U.S. Merit Systems Protection Board

CASE REPORT DATE: September 12, 2008

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BOARD DECISIONS

► **Appellant: Balsam Y. Sabbagh**
Agency: Department of the Army
Decision Number: 2008 MSPB 208
Docket Number: DC-1221-08-0184-W-1
Issuance Date: September 9, 2008
Appeal Type: Individual Right of Action (IRA)

Whistleblower Protection Act
- Exhaustion of Remedy
Jurisdiction

The appellant petitioned for review of an initial decision that dismissed her IRA appeal as untimely filed. She alleged that the agency retaliated against her for making protected disclosures to the Inspector General at the Department of Defense and the Secretary of the Army. After finding that the appellant sought corrective action from OSC, the AJ dismissed the IRA appeal as untimely filed by 33 months and not subject to waiver or equitable tolling.

Holdings: The Board affirmed the initial decision as modified, dismissing the appeal for lack of jurisdiction:

1. **Before filing an IRA appeal with the Board of an action that is not an "otherwise appealable action," the individual must first seek corrective action from OSC as required by 5 U.S.C. § 1214(a)(3). To satisfy this exhaustion requirement, an appellant must inform OSC of the precise ground of her charge of whistleblowing, giving OSC a sufficient basis to pursue an investigation which might lead to corrective action.**

2. Sections 1213 and 1214 of Title 5, United States Code, give OSC different responsibilities with respect to whistleblowing disclosures. Under section 1213, whenever OSC receives a disclosure of this nature, it reviews the information to determine whether there is a substantial likelihood that the information discloses

such wrongdoing. If OSC makes a positive determination, it transmits the information to the appropriate agency head and requires the agency head to conduct an investigation and submit a written report. Under section 1214, OSC investigates complaints that an agency has committed prohibited personnel practices, including retaliation for whistleblowing under 5 U.S.C. § 2302(b)(8), and may seek corrective action on behalf of the complainant. An IRA appeal under 5 U.S.C. § 1221 only arises with respect to matters under section 1214.

3. The appellant did not file a complaint (Form OSC-11) under section 1214. She filed a disclosure (Form OSC-12) under section 1213. There is no indication that the appellant ever sought corrective action from OSC for a prohibited personnel practice described in 5 U.S.C. § 2302(b)(8). Accordingly, she did not exhaust her remedy with OSC as required by 5 U.S.C. § 1214(a)(3), and the appeal must be dismissed for lack of jurisdiction.

► **Appellant: Judy Lynne Aldridge**
Agency: Department of Agriculture
Decision Number: 2008 MSPB 209
Docket Number: DC-0752-07-0821-I-1
Issuance Date: September 10, 2008
Appeal Type: Adverse Action by Agency
Action Type: Constructive Adverse Action

Jurisdiction
- Resignation/Retirement

The appellant petitioned for review of an initial decision that affirmed her removal. The agency proposed the appellant's removal from her position as a GS-13 Management Analyst based on 3 charges of misconduct. Prior to the issuance of a decision letter, she retired under a voluntary early retirement program. In a declaration made under penalty of perjury, the appellant alleged that she was called into a meeting with the deciding official, and informed that she was being terminated as of that day. She said she asked if that meant she would lose her retirement benefits, and both the deciding official and a Human Resources specialist replied in the affirmative. After telling management officials that she had no intention of retiring, the deciding official told the appellant that she would hold her decision in abeyance until the following Monday for the appellant to sign retirement papers, and if this was not done, the termination decision would be issued.

The AJ determined that, notwithstanding the lack of a written decision, the appellant had been removed based on the charges set forth in the notice of proposed removal. Following a hearing on the merits, the AJ sustained 2 of the 3 charges in their entirety and the other charge in part. He further found that the appellant failed to establish her affirmative defenses, and that the removal penalty was reasonable.

