U.S. Merit Systems Protection Board

CASE REPORT DATE: March 13, 2009

Note: These summaries are descriptions prepared by individual MSPB employees. They do not represent official summaries approved by the Board itself, and are not intended to provide legal counsel or to be cited as legal authority. Instead, they are provided only to inform and help the public locate Board precedents.

BOARD DECISIONS

- **Appellant: Brian A. Miller**
  Agency: United States Postal Service
  Decision Number: 2009 MSPB 22
  Docket Number: CH-0752-08-0500-I-1
  Issuance Date: March 6, 2009
  Appeal Type: Adverse Action by Agency
  Action Type: Removal

  Harmful Error
  Due Process
  New Evidence

  The appellant petitioned for review of an initial decision that sustained his removal for failure to maintain regular attendance. The agency attempted to deliver its notice of proposed removal to the appellant via certified mail, Express Mail, and first-class mail. The Express Mail letter was returned to the agency as unclaimed, where it was signed for by "JHARRIS." About 6 weeks later, the agency issued a final decision effecting the appellant's removal. Before the Board, the appellant asserted that the agency committed harmful error because he never received the notice of proposed removal "in person" and was not given the proposal notice in time to file a grievance. The AJ found that the agency proved its charge and rejected the appellant's defense of harmful error. She determined that James Harris, the appellant's representative in the Board proceeding, had received the notice of proposed removal on his behalf when it was returned as unclaimed. She also determined that the appellant was not deprived of his right to file a timely grievance, and that removal was a reasonable penalty.

  Holdings: The Board granted the appellant's PFR, but sustained his removal, affirming the initial decision as modified:

  1. The appellant failed to present evidence that the agency was required to issue the notice of proposed removal in person. Accordingly, the AJ properly held that the appellant failed to establish harmful error in this respect.

2. The Board concluded that the AJ erred in finding that the appellant's representative received the notice of proposed removal on his behalf when the Express Mail letter was returned to the agency unclaimed.

a. The Board will consider evidence submitted for the first time on PFR when the party was not put on notice of the nature of a dispositive issue until the issuance of the initial decision. Here, the appellant could not have anticipated that the AJ would match the name on the delivery confirmation for the unclaimed Express Mail letter with the name of the appellant's representative and infer that Mr. Harris signed for the unclaimed letter as the appellant's representative.

b. The Board credited Mr. Harris's statement that he signed for the unclaimed letter as part of his official job duties, not as the appellant's representative, and that he placed the letter unopened on the supervisor's desk.

3. Even if the appellant could prove that he failed to receive both the Express Mail letter and the certified letter, such failure does not constitute harmful error by the agency, as the appellant has not cited a law, rule, that required the agency to send the notice by Express Mail or certified mail. Nor has he demonstrated that any such error likely would have caused the agency to reach a different decision.

4. There is no denial of minimum due process of law, because the appellant failed to submit evidence that he did not receive the proposal notice sent via first-class mail.

5. There is no error in the AJ's findings with respect to the merits of the charge, nexus, or the reasonableness of the removal penalty.

- **Appellant: Scot R. Winlock, Sr.**
  Agency: Department of Homeland Security
  Decision Number: 2009 MSPB 23
  Docket Number: DA-0752-08-0261-I-1
  Issuance Date: March 6, 2009
  Appeal Type: Adverse Action by Agency
  Action Type: Removal

Adverse Action Charges
- Performance-Based Actions

The agency petitioned for review of an initial decision that reversed its removal action. The appellant was a Transportation Security Manager with the Transportation Security Administration (TSA). The removal was based on his unsatisfactory performance in that he failed two Standard Operating Procedure Quizzes (SOPQs), thereby receiving a "Does Not Meet Standards" performance rating in a critical element of his performance plan. On appeal to the Board, the AJ found that the agency failed to prove that the appellant's performance was unsatisfactory and reversed his removal.

Holdings: The Board granted the agency's PFR, reversed the initial decision, and sustained the removal action:

1. Because the appellant is a TSA employee, the appeal is governed by the provisions of Aviation and Transportation Security Act (ATSA) and the personnel management system of 49 U.S.C. § 40122.

