the AJ erred in accepting the appellant's claim of self-defense.**

- a. The doctrine of self-defense requires proof that the individual used only so much force as was reasonably necessary to free himself from another's unwanted grasp, and the defense may not be successfully invoked if the person raising it was not free from fault in bringing on the difficulty, unless that person retreats in good faith, intending to abandon the difficulty that eventually led to the aggression.**
- b. It was true that, prior to the physical altercation, the co-worker several times challenged the appellant to a fight and that the appellant declined on each occasion, that the co-worker was waiting for him after the appellant clocked out, that the co-worker twice pushed him when the appellant attempted to descend the stairs, that the co-worker struck the appellant first, and that during each of the ensuing 3 fights over the next 4 minutes, the co-worker attacked the appellant first.**
- c. Despite the above facts, the appellant did not establish the elements of self-defense. First, he was not free from fault in bringing on the difficulty. Second, the appellant did not take all reasonable steps to avoid the physical altercation. In particular, the Board found that, after the co-worker twice pushed the appellant as he attempted to descend the stairs, the appellant did not retreat in good faith before the fight began.**

2. The penalty of removal is within the tolerable limits of reasonableness. The evidence indicates that the deciding official did give bona fide consideration to the relevant *Douglas* factors, and the Board saw no basis on which to conclude that the removal penalty was clearly excessive under the circumstances.

- **Appellant: Bryan D. Baldwin**  
**Agency: Department of Veterans Affairs**  
**Decision Number: [2008 MSPB 169](#)**  
Docket Number: CH-0752-08-0238-I-1  
Issuance Date: July 30, 2008  
Appeal Type: Adverse Action by Agency  
Action Type: Constructive Adverse Action

### **Jurisdiction**

**- Resignation/Retirement/Separation**

### **New Evidence**

The appellant petitioned for review of an initial decision that dismissed his appeal of an allegedly involuntary resignation for lack of a nonfrivolous allegation of jurisdiction. Following the issuance of a decision notice informing the appellant that he would be removed on misconduct charges, the appellant resigned from his position as a Maintenance Mechanic. Without conducting a hearing, the AJ dismissed the appeal on the basis that the appellant failed to make a nonfrivolous allegation that his resignation was the result of agency coercion. She further found that the Board lacks jurisdiction to review the appeal as an involuntary retirement.

**Holdings: The Board denied the appellant's PFR, reopened the appeal on its own motion and remanded the case to the regional office for further adjudication:**

1. The AJ correctly determined that the Board lacks jurisdiction over the appeal as an involuntary retirement under [5 U.S.C. § 7701\(j\)](#) and *Mays v. Department of Transportation*, [27 F.3d 1577](#) (Fed. Cir. 1994), because the appellant was not eligible to retire at the time of his separation from service.
2. The appellant failed to make a nonfrivolous allegation of an involuntary resignation based on coercion, either on the basis that the agency knew it would not prevail on its removal action, or on the basis that the agency made his working conditions so intolerable that a reasonable person in his position would have felt compelled to resign.
3. The appellant has made a nonfrivolous allegation of an involuntary resignation based on agency-supplied misinformation.
  - a. For the first time on review, the appellant contends that the agency misled him concerning his choices regarding resignation/retirement and his appeal rights. This contention is not properly before the Board because the appellant made no showing that it is based on new and material evidence not previously available despite his due diligence.
  - b. Nevertheless, the Board reopened the appeal on its own motion because the appellant has made a nonfrivolous allegation that the agency led him to

believe his separation was being processed as a retirement. After receiving notice of the agency's decision to remove him, he went to the personnel office and notified the official of his intent to retire, and signed an SF-52 that listed "Retirement" in the box titled "Nature of Action." Other than the agency's disputed version of events, there is no indication in the record that the appellant became aware that his separation was being processed as a resignation rather than as a retirement until after the resignation became effective.