



U.S. Merit Systems Protection Board

CASE REPORT

DATE: October 10, 2008

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BOARD DECISIONS

- ▶ **Appellant: Daniel T. Mapstone**
Agency: Department of the Interior
Decision Number: [2008 MSPB 224](#)
Docket Number: AT-3443-07-0076-B-1
Issuance Date: September 26, 2008

Jurisdiction

Miscellaneous Agency Actions - Employment Practices

The appellant petitioned for review of a remand initial decision that dismissed his employment practices appeal for lack of jurisdiction.

Holding: The Board granted the appellant's PFR, reversed the remand initial decision, and remanded the appeal to the regional office for further adjudication, finding that the appellant had established both criteria for jurisdiction over an employment practices appeal under [5 C.F.R. § 300.104\(a\)](#): (1) The appeal concerns an employment practice that OPM is involved in administering; and (2) the employment practice is alleged to have violated one of the "basic requirements" for employment practices in [5 C.F.R. § 300.103](#).

- ▶ **Appellant: Jonathan M. McFarlane**
Agency: United States Postal Service
Decision Number: [2008 MSPB 225](#)
Docket Number: NY-0752-08-0078-I-1
Issuance Date: September 29, 2008

Jurisdiction

Restoration

The appellant petitioned for review of the initial decision that dismissed his appeal for lack of jurisdiction. The appeal concerned the appellant's proper placement and

ability to perform following his recovery from an on-the-job injury, where his previous position had been abolished during his absence from the workplace.

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

1. The AJ properly found that the Board would have no jurisdiction over the appeal except as a potential restoration rights appeal under [5 U.S.C. § 8151](#) and [5 C.F.R. Part 353](#). There was no jurisdiction as an adverse action, as the appellant was not an “employee” under [5 U.S.C. § 7511](#).
2. The appellant failed to raise nonfrivolous allegations establishing jurisdiction over his restoration rights claims.

- ▶ **Appellant: Patricia K. Zelenka**
Agency: Office of Personnel Management
Decision Number: [2008 MSPB 228](#)
 Docket Number: PH-831M-07-0316-B-1
 Issuance Date: October 3, 2008
 Appeal Type: CSRA - Overpayment of Annuity
 Action Type: Retirement/Benefit Matter

Retirement
- Annuity Overpayment

The appellant petitioned for review of a remand initial decision that found that she was not entitled to a waiver of the recovery of an annuity overpayment. In a previous decision, [2007 MSPB 308](#), 107 M.S.P.R. 522, the Board affirmed OPM’s determination that the appellant had received an overpayment of \$45,341.22, and that she was without fault in the creation of the overpayment, but remanded because the record was insufficient to determine whether the appellant was entitled to waiver of the overpayment on grounds of financial hardship. On remand, the AJ reviewed the appellant’s updated income and expense documentation, and determined that the appellant is not eligible for a waiver.

Holdings: The Board affirmed the remand initial decision as modified, still finding that the appellant is not entitled to a waiver:

1. Financial hardship exists when the annuitant needs substantially all of her current income and liquid assets to meet current ordinary and necessary living expenses and liabilities. The Board determined that the appellant’s monthly income is \$6,800 and her total monthly expenses are \$6,605. Accordingly, she is not eligible for a waiver of the overpayment on grounds of financial hardship.
2. Under the circumstances of this case, the Board is without authority to adjudicate the appellant’s possible entitlement to an adjustment of the recovery schedule.

- **Appellant: Rosanne M. Greco**
Agency: Department of Homeland Security
Decision Number: [2008 MSPB 227](#)
Docket Number: PH-3330-08-0252-I-1
Issuance Date: October 3, 2008
Appeal Type: Veterans Employment Opportunities Act

Timeliness - PFA

The appellant petitioned for review of an initial decision that dismissed her VEOA appeal as untimely filed. On January 30, 2008, the appellant submitted an apparently untimely Board appeal, as it was submitted more than 15 days after the Department of Labor's notice that it was unable to resolve her complaint. The appellant filed a response to the AJ's show-cause order indicating that she did not receive DOL's letter until after the filing deadline had passed because, at that time, she was not living at the mailing address she gave to DOL and she had no access to the email address that she gave DOL. The AJ dismissed the appeal as untimely filed by 6 days, concluding that equitable tolling was not warranted because the circumstances that the appellant described were not beyond her control, but rather constituted nothing more than a claim of excusable neglect.