2. Although chapter 75 of title 5, United States Code does not apply to such appeals, the substance of the standards applicable to TSA employees under ATSA and the FAA personnel management system are the same as under chapter 75, i.e., an employee may be removed "for such cause as will promote the efficiency of the service," there must be a nexus between a legitimate government interest and the matter that forms the basis for the action, the penalty must be appropriate taking into account the relevant Douglas factors and other relevant considerations, and the agency must prove its case by a preponderance of the evidence.

3. In reversing the agency's action, the AJ gave significant weight to the fact that the appellant failed only one portion of a critical element, and received an "Achieves Standards" rating on 5 other critical elements and other portions of the critical element in question. The agency presented evidence that a Security Manager's technical knowledge of standard operating procedures as measured by the SOPQ's is so important that it is an essential component of the critical element in question. The managers of federal agencies, not the Board, have the authority to decide what agency employees must do in order to perform acceptably in their particular positions.

4. The agency's decision to discontinue the SOPQs in 2008 is not an indication that the agency thought the quizzes were not a valid measure of Security Manager's technical proficiency. Management expertise resides with the agency, not the Board.

5. The Board rejected the AJ's finding that there was no evidence that the SOPQs were an adequate measure of the appellant's performance. An agency has considerable discretion to determine what the performance elements for a position will be and how they will be measured. The performance standards at issue in this appeal were not an abuse of the agency's broad management discretion.

6. Based on the undisputed facts of record, the appellant did not meet his performance standards.

7. The removal penalty did not constitute an abuse of the agency's broad discretionary authority.

- **Appellant: Sahedou Ousman**
  Agency: Department of Agriculture
  Decision Number: 2009 MSPB 24
  Docket Number: NY-315H-01-0301-I-1
  Issuance Date: March 6, 2009

  Timeliness - PFR

  The appellant petitioned for review of an initial decision issued in 2001 that dismissed his appeal for lack of jurisdiction.

  Holding: The Board dismissed the appellant's PFR as untimely filed without good cause shown for the more than 7-year delay in filing.

- **Appellant: William H. Armstrong**
  Agency: Department of the Treasury
  Decision Number: 2009 MSPB 25
  Docket Numbers: DC-0752-08-0188-C-1
  DC-0752-08-0188-I-1
  Issuance Date: March 6, 2009
  Appeal Type: Adverse Action by Agency
  Action Type: Removal

  Settlement
  - Validity
  Timeliness - PFR
  Compliance

  The appellant petitioned for review of a February 2008 initial decision that dismissed his removal appeal pursuant to a settlement agreement, and for review of a July 2008 compliance initial decision that denied his petition for enforcement. The appellant, a GS-14 Criminal Investigator, applied for a job with the Department of Agriculture (USDA) and, in August 2007, received a job offer. Soon after, the USDA received anonymous letters the appellant alleged were written by Treasury employees accusing him of serious misconduct, which he alleged resulted in a hold on his job offer. In September, the agency proposed his removal, which it effected in December. On appeal to the Board, the parties entered into a settlement agreement under which the agency agreed to substitute a 30-day suspension for the removal. The agreement generally prohibited the agency from providing USDA with any information regarding the rescinded penalty, contained specific limitations on responses to employment inquiries, and negotiated the text of the agency's response to USDA's January 2008 request for information regarding the disposition of the appellant's disciplinary matter, which remained unanswered at the time of the settlement.

  In May 2008, the appellant filed a pleading asking that the settlement agreement be set aside or, in the alternative, a petition for enforcement including a motion for sanctions. The appellant alleged that the settlement agreement "was a product of fraud and misrepresentation" that "vitiated the entire premise and benefit on which [the appellant] agreed to enter a settlement with the Agency." Specifically, the appellant

claimed that the agency induced him into signing the settlement agreement by misrepresenting the nature and extent of contacts between agency personnel and the hiring official for USDA.

