U.S. Merit Systems Protection Board

CASE REPORT DATE: August 22, 2008

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BOARD DECISIONS

► **Appellant: Dennis T. Mangano**
Agency: Department of Veterans Affairs
Decision Number: 2008 MSPB 202
Docket Number: SF-1221-04-0234-B-3
Issuance Date: August 21, 2008
Appeal Type: Individual Right of Action (IRA)

Whistleblower Protection Act
Board Procedures/Authorities
- Authority of Administrative Judges/Board
- Remands

The appellant filed a petition for review (PFR) of a remand initial decision that denied his request for corrective action. The appellant served as a part-time staff physician at an agency medical center. His duties included supervising and evaluating resident trainees and medical students from a state university, and he maintained a faculty appointment at the university. In 1997, the appellant informed the medical center's director that he had learned that his supervisor, Dr. Cason, had used medical equipment in animal experiments and then reintroduced the equipment to the human operating room, and that this improper use increased infection rates in veterans undergoing heart surgery at the medical center. The appellant believed that his supervisor and other agency officials then began a series of retaliatory acts to undermine his career, including a 1999 performance evaluation, placement on administrative leave in 2000, a requirement to receive permission to enter the medical center, initiating an Administrative Investigative Board (AIB), and a quality improvement review (QIR). The alleged retaliatory acts ultimately culminated in two notices of removal in 2001, the first based on alleged improper conduct with peers and colleagues, and the second, effected in May 2001, stating that it was instead removing him for the reason stated in the first notice and because he had ceased to be an active faculty member of the state university, which was necessary for him to perform his duties of supervising and managing university residents. The appellant filed a

complaint with OSC asserting that various actions, including both removal notices, constituted retaliation for whistleblowing. During OSC's investigation into the matter, the agency acquiesced to OSC's request for it to rescind the appellant's 1999 performance evaluation, his placement on administrative leave, its requirement that he receive permission before entering the medical center, and its first separation decision. OSC nevertheless terminated its investigation into his removal without ordering corrective action.

In his original initial decision, the administrative judge (AJ) determined that the most efficient way to resolve the appeal was to first determine whether the agency could show by clear and convincing evidence that it would have removed the appellant absent his whistleblowing because his position required him to maintain a faculty appointment with the state university, and that the suspension of his faculty appointment required his termination. The AJ answered this question in the affirmative. On review, the Board vacated and remanded the appeal for further adjudication. 2006 MSPB 363, 104 M.S.P.R. 316. In doing so, the Board specifically noted that the agency did not remove the appellant for failing to maintain a condition of employment, and instead removed him primarily because he had ceased to be an active faculty member and faculty membership was necessary for him to perform his duties. The Board found that, while the AJ emphasized throughout discovery and the hearing that the relevant inquiry was whether maintaining a faculty appointment was a condition of employment, and did not allow evidence regarding whether it was practical or efficient to require the faculty appointment, the AJ injected the practicality issue into the proceeding by finding that the agency proved it would have removed the appellant absent his whistleblowing by showing that it was impractical to retain him without his faculty appointment. The Board concluded that denying the appellant the opportunity to develop evidence on the practicality issue, and then relying on the lack of evidence to rule against the appellant, was an abuse of discretion. The Board found that the AJ similarly erred in restricting the appellant's attempts to show the strength of the agency officials' motive to retaliate against him, and failing to address all of the appellant's requests for relief. The remand order specifically instructed the AJ to conduct further adjudication regarding whether it was practical to allow an anesthesiologist in the appellant's circumstances to remain employed, and of the motive to retaliate by the agency officials involved in the decision to remove the appellant, and then to reassess whether the agency met it burden of proof by clear and convincing evidence.

On remand, the AJ found, inter alia, that: the practicality of retaining the appellant in his position after his faculty appointment suspension had never been an issue and was irrelevant, the real issue being whether the appellant's loss of his faculty appointment mandated his termination; the prior initial decision definitively found that the appellant's position required that he possess a university affiliation without regard to whether that requirement was practical; and the remand adjudication would therefore be limited to the motive to retaliate by the agency officials involved in the decision to terminate the appellant's employment. Following a hearing, the AJ found that the agency proved by clear and convincing evidence that possessing a faculty appointment was a condition of employment, the agency official solely responsible for the appellant' termination did not have a motive to retaliate against the appellant for his alleged

whistleblowing, and that the appellant did not establish that either the AIB or the QIR were personnel actions within the Board's jurisdiction.