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

- 1. When an appellant timely files a submission that does not satisfy the Board's criteria for an appeal, but that nevertheless manifests an intention to file an appeal, this constitutes compliance with the filing time limit.**
- 2. Here, the appellant faxed the Board's regional office a submission on January 17, which was sufficient for the regional office to contact the appellant on January 30 to inform her that it had received the fax, but not the appeal itself. The appellant acted diligently when she cured her incomplete filing the same day the regional office alerted her to the problem.**

- **Appellant: Jennifer Henry**
Agency: Department of Veterans Affairs
Decision Number: [2008 MSPB 229](#)
Docket Number: NY-0752-03-0330-P-1
NY-0752-03-0330-A-1
Issuance Date: October 3, 2008
Appeal Type: Adverse Action by Agency
Action Type: Compensatory Damages, Attorney Fees

Board Procedures/Authorities
- Dismissals – With/Without Prejudice

The appellant petitioned for review of two initial decisions that dismissed her appeals requesting compensatory damages and attorney fees without prejudice to refiling because of an EEOC proceeding.

Holding: The Board denied the PFRs, but forwarded the appeals to the regional office for adjudication as timely refiled appeals. The Board need not reach the issue whether the AJ abused her discretion in dismissing the appeals because the EEOC has now issued the decision that was the basis for the dismissals.

- ▶ **Appellant:** Larry M. Dow
- Agency:** General Services Administration
- Decision Number:** [2008 MSPB 226](#)
- Docket Number:** SF-3443-02-0159-X-1
- Issuance Date:** October 3, 2008

Compliance

This case was before the Board following its previous decision, [2008 MSPB 194](#), 109 M.S.P.R. 342, which found that the agency was in noncompliance with its obligations under VEOA, and ordered the agency to do the following: (1) Remove a named individual and any others selected for the position in question; (2) reconstruct certificates of eligibles that contain at least 3 names for appointment; and (3) if the agency wishes to select an applicant who is a non-preference eligible over the appellant for the position, it must obtain evidence of OPM's approval under [5 U.S.C. § 3318\(b\)\(1\)](#).

Holding: The agency has done what was ordered in the Board's previous decision and is therefore in compliance with its obligations. The Board rejected the appellant's argument that the agency is not in compliance because it has failed to designate a selectee. Neither VEOA nor OPM's regulations require the agency to select an individual for a vacancy. Accordingly, the Board dismissed the appellant's petition for enforcement.

- ▶ **Appellant:** Stephen A. Downs
- Agency:** Department of Veterans Affairs
- Decision Number:** [2008 MSPB 330](#)
- Docket Number:** AT-3330-08-0385-I-1
AT-4324-08-0389-I-1
- Issuance Date:** October 6, 2008
- Appeal Type:** Veterans Employment Opportunities Act

Miscellaneous Topics

- USERRA/VEOA/Veterans' Rights

The appellant petitioned for review of an initial decision that dismissed both his USERRA and VEOA appeals for lack of jurisdiction. Both appeals related to the appellant's non-selection for a vacancy with the agency. In both instances, the AJ based his ruling on the appellant's discharge from the military under other than honorable conditions.

Holdings: The Board affirmed the initial decision in part by dismissing the appellant's USERRA appeal for lack of jurisdiction. It vacated the initial decision

as to the VEOA appeal, concluding that the Board has jurisdiction, but denying the appellant's request for corrective action on the merits:

1. The Board denied the appellant's request for corrective action under VEOA on the merits.

- a. Under [5 U.S.C. § 3304](#)(f)(1), VEOA rights apply to preference eligibles *or* veterans who have been separated from the armed forces under honorable conditions after 3 years or more of active service. The AJ addressed only the second of these criteria. The appellant is a preference eligible within the meaning of [5 U.S.C. § 2108](#) because he qualifies as a "disabled veteran."
- b. On the merits, preference eligibles are guaranteed the right to compete under merit promotion procedures whenever the agency accepts applications from outside its own workforce. But unlike in the competitive examination process, preference eligible veterans are not entitled to any point preferences in the merit promotion process. Here, the appellant was allowed to compete for the position at issue; he was interviewed, and his name was among those forwarded to the selecting official for consideration. Under these circumstances, the agency did not violate the appellant's veterans' preference rights.