Holdings: The Board dismissed the appellant's PFR of the initial decision that approved the settlement agreement as untimely filed without good cause shown for the delay, and denied the appellant's PFR of the compliance initial decision for failing to meet the Board's criteria for review:

1. The appellant's request to invalidate the settlement agreement was filed 2 months after the deadline for filing a timely PFR. The appellant argued that the delay should be excused because he did not become aware of the evidence on which he relies to set aside the agreement until May 20, 2008, just 8 days before filing the PFR.

2. To establish good cause for an untimely PFR, an appellant must show that he exercised due diligence once he becomes aware of the evidence he claims establishes a valid reason to set aside the settlement agreement, but the evidence must be of sufficient weight to warrant a different outcome. Here, the appellant acted with due diligence once he became aware of the evidence on which he relies, but the evidence did not warrant a different outcome.

3. After analyzing the pertinent evidence, the Board concluded that the appellant did not establish that the agency fraudulently induced him into signing the settlement agreement by misrepresenting the nature and extent of contacts between agency personnel and USDA's hiring official.

4. The appellant's PFR effectively abandoned the compliance appeal. Accordingly, the PFR in that appeal is denied for failing meet the requirements of 5 C.F.R. § 1201.115.

- **Appellant: Ermea J. Russell**
  Agency: Equal Employment Opportunity Commission
  Decision Number: 2009 MSPB 26
  Docket Number: AT-3443-04-0915-M-1
  Issuance Date: March 9, 2009

USERRA/VEOA Veterans' Rights

This case was before the Board by order of the U.S. Court of Appeals for the Federal Circuit, No. 2008-3106 (Nov. 18, 2008) (NP). In its first reported decision, 104 M.S.P.R. 14 (2006), the Board found that it had jurisdiction over the appellant's USERRA claim notwithstanding her filing a grievance under a collective bargaining agreement, and remanded the case to the AJ. After the AJ denied the appellant's request for corrective action on the merits, the Board concluded that the Federal Circuit's decision in *Pittman v. Department of Justice*, 486 F.3d 1276 (Fed. Cir. 2007), required dismissal of the case for lack of jurisdiction. On appeal to the court, the court determined that the appellant's statutory right to appeal the matter to the Board is not governed by *Pittman*, and not foreclosed by the election requirements of 5 U.S.C. § 7121(e)(1).

Holdings: The Board affirmed the AJ's denial of the appellant's USERRA claim on the merits. It found that the AJ properly analyzed the facts and the applicable law both as a reemployment claim and as a discrimination claim under USERRA.

- **Appellant: Omar E. Rivera**
  Agency: Department of the Air Force
  Decision Number: 2009 MSPB 27
  Docket Number: AT-3443-08-0301-R-1
  Issuance Date: March 10, 2009

  USERRA/VEOA/Veterans' Rights

  The appellant petitioned for review of an initial decision that dismissed his USERRA claim for lack of jurisdiction. Relying on the Board's decision in *Russell v. Equal Employment Opportunity Commission*, 107 M.S.P.R. 171 (2007), the AJ concluded that the Board lacks jurisdiction over USERRA cases in instances where an appellant has a right to pursue the matter under a negotiated procedures.

  Holding: Pursuant to the Federal Circuit's decision in *Russell*, No. 2008-3106 (Nov. 18, 2008) (NP), and the Board's decision on remand, 2009 MSPB 26, an employee may bring a USERRA appeal if he is otherwise covered by a collective bargaining agreement. Accordingly, the Board has jurisdiction and the appeal must be remanded for adjudication.

- **Appellant: Johnny Gonzalez**
  Agency: Department of Homeland Security
  Decision Number: 2009 MSPB 28
  Docket Number: AT-3443-08-0260-X-1
  Issuance Date: March 11, 2009

  Compliance
  USERRA/VEOA/Veterans' Rights

  This case was before the Board on the AJ's Recommendation finding the agency in noncompliance with a final Board order. In the merits proceeding, the AJ determined that an individual on military duty could not be appointed to a civilian position unless he or she was on terminal leave from the military. Since the person selected for the vacancy at issue was not on terminal leave at the time of his selection, the AJ concluded that the appointment was illegal and ordered the agency to reconstruct the selection process. The appellant filed a petition for enforcement complaining that the agency's reconstruction process resulted in the same individual being selected for the position. The AJ recommended that the agency be required to reconstruct the selection process without considering the individual originally selected by the agency.