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

1. The AJ's ruling that practicality was not at issue and that faculty membership was a condition of employment was error.

a. First, an AJ is required to follow the Board' remand instructions; here, the AJ ignored these instructions and repeated his prior errors.

b. The AJ's insistence that the relevant inquiry is whether maintaining a faculty appointment was a condition of employment violates the law-of-the-case doctrine, which is intended to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit.

c. The AJ's reasoning that practicality is irrelevant because, "if it were merely practical or impractical to retain appellant as an anesthesiologist without a university affiliation, the agency could not establish by clear and convincing evidence that appellant would have been removed in any event," is wrong. Whether it may have been practical to retain the appellant without his faculty affiliation goes to the strength of the agency's evidence supporting it removal decision, which is not dispositive of the broader issue of whether the agency could show that it would have terminated the appellant absent his whistleblowing.

d. The AJ's conclusion that a faculty affiliation was a "de facto" condition of employment cannot stand on the basis of the current record. One cannot ascertain whether a matter is de facto, i.e., actual, existing in fact, without knowing the relevant facts, and the appellant must be afforded the opportunity to develop and present evidence on the matter.

2. The AJ erred in considering only whether the hospital director, who was the deciding official, had a motive to retaliate. In examining retaliatory motive for an agency action, "involved" officials may encompass more than just the proposing or deciding officials, and may include other officials upon whom the proposing or deciding official relief for information. The record establishes that Dr. Cason was involved in the decision to terminate the appellant's employment.

3. The AJ erred in ruling that the AIB and QIR were not relevant. If the AJ finds on remand that the agency did not prove by clear and convincing evidence that it would have removed the appellant for the faculty membership charge regardless of the appellant's whistleblowing, and the AJ then examines the intimidating conduct charge, the question arises whether either the AIR or QIR is so closely related to that charge that those investigations could have been a pretext for gathering evidence to use against the appellant in effecting his removal. After considering the evidence of record, the Board answered this question in the affirmative.

► **Appellant: Kevin F. Coradeschi**
Agency: Department of Homeland Security
Decision Number: 2008 MSPB 199
Docket Number: NY-0752-04-0163-A-1
Issuance Date: August 14, 2008
Appeal Type: Adverse Action by Agency
Action Type: Attorney Fee Request

Attorney Fees
- Reasonableness

The agency petitioned for review if an initial decision that awarded attorney fees and expenses in the amount of $99,322.48. On review, the agency did not contest the AJ's findings that the appellant was the prevailing party, that he incurred attorney fees pursuant to an existing attorney-client relationship, and that an award of fees is warranted in the interest of justice. At issue was the amount of attorney fees and expenses awarded.

Holdings: The Board affirmed the initial decision as modified, reducing the amount of the award to $72,302.41:

1. The Board lacks the authority to award attorney fees incurred in connection with an appeal of a Board decision to the Federal Circuit. The AJ erred in awarding such fees.

2. Photocopying expenses are not recoverable in cases of this sort.

► **Appellant: Arthur Vitello**
Agency: United States Postal Service
Decision Number: 2008 MSPB 200
Docket Number: PH-0752-08-0384-I-1
Issuance Date: August 19, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Board Procedures/Authorities
- Withdrawal of Appeal/PFR
- Reopening and Reconsideration

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

Holding: Where a Postal Service employee withdraws an appeal to pursue a negotiated grievance-arbitration procedure and subsequently files a PFR challenging the dismissal of his appeal as withdrawn, the Board considers the PFR as a new appeal and as a request to reopen the previously dismissed appeal. The Board found that the appellant failed to establish good cause for the untimely filing of a new appeal or to reopen the original appeal.