2. The Board lacks jurisdiction over the appellant's USERRA appeal.

- a. Although the appellant meets the Board's general USERRA jurisdictional test, the Board lacks jurisdiction over his USERRA claim under [38 U.S.C. § 4304](#), which provides that a person's entitlement to the benefits of the statute terminates upon the separation of the claimant "under other than honorable conditions."
- b. Although it has previously held that an appellant who raises a USERRA claim has an unconditional right to a hearing, the Board clarified that a USERRA claimant is entitled to a hearing only upon establishing Board jurisdiction over his appeal.

COURT DECISIONS

- ▶ **Petitioner:** Lance Greenstreet
Respondent: Social Security Administration
Court: U.S. Court of Appeals for the Federal Circuit
Docket Number: [2007-3312](#)
Issuance Date: September 24, 2008
Arbitration/Collective Bargaining-Related Issues
Penalty

The court reviewed an arbitrator's decision that found that the employee's termination was an excessive penalty and ordered his reinstatement without back pay.

Holding: Relying on MSPB precedent, the court held that the length of the employee's suspension was arbitrary when based solely on his "time served." The

court vacated the arbitrator's decision and remanded for a new determination of the appropriate length of the suspension.

► **Petitioner: Matthew R. Drake**

Respondent: Agency for International Development

Court: U.S. Court of Appeals for the Federal Circuit

Docket Number: [2008-3048](#)

Issuance Date: October 7, 2008

**Whistleblower Protection Act
- Protected Disclosure**

The petitioner appealed the Board's final decision, [107 M.S.P.R. 251](#) (2007) (Final Order, Member Sapin dissenting), which upheld the AJ's determination that the petitioner did not make a protected whistleblowing disclosure. After attending two parties at the U.S. Embassy in Budapest, the appellant sent an email to an Assistant Inspector General stating that he "witnessed large amounts of alcoholic beverages being served, extensive toasting, and intoxication of USAID and Dep't of State Personnel while on duty, including the Deputy Chief of Mission, Mission Director, Regional Legal Advisor, Regional Inspector General, and other representatives of the U.S. government." Less than a month after sending the email, the appellant's supervisor wrote a memorandum recommending that the appellant be transferred to Washington, D.C.

In a previous decision, [103 M.S.P.R. 524](#) (2006), the Board held that the appellant had made nonfrivolous allegations of jurisdiction and remanded the case to the regional office. On remand, the AJ determined that the appellant had not made a protected disclosure based on three separate theories: (1) that 3 FAM 4542 (the agency's table of penalties) is not a law, rule, or regulation; (2) that, even if 3 FAM 4542 was a law, rule, or regulation, the violation was of "such a trivial nature" that the petitioner could not reasonably believe he was reporting a genuine violation; and (3) that, even if 3 FAM 4542 was a law, rule, or regulation, a disinterested observer could not have concluded that the petitioner's disclosure evidenced a violation.

Holding: Because the AJ erred in concluding that the petitioner had not made a whistleblowing disclosure protected under [5 U.S.C. § 2302\(b\)\(8\)](#), the court reversed and remanded the case to the MSPB for further adjudication:

1. The agency concedes that 3 FAM 4542 is a law, rule, or regulation under the WPA.

2. The AJ misinterpreted the court's holdings in *Langer v. Department of the Treasury*, [265 F.3d 1259](#) (Fed. Cir. 2001) and *Herman v. Department of Justice*, [193 F.3d 1375](#) (Fed. Cir. 1999) in finding that the petitioner's email was "a disclosure of a trivial violation [that] does not constitute a protected disclosure." Based on the facts in those cases, the court held that the relevant disclosures were not protected because they disclosed, at most, minor and inadvertent miscues occurring in the conscientious carrying out of one's assigned duties, not violations of laws, rules, or regulations. Here, the alleged intoxication of agency personnel reported by the petitioner was the result of deliberate and intentional consumption

of alcohol during working hours and would result in a violation of a law, rule, or regulation.

3. The AJ correctly articulated the correct test—that “in order to show that he reasonably believed 3 FAM had been violated, the appellant would be required to show that a disinterested observer with knowledge of the essential facts known to and readily ascertainable by him reasonably could conclude that employees were intoxicated—in application the AJ required the petitioner to prove that the agency employees were actually intoxicated. This was error. The petitioner did establish that a reasonable person in his position could conclude that the employees were intoxicated.