  Before the full Board, the agency presented evidence that, in reconstructing the selection process, it asked the selecting official about what he would have done under various circumstances, and the selecting official advised that, if he had known of the selectee's nonavailability as of the date of selection, he would have waited for the selectee's availability "through January 2008, but not to 1 April 2008." The appellant

argued that delaying the selectee's start date until he became eligible on January 17, 2008 was not a viable option, in that waiting 6 months after the closing of the job announcement for the sole purpose of allowing the selectee to become eligible is a prohibited personnel practice because it would grant a preference or advantage not authorized by law, rule, or regulation. He also argued that the Board's final decision required the agency to reconstruct the selection process by considering the candidates who were eligible for appointment on the date of the original selection.

Holding: The Board dismissed the petition for enforcement as moot, finding that the agency was in compliance with its obligations. The Board concluded that the appellant did not establish that the delay in the start date was contrary to law, rule, or regulation. The record shows that the agency had already waited months to fill the position, so it does not strain credulity that the selecting official would have waited an additional 39 days.

- **Appellant: Yuri J. Stoyanov**
  Agency: Department of the Navy
  Decision Number: 2009 MSPB 29
  Docket Number: DC-0752-08-0466-I-1
  Issuance Date: March 11, 2009
  Appeal Type: Adverse Action by Agency
  Action Type: Suspension - Indefinite

Split-Vote Decisions

This case was before the Board on PFR of an initial decision which affirmed the agency's indefinite suspension action.

Holdings: Since the two Board members could not agree on the disposition of the PFR, the initial decision became the Board's final decision. Chairman McPhie issued a separate decision expressing his belief that this case stands at the intersection of *Department of the Navy v. Egan*, 484 U.S. 518 (1988), which mandates that the Board not review the underlying merits of an agency's action to revoke an employee's security clearance, and *Cheney v. Department of Justice*, 479 F.3d 1343 (Fed. Cir. 2007), which held that 5 U.S.C. § 7513(b) entitles an employee to notice of the reasons for placing the employee on enforced leave pending a decision on the employee's security clearance. Under the circumstances of this case, Chairman McPhie would have found that the appellant's right to notice of the reasons for the suspension of his access to classified information has been violated.

- **Appellant: Andy Boctor**
  Agency: United States Postal Service
  Decision Number: 2009 MSPB 30
  Docket Number: SF-3330-08-0322-I-1
  Issuance Date: March 11, 2009
  Appeal Type: Veterans Employment Opportunities Act

USERRA/VEOA/Veterans' Rights

The agency petitioned for review of an initial decision that found that it violated the appellant's veterans' preference rights under VEOA. The agency issued 2 separate vacancy announcements for the position of sales specialist, one which was restricted to current employees, and one which was open to external applicants. The appellant, who was not an agency employee, submitted an application under the external announcement. After considering internal candidates only, the agency made a selection and canceled the external announcement. On appeal to the Board, the AJ found that the agency had violated the appellant's right to compete for the position under 5 U.S.C. § 3304(f)(1).

On PFR, the agency argued that, in *Brandt v. Department of the Air Force*, 103 M.S.P.R. 671 (2006), the Board made an implicit distinction between when external applications are *solicited* and when external applicants are *considered*, and that veterans' preference concepts are applicable "only once any external candidates are considered." The agency argued that, because it did not consider any of the external candidates, it was permitted to hire an internal candidate without considering the appellant or any other external candidate.

Holdings: The Board affirmed the initial decision as modified, still granting the appellant's request for relief and ordering the agency to reconstruct the selection process:

1. *Brandt* did not make the distinction urged by the agency. The plain language of 5 U.S.C. § 3304(f)(1) shows that a preference eligible's right to compete for an announced vacancy arises whenever "the agency making the announcement <u>will accept applications</u> from individuals outside its own workforce," not just when it considers those applications it indicated a willingness to accept.

2. The Board rejected the agency's argument that it was not required to consider the appellant because its own procedures required it to consider qualified internal candidates before considering external candidates. An agency's internal procedures cannot override its statutory obligations.

