



U.S. Merit Systems Protection Board

CASE REPORT

DATE: December 19, 2008

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BOARD DECISIONS

- **Appellant: Jennifer Marshall**
Agency: Department of Veterans Affairs
Decision Number: [2008 MSPB 249](#)
Docket Number: CB-7121-07-0017-B-1
Issuance Date: December 11, 2008
Action Type: Arbitration

Arbitration/Collective Bargaining-Related Issues

The appellant requested review of an arbitrator's decision finding that the agency removed her for just cause on grounds that she failed to follow instructions. The appellant was removed for failing to comply with instructions to return copies of certain supervisory notes she had obtained while acting as a union representative. She asserted that there was no just cause for the action because, inter alia, she obtained the documents in the course of her representational duties and there was no basis for the agency to order the union to return copies of documents legally obtained in the course of representation.

Holdings: The Board granted the request for review, reversed the arbitrator's decision, and ordered the agency to cancel the removal and reinstate the appellant to her position:

- 1. The Board has jurisdiction to review the arbitrator's decision under [5 U.S.C. § 7121\(d\)](#) because the subject matter of the grievance (removal) is one over which the Board has jurisdiction, the appellant has alleged discrimination under [5 U.S.C. § 2302\(b\)\(1\)](#), and a final decision has been issued.**
- 2. The arbitrator did not err as a matter of law with respect to the merits of the agency's charge. It was appropriate to employ the "obey now, grieve later" standard under which an employee is generally required to obey an order, even if she believes it to be improper, and protest the propriety of the order later.**
- 3. The arbitrator erred in failing to address the appellant's affirmative defenses of retaliation for protected EEO activity and for union activity. The Board determined that it was appropriate to resolve those issues itself rather than remand them to the arbitrator.**

4. Where, as here, the agency has already articulated a non-discriminatory reason for its action, there is no need to determine whether the appellant has established a prima facie case; the inquiry proceeds directly to the ultimate question of whether, upon weighing all of the evidence, the appellant has met her overall burden of proving illegal retaliation.

5. The Board determined that the appellant met her burden of proving that the removal action was taken in retaliation for protected activity:

- a. Since at least 2004, the appellant had engaged in extensive protected activity by filing and litigating grievances, ULPs, and EEO complaints while serving as president of the union. The appellant's conduct in connection with the notes she obtained was protected activity.
- b. The deciding official knew that the appellant was representing an employee in an active EEO complaint, that she had provided copies of the documents to the EEO counselor, and that the appellant told the counselor she believed the documents constituted direct evidence of discrimination. The deciding official was significantly involved in prior EEO actions concerning the appellant.
- c. The removal was the fourth disciplinary action brought by the agency against the appellant in less than a year, and each of the preceding actions had been overturned by neutral arbitrators, two of whom sustained the union's grievance on the grounds that the discipline was imposed in reprisal for the appellant's protected activities.
- d. The agency's resort to the harsh penalty of removal, rather than some lesser form of discipline, to resolve what was essentially a disagreement between it and the union over the right to possess documents, is circumstantial evidence that the agency was motivated by reprisal. The Board saw no apparent reason why the agency could not have pursued an order against the union from an arbitrator, agency, or court with jurisdiction to obtain the copies of the documents, especially where it was unclear whether the union was entitled to the documents.

➤ **Appellant: David Galloway**
Agency: Department of Agriculture
Decision Number: [2008 MSPB 250](#)
Docket Number: AT-0752-06-1173-C-2
Issuance Date: December 17, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Compliance
Board Procedures/Authorities
- Bias

The appellant petitioned for review of a compliance initial decision that denied his petition for enforcement (PFE). The appellant's appeal of his removal was resolved by a settlement agreement in which he dismissed his appeal and the agency agreed to assist

him in applying for disability retirement, including “promptly providing forms or information the Appellant is not able to obtain from internet or other ready sources.” The parties agreed that the agency’s assistance would “cease at the time a decision is rendered by [OPM] on [the appellant’s] application for disability retirement.” On September 5, 2007, OPM notified the agency that it had approved the appellant for disability retirement, and requested the agency to report the appellant’s last day of pay. On February 25, 2008, the appellant filed his PFE, alleging that the agency failed to submit his records to OPM, which precluded OPM from making a final decision on his disability pay and causing him “severe financial problems.” The agency responded that the appellant had breached the agreement by filing a PFE without notifying it of the problem and giving it an opportunity to correct any problems. The agency also claimed that it had submitted the information in question to OPM the same day it was requested, but it failed to submit any evidence to substantiate this claim.