Holdings: The Board granted the appellant's PFR, vacated the initial decision, and remanded the appeal to the regional office for a hearing on whether the appellant's retirement was the result of agency misinformation, and therefore an involuntary act within the Board's jurisdiction:

1. **It is true that, once a decision to remove has been issued, the appellant retains appeals rights under 5 U.S.C. § 7701(j) even if she separates from the service through retirement. In this case, however, the agency neither issued a decision nor effected the appellant's removal. It was therefore error for the AJ to address the merits of the proposed action.**

2. The appellant made a nonfrivolous allegation that her retirement was involuntary, and is therefore entitled to a jurisdictional hearing.

a. A decision to retire is presumed to be a voluntary act outside the Board's jurisdiction. Once an appellant makes a nonfrivolous allegation casting doubt on the presumption of voluntariness, she has the right to a hearing on the issue of Board jurisdiction.

b. One means by which an appellant may overcome the presumption of voluntariness is by showing that the retirement was obtained by agency misinformation or deception. In her declaration, the appellant stated that she was informed by her second-line supervisor and a Human Resources specialist that her removal would result in the loss of her retirement benefits, and that the fear of losing retirement benefits after more than 28 years of federal service induced her to retire. The agency officials' statements were incorrect; had the agency proceeded with the proposed removal, the appellant would have remained eligible for deferred retirement upon reaching the age of 62.

► **Appellant: Robert W. Minor**
Agency: Department of the Air Force
Decision Number: 2008 MSPB 206
Docket Number: AT-0432-07-0965-I-1
Issuance Date: September 8, 2008
Appeal Type: Performance
Action Type: Removal

Timeliness - PFR

The appellant petitioned for review of an initial decision that affirmed his removal. The PFR was filed more than two months after the deadline for timely filing.

Holding: The Board dismissed the PFR as untimely filed without good cause shown. The appellant's explanations did not contain a showing of how his personal difficulties affected his ability to timely file his petition or request an extension of time.

► **Appellant: Frances A. Raleigh**
Agency: Department of Veterans Affairs
Decision Number: 2008 MSPB 207
Docket Number: DA-0752-08-0108-I-1
Issuance Date: September 9, 2008
Appeal Type: Adverse Action by Agency

Action Type: Removal

Timeliness - PFR

The appellant petitioned for review of an initial decision that dismissed her appeal as untimely filed. The PFR was filed more than a month and a half after the deadline for timely filing.

Holding: The Board dismissed the PFR as untimely filed without good cause shown. The appellant's primary argument was that she was medicated for her medical condition to the extent that she was unable to function, but her evidence only shows that she was on medication in 2005 and 2007, outside of the relevant period in 2008.

► **Appellant: Stephan D. Evans**
Agency: United States Postal Service
Decision Number: 2008 MSPB 210
Docket Number: SF-0752-06-0193-X-1
Issuance Date: September 10, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Compliance

This case was before the Board based on a finding that the agency was in noncompliance with a final Board Order that required the agency to cancel the appellant's removal and place him in a lower-graded nonsupervisory position with the least reduction in grade and pay. At issue was the proper rate at which the appellant should have been paid during the back pay period, correction of the appellant's leave record, the number of holidays for which the appellant should have been paid, and the proper rate of interest.

Holdings: The Board found that the agency correctly determined the proper rate and amount of back pay, and had properly corrected the appellant's leave record and holiday pay. It found, however, that the agency incorrectly determined the applicable interest rate for back pay, and ordered the agency to recalculate the amount of interest owed using the rate of 5.07%.

COURT DECISIONS

► **Petitioner: Andy L. Smith**
Respondent: United States Postal Service
Court: U.S. Court of Appeals for the Federal Circuit
Docket Number: 2007-3238
Issuance Date: September 4, 2008

Miscellaneous Topics
- USERRA/VEOA/Veterans' Rights

The petitioner appealed from a final Board decision denying his request for compensation under USERRA. He sought an award of compensation for working irregular hours in a part-time position upon his return from military service when he should have been in a full-time position with regular hours. The AJ found that Smith was not entitled to compensation because he would not have had an irregular work schedule if he had been timely appointed to the full-time position to which he was entitled and therefore would not have earned premium pay.

Holding: Smith is entitled to compensation because he was denied a benefit of the full-time position, i.e., a regular schedule of work. The court vacated the Board's decision and remanded for a determination of the amount of compensation owed.