U.S. Merit Systems Protection Board

CASE REPORT DATE: December 4, 2008

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BOARD DECISIONS

- **Appellant: Gregory M. Miller**
  Agency: Department of Homeland Security
  Decision Number: 2008 MSPB 243
  Docket Number: DE-1221-04-0127-B-2
  DE-1221-03-0429-B-2
  DE-1221-04-0446-W-3
  Issuance Date: November 14, 2008
  Appeal Type: Individual Right of Action (IRA)

Timeliness - PFR

In July 2008, the appellant petitioned for review of a June 2006 initial decision that denied his request for corrective action under the Whistleblower Protection Act.

Holding: The Board dismissed the PFR as untimely filed without good cause shown. Under *Dunbar v. Department of the Navy*, 43 M.S.P.R. 640 (1990), the Board recognizes an exception to the general rule that a party is responsible for his attorney's failure to file a timely petition for review (PFR) when an appellant has shown that his diligent efforts to prosecute his case were thwarted by his attorney's deception and negligence. Although the appellant presented evidence that his attorney deceived him into believing that a PFR had been filed on his behalf, he did not make any inquiries at the Board regarding the status of his appeal until more than 15 months after the filing deadline had passed, and several months after he began his unsuccessful attempts to obtain a copy of the PFR from his former attorney, and he waited an additional 6 weeks to file after learning that a PFR had not been filed.

- **Appellant: Martin Montee**
  Agency: Department of the Army
  Decision Number: 2008 MSPB 244
  Docket Number: DE-3443-08-0234-I-1
  DE-3443-08-0261-I-1
  Issuance Date: December 1, 2008

Miscellaneous Topics
- USERRA/VEOA/Veterans' Rights

The agency petitioned for review of an initial decision finding that it violated the appellant's VEOA rights and dismissing his USERRA claim as moot. The appellant, a 10-point preference-eligible, applied for and was tentatively selected for appointment to an intelligence position in the agency's U.S. Europeon Command, with the duty station being in the United Kingdom. The agency subsequently notified the appellant that he was ineligible for the position because, under applicable authorities, he was "considered an employee recruited from outside the United States." Specifically, it determined that he was considered "ordinarily resident" in the United Kingdom. The AJ found that the agency had violated the appellant's rights under 5 U.S.C. § 3304(f)(1), and therefore VEOA. He declined to address the issue of whether the appellant was "ordinarily resident" in the United Kingdom, concluding that, even if he was, he was entitled, as a preference-eligible covered by 5 U.S.C. § 3304(f)(1), to compete for the position. The AJ ordered the agency to place the appellant in the intelligence specialist position. Since the appellant would be entitled to no additional remedy under USERRA, the AJ dismissed that claim as moot.

Holdings: The Board vacated the initial decision and remanded the case to the regional office for further adjudication:

1. The vacancy announcement under which the appellant applied was open to all U.S. citizens except those "ordinarily resident" in the United Kingdom, where the position in question was located. In ruling that the agency violated the appellant's vterans' preference rights, the AJ relied on *Jolley v. Department of Homeland Security*, 105 M.S.P.R. 104 (2007), for the proposition that an agency is not permitted to exclude an applicant from competing under 5 U.S.C. § 3304(f)(1) on the ground that the applicant was outside the "area of consideration" stated in the vacancy announcement.

2. The "area of consideration" that the Board found in *Jolley* could not be used to exclude applicants was not based on qualifications for the position to be filled, but was a matter of agency discretion to accept applications only from "on-site" employees. In this case, the requirement that a citizen with "ordinary resident status" in the United Kingdom may not be appointed to a position in that country was a qualification requirement. Accordingly, the agency did not violate section 3304(f)(1) by withdrawing its offer if the appellant was in fact "ordinarily resident" in the United Kingdom. Since this issue has not been adjudicated, a remand is necessary.

3. If the appellant is found on remand to be qualified for the position at issue, the AJ should consider the agency's argument that section 3304(f)(1) does not apply to positions in the Defense Civilian Intelligence Personnel System.

4. If appropriate, the AJ should again determine whether his findings on the VEOA claim make the appellant's USERRA claim moot.

- **Appellant: Raymond Marshall**
  Agency: Department of Health and Human Services
  Decision Number: 2008 MSPB 245
  Docket Number: AT-3443-06-0811-X-1
  Issuance Date: December 2, 2008

  Compliance
  USERRA/VEOA/Veterans' Rights

  In a previous decision, 2008 MSPB 215, 110 M.S.P.R. 114, the Board found that the agency was not in compliance with its obligatons under VEOA with respect to a vacancy for which the appellant was not selected, and ordered the agency to: (1) Remove the incumbent from that position; (2) reconstruct the certificate of eligibles; and (3) obtain OPM's approval under 5 U.S.C. § 3318(b)(1) in the event the agency selected a non-preference eligible over the appellant. The agency submitted evidence of compliance with the first two items, but stated that it was not going to make any selection for the position at issue in this case.

  Holding: The Board found the agency in compliance and dismissed the petition for enforcement. The fact that the agency decided not to fill the position did not deny the appellant his opportunity to compete for the position, or otherwise violate his VEOA rights.

COURT DECISIONS

- **Petitioner: Ermea J. Russell**
  Respondent: Merit Systems Protection Board
  Court: U.S. Court of Appeals for the Federal Circuit
  Docket Number: 2008-3106 (NP)
  Issuance Date: November 18, 2008

  The petitioner appealed from a Board decision, 107 M.S.P.R. 171 (2007), that determined that the Board lacked jurisdiction over her USERRA claim. The basis for the Board's decision was that it was required by the court's decision in *Pittman v. Department of Justice*, 486 F.3d 1276 (Fed. Cir. 2007), which held that a party who elects to grieve an adverse action under 5 U.S.C. § 7121(e)(1) cannot later file a USERRA action concerning a similar matter to the Board. During the court proceeding, both parties, plus the EEOC and amicus curiae, agreed that *Pittman's* jurisdictional holding does not control this case, which instead concerns a challenge to an alleged denial of reemployment due to transfer.

Holding: As required by the plain language of 38 U.S.C. § 4302(b), the petitioner's statutory right to appeal the reemployment matter to the Board is not affected by the requirement of the collective bargaining agreement that she file a grievance, because the CBA cannot impose a requirement contrary to statute.

Circuit Judge Dyk filed a separate opinion setting forth the reasons he doubted the correctness of the majority's holding.