The AJ determined that the appellant breached the settlement agreement because he failed to provide the agency with notice of the alleged noncompliance prior to filing his PFE, and that this was a material breach that discharged the agency from its contractual duty to perform. The AJ further determined that the agency did not breach the settlement agreement. In making this determination, the AJ did not resolve the factual dispute over whether the agency provided the date of the appellant’s last day in pay status to OPM, because the AJ determined that the agency’s obligation under the agreement to provide information to OPM ceased when OPM rendered its decision on the appellant’s application for disability retirement. The AJ acknowledged that the agency owed a duty to the appellant to provide OPM with the requested information, but found that this duty did not arise under the settlement agreement and was therefore beyond the Board’s enforcement authority.

Holdings: The Board granted the appellant’s PFR, vacated the initial decision, and remanded the case to the regional office for further adjudication:

- 1. Although the appellant breached the settlement agreement by filing a PFE without first providing the agency written notice of noncompliance, this was not a material breach, because it did not relate to a matter of vital importance or go to the essence of the agreement. Accordingly, the agency was not excused from complying with its duties under the agreement.**
- 2. The agency’s duty to provide OPM with the appellant’s last day in pay status did come within the requirements of the settlement agreement, as this was information that the appellant was unable to obtain on his own. Since the AJ did not adjudicate the factual dispute over whether the agency provided this information to OPM, a remand is necessary.**
- 3. The appellant failed to establish AJ bias.**

COURT DECISIONS

- **Petitioner:** Victor W. Welshans
Respondent: United States Postal Service
Court: U.S. Court of Appeals for the Federal Circuit
Docket Number: [2008-3088](#)
Issuance Date: December 15, 2008

Miscellaneous Topics

- USERRA/VEOA/Veterans' Rights

The petitioner appealed the Board's final decision that dismissed his request for corrective action under USERRA. The appellant alleged that the agency improperly charged him for military leave for non-workdays when he served as a reservist in the United States Army. In denying the request for corrective action, the Board concluded that the agency's Employee and Labor Relations Manual (ELM) in effect in 1999, when the leave was charged, required that the Postal Service charge non-workdays falling within a period of absence for active duty against military leave.

Holding: The court affirmed the Board's decision:

1. The court rejected the petitioner's argument that a contrary outcome was required by the court's decision in *Butterbaugh v. Department of Justice*, [336 F.3d 1332](#) (Fed. Cir. 2003). In *Butterbaugh*, the court concluded that the word "days" in [5 U.S.C. § 6323](#) should be construed to mean workdays rather than calendar days. But the Postal Service is specifically excluded from the application of section 6323.
2. The court rejected the petitioner's argument that a contrary outcome was required by the provisions of the ELM. During the relevant time period, the ELM unambiguously required that the Postal Service charge non-workdays falling within a period of absence for military duty against military leave. The court refused to consider the petitioner's argument that the Postal Service intended to "impliedly integrate" all section 6323 rights into the ELM because he did not raise this argument below—either before the administrative judge or the Board—and it would be manifestly unfair for the court to resolve the question without giving the government the opportunity to present evidence on the issue.
3. The court rejected the petitioner's contention that charging him military leave for non-workdays was, on its face, a violation of USERRA, which authorizes Board review of a government employee's claim that he has been denied a "benefit of employment" on the basis of his membership in the uniformed services. The Postal Service military leave policy did not deny reservists any benefit of employment. Instead, the ELM in effect in 1999 granted reservists an additional benefit not available to non-military employees. While non-reservists were entitled to sick and annual leave, reservists were granted not only sick and annual leave, but military leave as well.