U.S. Merit Systems Protection Board

CASE REPORT DATE: March 27, 2009

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BOARD DECISIONS

- **Appellant: Herbert W. Hayes**
  Agency: Department of the Army
  Decision Number: 2009 MSPB 40
  Docket Number: AT-0330-06-0198-B-2
  Issuance Date: March 19, 2009

Jurisdiction
USERRA/VEOA

The appellant petitioned for review of a remand initial decision that dismissed his VEOA appeal. Previously, 109 M.S.P.R. 326 (2008), the Board vacated the initial decision, which had dismissed the appeal for lack of jurisdiction on the ground that the complaint with the Department of Labor (DOL) had not been filed within the 60-day period specified in 5 U.S.C. § 3330a(a)(2)(A), in light of the decision in *Kirkendall v. Department of the Army*, 479 F.3d 830 (Fed. Cir. 2007) (en banc), which held that the statutory time limit is subject to equitable tolling. On remand, the appellant argued that a DOL representative had misled him in a telephone conversation into believing that the 60-day deadline would not begin to run until his grievance was resolved. in dismissing the appeal, the administrative judge (AJ) found that the appellant failed to set forth circumstances described by the Supreme Court as justifying equitable tolling—where the complainant actively pursued his remedies by filing a defective pleading during the statutory period, or where he was "induced or tricked by his adversary's misconduct into allowing the filing deadline to pass."

Holdings: The Board denied the appellant's petition for review (PFR), but reopened the appeal on its own motion and affirmed the initial decision as modified, denying the appellant's request for corrective action:

1. Equitable tolling does not apply in this case. Because the appellant's telephone conversation with the DOL representative occurred more than 6 months after the statutory deadline for filing a VEOA complaint with DOL had passed, nothing said

in that conversation could be said to have induced or tricked the appellant into missing the deadline.

2. A failure to meet the 60-day time limit is not a failure to exhaust administrative remedies that deprives the Board of jurisdiction; instead, the request for corrective action will be denied based on the failure to meet the time limit.

- **Appellant: Alex Bilbrew**
  Agency: United States Postal Service
  Decision Number: 2009 MSPB 41
  Docket Number: SF-0752-08-0522-I-1
  Issuance Date: March 19, 2009
  Appeal Type: Adverse Action by Agency
  Action Type: Suspension - Indefinite

Board Procedures/Authorities
- Withdrawal of Appeal

The appellant filed a request to reopen his appeal of a suspension that had been dismissed as withdrawn. After the appeal was filed, the agency filed a motion to dismiss for lack of jurisdiction on the ground that the appellant was not on unpaid leave for more than 14 days. During a conference call, the appellant's counsel withdrew the appeal on the apparent belief that the Board lacked jurisdiction. The AJ later discovered information showing that the appellant was suspended for more than 14 days and held another conference call to inform the parties that she would not accept the appellant's withdrawal. In response, the appellant's counsel reaffirmed his desire to withdraw the appeal and stated his intention to pursue the matter before the EEOC instead. The AJ then issued an initial decision dismissing the appeal as withdrawn. More than 3 weeks after the deadline for filing a timely PFR, the appellant filed a request to reopen his case.

Holdings: The Board dismissed the pleading, whether considered as an untimely filed appeal or as a request to reopen:

1. The Board treats a PFR of an appellant-initiated dismissal of an appeal as a late-filed appeal or as a request to reopen and reinstate the prior appeal.

2. Considered as a new appeal, the pleading was 5 months late, and the appellant failed to establish good cause for the delay.

3. The Board found no basis for granting the request to reopen the appellant's previously dismissed appeal. The Board will not reinstate an appeal once it has been withdrawn absent unusual circumstances, such as misinformation or new and material evidence. The Board did not find such circumstances here. In particular, the appellant had not alleged that the withdrawal by his counsel was against his directions or without his knowledge.

- **Appellant: Gerald D. Wilson, Jr.**
  Agency: Department of the Army
  Decision Number: 2009 MSPB 42
  Docket Number: DC-315H-08-0700-I-1
  Issuance Date: March 20, 2009
  Action Type: Probationary Termination

  Jurisdiction – Probationers
  USERRA/VEOA/Veterans' Rights

  The appellant petitioned for review of an initial decision that dismissed his appeal of his termination for lack of jurisdiction. The appellant was terminated during his probationary period for post-appointment reasons. In his appeal, the appellant asserted that he was terminated because "agency officials didn't like the fact that I was an Army National Guard Solder at the same time I was an Army Civilian Employee." After considering the parties' responses to a show-cause order, the AJ dismissed the appeal for lack of jurisdiction, whether considered as an adverse action appeal or as a USERRA appeal.

  Holdings: The Board affirmed the initial decision regarding jurisdiction as to the termination of a probationary employee, but vacated and remanded as to the USERRA matter:

  1. The appellant failed to establish jurisdiction under 5 C.F.R. § 315.806, as the termination was for a post-appointment reason and the appellant did not allege marital status or partisan political discrimination.

  2. A claim of discrimination under USERRA should be broadly and liberally construed. A weakness of the assertions in support of a claim is not a basis to dismiss the appeal for lack of jurisdiction; an appellant's failure to develop his contentions is a basis for denying the request for corrective action on the merits. The appellant's assertion that he was terminated because "agency officials didn't like the fact" of his uniformed service was sufficient to establish jurisdiction. Accordingly, the appeal must be remanded to the regional office for further adjudication.

- **Appellant: Dexter R. Allison**
  Agency: Department of Transportation
  Decision Number: 2009 MSPB 43
  Docket Number: CH-0752-06-0703-X-1
  Issuance Date: March 24, 2009
  Appeal Type: Adverse Action by Agency
  Action Type: Removal

  Compliance

  This case was before the Board on the AJ's Recommendation that the Board grant the appellant's petition for enforcement and reinstate the underlying appeal. The appellant's removal appeal was resolved by a settlement agreement that strictly limited

the nature and content of information that could be provided to a prospective employer to the dates of his employment, position held, and wage information. The agency provided information to a prospective employer that included references to the removal action. The AJ found that the agency breached the agreement, that its breach was material, and recommended that the Board vacate the initial decision dismissing the appeal as settled and reinstate the appeal.

Holding: The Board concurred with the AJ that the agency materially breached its obligations under the settlement agreement. Accordingly, it vacated the initial decision and forwarded the case to the regional office for reinstatement of the appellant's appeal of his removal.

- **Appellant: Armida G. Chavez**
  Agency: Office of Personnel Management
  Decision Number: 2009 MSPB 44
  Docket Number: DE-844E-08-0296-I-1
  Issuance Date: March 26, 2009
  Appeal Type: FERS - Employee Filed Disability Retirement
  Action Type: Retirement/Benefit Matter

Retirement
- Disability Retirement

The appellant petitioned for review of an initial decision that affirmed OPM's denial of her application for disability retirement benefits. Although the AJ concluded that the appellant established that she was disabled, he found that the appellant failed to establish that she could not be accommodated in her position with the Postal Service as a City Letter Carrier.

Holdings: The Board granted the appellant's PFR, reversed the initial decision and OPM's final decision, and ordered OPM to award disability retirement benefits to the appellant:

1. Based on the evidence from both the appellant's treating physician and her supervisor, and on her own subjective description of her inability to work, the Board found that the appellant had shown that she is precluded from useful and efficient service or retention in her position.

2. The Board reversed the AJ's determination that the appellant failed to establish that she could not be accommodated in her position. Where an agency certification that accommodation is unavailable is unrebutted, and the record supports the conclusion that accommodation would not be possible, the accommodation criterion for obtaining disability retirement is satisfied.