U.S. Merit Systems Protection Board

CASE REPORT DATE: April 3, 2009

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BOARD DECISIONS

- **Appellant: Bernard Branch**
  Agency: Department of the Army
  Decision Number: 2009 MSPB 45
  Docket Number: DC-0752-09-0004-I-1
  Issuance Date: March 27, 2009
  Appeal Type: Adverse Action by Agency
  Action Type: Removal

Timeliness - PFA

The appellant petitioned for review of an initial decision that dismissed his appeal as untimely filed. The appellant was removed from his position effective August 28, 2008, on the ground that he violated the terms of a last chance agreement. The appellant submitted an appeal of his removal to the Office of the Clerk of the Board on September 25, 2008, 28 days after the effective date off his removal. This appeal was forwarded to the Washington Regional Office on October 1, 2008. In dismissing the appeal, the administrative judge (AJ) found that the appeal was filed on October 1, after the 30-day filing deadline, and that the appellant failed to show good cause for the delay.

Holdings: The Board granted the appellant's petition for review (PFR), reversed the initial decision, and remanded the case to the regional office:

1. It is well settled that filing a pleading with the wrong Board office does not render the pleading untimely. Here, the appellant timely filed her appeal on September 25, 2008.

2. On remand, the AJ must determine whether the appellant has established that the waiver of appeal rights in the last chance agreement is unenforceable because (1) He complied with the agreement; (2) the agency breached it; (3) he did not voluntarily enter into the agreement; or (4) the agreement was the product of fraud or mutual mistake.

- **Appellant: Linda Galloway**
  Agency: Social Security Administration
  Decision Number: 2009 MSPB 46
  Docket Number: CB-7121-09-0001-V-1
  Issuance Date: March 27, 2009
  Action Type: Arbitration

  Arbitration/Collective Bargaining-Related Issues
  - Election of Remedy

  The appellant requested review of an arbitration decision that found her grievance of the agency's removal action not arbitrable. In March 2007, the appellant filed a formal EEO complaint alleging that certain employment actions were based on her age, color, race, and reprisal, that that she was subjected to harassment and a hostile work environment. She amended her complaint in September and October to include further matters, including the agency's September 27 notice of proposed removal for unacceptable performance. The agency effected the appellant's removal on October 29. In November, the appellant's union invoked arbitration on her behalf. In finding that the matter was not arbitrable, the arbitrator determined that the matters involved in the appellant's EEO complaint were not separable from the removal action involved in the grievance, and that the earlier-filed EEOC complaint constituted a valid and binding election of forum under 5 U.S.C. § 7121(d).

  Holdings: The Board granted the appellant's request, reversed the arbitrator's decision, and remanded the matter to the arbitrator for further consideration:

  1. The Board has jurisdiction, as (1) The subject matter of the grievance (removal) is within the Board's jurisdiction; (2) the appellant alleges that the action constitutes discrimination; and (3) the arbitrator has issued a final decision.

  2. The appellant made a valid and binding election of the negotiated grievance procedure (arbitration).

  a. Under 5 U.S.C. § 7121(d), an employee who is subject to a collective bargaining agreement can elect to raise the matter under a statutory procedure (either the EEOC complaint process or an MSPB appeal) or the negotiated procedure, but not both. A person is deemed to have exercised her option when she timely initiates an action under the applicable statutory procedure or files a grievance, "whichever event occurs first."

  b. The appellant's first and only action following her receipt of the agency's notice of removal was to have the union invoke arbitration of the removal action on her behalf. This was a valid election under § 7121(d).

- **Appellant: Patchara Baumgartner**
  Agency: Department of Housing and Urban Development
  Decision Number: 2009 MSPB 47
  Docket Number: SF-0752-07-0027-X-1
  Issuance Date: March 27, 2009

  Compliance
  - Dismissal on Proof

This case was before the Board on the AJ's Recommendation finding the agency in noncompliance with a settlement agreement. The AJ determined that compliance required that the agency reassign the appellant to a particular position.

Holding: Following the AJ's Recommendation, the agency took the action that the AJ determined would constitute compliance. Finding that the agency was now in compliance, the Board dismissed the appellant's petition for enforcement as moot.