► **Appellant: James Galatis**
Agency: United States Postal Service
Decision Number: 2008 MSPB 201
Docket Number: PH-0752-07-0298-X-1
Issuance Date: August 21, 2008
Appeal Type: Adverse Action by Agency
Action Type: Reduction in Grade/Rank/Pay

Compliance

This case was before the Board on the AJ's Recommendation finding that the agency was not in compliance with the settlement agreement that resolved the underlying appeal. The appellant had been demoted from EAS-19 to PS-05. The settlement agreement provided, among other matters, that the appellant would be placed in a permanent EAS-17 position and be provided back pay from the effective date of the agency action. The appellant contended, among other matters, that he had not received the correct amount of back pay. The AJ found that the agency was not in compliance with all its obligations. The agency then submitted evidence of its intention to comply with the AJ's Recommendation, including back pay at the EAS-17 level retroactive to March 17, 2007. The appellant contended, however, that his back pay should be calculated as the difference between the pay of his former EAS-19 position and the pay he received in the PS-05 position.

Holdings: The Board held that, although the agency correctly determined that the appellant was only entitled to back pay at the EAS-17 level, it has not yet established that it is in full compliance with the settlement agreement:

1. The settlement agreement is unambiguous, providing that the appellant would be "afforded back pay from the effective date of the agency action, which was March 17, 2007," and the EAS-17 level is the only pay level mentioned in the agreement. The agreement is naturally read to provide for calculation of back pay using that level.

2. Although the agency has provided the gross and net amounts of the back pay, it has submitted no documentation that provides a detailed explanation of how these amounts were determined. The Board ordered the agency to submit evidence of payment, including calculations on which the payment was based.

► **Petitioner: Special Counsel**
Respondent: David Briggs
Decision Number: 2008 MSPB 203
Docket Number: CB-1216-08-0006-T-1
Issuance Date: August 21, 2008
Appeal Type: Disciplinary Action - Hatch Act

Special Counsel Actions
- Hatch Act

The respondent filed a PFR of the ALJ's initial decision ordering the respondent's removal for violating the Hatch Act. After winning a primary to become the

Democratic candidate for the position of Schuylkill (Pennsylvania) County Township Supervisor, the respondent became an employee of the Mine Safety and Health Administration. Despite warnings from the Office of Special Counsel that his continued candidacy would place him in violation of the Hatch Act, the respondent failed to withdraw his candidacy and OSC filed a disciplinary complaint with the Board.

Holdings: The Board affirmed the ALJ's initial decision as modified, and ordered the respondent's employing agency to remove him from his federal position:

1. The respondent's contention that he was not in violation because he was a candidate for office before he became a federal employee is without merit. The plain language of 5 U.S.C. § 7323(a)(3) prohibits an employee from being a candidate for partisan political office at any time while he is covered by the Hatch Act, and not just from becoming one while he is an employee.

2. A respondent who has been found to have violated the Hatch Act has the burden of presenting evidence showing that the Act's presumptive penalty of removal should not be imposed. The respondent in this case has failed to make this showing.

► **Appellant: Robert Rorick**
Agency: Office of Personnel Management
Decision Number: 2008 MSPB 198
Docket Number: DC-0845-08-0130-I-1
Issuance Date: August 14, 2008
Appeal Type: FERS - Collection of Overpayment
Action Type: Retirement/Benefit Matter

Retirement
- Annuity Overpayment
Jurisdiction

The appellant petitioned for review of an initial decision that affirmed OPM's denial of his request for a waiver of recovery of an overpayment. OPM granted the appellant a retirement annuity in 2006, but later notified the appellant that it had overpaid him $1,109.27 in interim annuity benefits, and indicated it would recover the overpayment in seven installments. OPM denied the appellant's request for a waiver, finding that, even though he was without fault in the creation of the overpayment, recovery of the overpayment would not be against equity and good conscience. On appeal to the Board, the AJ concurred that recovery of the debt was not against equity and good conscience, but found that the scheduled monthly repayment would cause financial hardship and reduced the amount of the monthly repayment. After the appellant filed his PFR, OPM asked the Board to vacate the initial decision and remand the appeal to OPM for the issuance of a new final decision, stating that it "discovered a substantive error in the adjudication of the appellant's annuity" that "could impact the total amount overpaid."

Holding: The Board dismissed the appeal for the issuance of a new reconsideration decision by OPM, without prejudice to the appellant's right to file a new appeal of that decision.