3. The AJ's order for relief could be regarded as requiring the agency to consider not only the appellant, but every other qualified candidate who applied under either announcement. The agency need not consider all candidates who applied under the external announcement, only those who are preference eligibles or qualified veterans.

- **Appellant: Raymond Sanchez, Jr.**
  Agency: Department of Homeland Security
  Decision Number: 2009 MSPB 31
  Docket Number: DE-0752-07-0075-X-1
  Issuance Date: March 11, 2009
  Appeal Type: Adverse Action by Agency
  Action Type: Removal

Compliance
Settlement - Breach

This case was before the Board pursuant to the AJ's Recommendation finding the agency in noncompliance with a settlement agreement, and recommending that the appellant be afforded the opportunity to have his underlying appeal reinstated or, alternatively, to have the settlement agreement enforced absent a specific provision. Under the settlement agreement that resolved the agency's removal action, the appellant agreed to voluntarily resign effective May 1, 2008, and submit a retirement application so that it would be effective the same date. The agency agreed to place him in a leave without pay status from the date of his removal until May 1, 2008, and to allow the appellant to retire as a Criminal Investigator.

The appellant filed a petition for enforcement after the agency issued a decision in April 2008 that removed him from the federal service effective June 8, 2007. The agency admitted that this action materially breached the settlement agreement, but asserted that it was required to implement the appellant's retroactive removal because the appellant had been convicted of a second degree felony, and 5 U.S.C. § 7371(b) requires that a law enforcement officer (LEO) convicted of a felony be removed from employment as a LEO on the first day of the pay period following the conviction.

Holdings: The Board agreed with the AJ's determination that the agency was in noncompliance, but ordered that the settlement agreement be enforced as modified by the Board:

1. Generally, when a party to a settlement agreement materially breaches the agreement, the non-breaching party may elect to enforce the terms of the agreement or to rescind the agreement and reinstate the underlying appeal. In *Lary v. U.S. Postal Service*, 472 F.3d 1363 (Fed. Cir. 2006), the court found that, under certain circumstances, specific performance which does not exactly mirror the performance contemplated by the settlement agreement is the appropriate remedy. Such an order "will be drawn as best to effectuate the purposes for which the contract was made and on such terms as justice requires."

2. Under 5 U.S.C. § 8336(c)(1), an employee with 20 years of service as a LEO may retire with an immediate annuity upon reaching 50 years of age, even if he is not serving in a LEO position at the time of his separation. The appellant obtained 20 years of LEO service in 2004, but did not turn 50 until April 30, 2008. A clear purpose of the settlement agreement was to allow the appellant to meet the requirements of § 8336(c)(1) and retire with an immediate annuity.

3. Because of the requirements of 5 U.S.C. § 7371(b), the settlement agreement cannot now be enforced as written. Rescission of the settlement agreement and reinstatement of the appeal would not be an adequate remedy because it would not alter the fact that the appellant has lost his immediate retirement eligibility because of the agency's breach of the agreement. Accordingly, some form of specific enforcement of the settlement agreement is appropriate.

4. Under the circumstances, a remedy with accomplishes the purpose of the settlement agreement is to place the appellant in a non-LEO position for the period from June 8, 2007, through May 1, 2008. This remedy does not violate the provision of the settlement agreement that "forever prohibited" the appellant from applying for any position with the agency.

COURT DECISIONS

- **Petitioner: John M. Killeen**
  Respondent: Office of Personnel Management
  Court: U.S. Court of Appeals for the Federal Circuit
  Docket Number: 2008-3079
  Issuance Date: February 27, 2009

Retirement
- Annuities

The petitioner is a retired air traffic controller entitled to annuity retirement benefits under the Civil Service Retirement System. The issue was the correct method of calculating the amount of the annuity under 5 U.S.C. § 8339(p)(1), considering that Mr. Killeen provided both full-time and part-time service after April 6, 1986.

Holding: The court vacated the Board's decision, 2007 MSPB 237, 106 M.S.P.R. 666, with instructions as to the correct method of computing Mr. Killeen's retirement annuity, raising the amount of the annuity from $28,850.41 to $29,635.36.