- **Appellant: Dorothy Luten**
  Agency: Office of Personnel Management
  Decision Number: 2009 MSPB 48
  Docket Number: CH-0831-08-0579-I-1
  Issuance Date: March 31, 2009
  Action Type: Retirement/Benefit Matter

Retirement
- Survivor Annuity

The appellant petitioned for review of an initial decision that affirmed OPM's decision denying her request for survivor annuity benefits. When the appellant's late husband submitted his retirement application on SF-2801 on May 21, 1987, he placed his initials in a box indicating his intent to provide maximum survivor benefits to the appellant. A portion of another box, which was not initialed by Mr. Luten, and which would reflect a choice of an annuity without survivor benefits, contained a handwritten notation, "Amended 2801 to come – per MSC 6/5/87 . . . (Wants item 2)." On the same day Mr. Luten completed the SF-2801, he and the appellant signed an OPM Form 1431, "Spouse's Consent to Survivor Election." An "x" appears in a box indicating Mr. Luten's election of an annuity with no survivor benefits, and the appellant signed below the statement, "I freely consent to the survivor annuity election described in part 1. I understand that my consent is final (not revocable)." A notary public signed the form indicating that the appellant signed the form in his presence. On May 29, 1987, Mr. Luten executed a second SF-2801, which indicated that he elected not to provide a survivor benefit to the appellant. The appellant did not sign any documents in connection with the second SF-2801.

In the Board proceeding, the appellant testified that she signed the Form 1431 after her husband showed her the original retirement application in which he elected to provide her maximum survivor benefits. She further testified that, when she signed the consent form at her home, there was no "x" in the box indicating that Mr. Luten was electing an annuity with no survivor benefits, that she would not have signed the form if there had been an "x" in this box, and that there was no notary public present when she signed the form. In affirming OPM's final decision, the AJ found that the appellant provided no evidence, beyond her own assertion, that it was her husband's intention to provide her maximum survivor benefits, and that the documentation proved that this was not her husband's intention.

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

1. The AJ misconstrued the governing law and the appellant's contentions on appeal. The relevant inquiry in determining whether the appellant met her burden of proving her entitlement to survivor benefits is whether she waived her right by consenting to her husband's election of a self-only annuity. The appellant was not seeking to void her election, but was contending that she never made an effective election at all.

2. Although the appellant's "consent" on Form 1431 to a self-only annuity appears to meet the requirements of 5 C.F.R. § 831.615(c), OPM's *Handbook* requires that spousal consent be given on an SF-2801-2.

3. The AJ was presented with an issue as to the relative credibility of two declarants, the appellant who claimed that there was no "x" on Form 1431 when she signed it and that she did not sign the form in the presence of the notary, and the notary, who certified that the appellant signed the form in his presence. Remand is necessary because the AJ failed to resolve these credibility issues.

- **Appellant: Lemorn B. Jones**
  Agency: United States Postal Service
  Decision Number: 2009 MSPB 49
  Docket Number: DA-0752-08-0416-I-1
  Issuance Date: April 1, 2009
  Appeal Type: Adverse Action by Agency
  Action Type: Removal

New Evidence
Penalty – Prior Record

The appellant petitioned for review of an initial decision that affirmed his removal for unacceptable attendance. In addition to citing 11 instances of unscheduled absences during a 3-month period, the agency noted that the appellant had received a 14-day suspension the previous year for unacceptable attendance. On PFR, the appellant offers new evidence—that an arbitrator has vacated the 14-day suspension.

Holdings: The Board affirmed the initial decision as modified, still affirming the appellant's removal:

1. When the initial decision was issued, the AJ correctly applied the *Bolling* rule that the Board's review of prior disciplinary action is limited to determining whether that action is clearly erroneous, if the employee was informed of the action in writing, the action is a matter of record, and that the employee was permitted to dispute the charge before a higher level of authority than the one that imposed the discipline. Nevertheless, the Board's policy is to not consider prior discipline that has been overturned in grievance proceedings.

2. The Board found that the deciding official considered the relevant *Douglas* factors and that the penalty of removal is within the tolerable limits of reasonableness for charged misconduct, even in the absence of any prior discipline.