U.S. Merit Systems Protection Board

CASE REPORT DATE: May 8, 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: Wayne C. Wall**
  Agency: Office of Personnel Management
  Decision Number: 2009 MSPB 57
  Docket Number: AT-0831-08-0779-I-1
  Issuance Date: April 17, 2009
  Action Type: Retirement/Benefit Matter

  Retirement
  - Disability Retirement

  The appellant petitioned for review of an initial decision that affirmed OPM's determination that he was not entitled to disability retirement benefits.

  Holdings: The Board affirmed the initial decision as modified, affirming OPM's denial of disability retirement benefits. The Board found, contrary to the initial decision, that the appellant did not establish that he was disabled from useful and efficient service.

- **Appellant: Johnnie M. Riggsbee**
  Agency: Office of Personnel Management
  Decision Number: 2009 MSPB 58
  Docket Number: DC-0731-08-0531-I-1
  Issuance Date: April 21, 2009
  Appeal Type: Suitability

  Miscellaneous Agency Actions
  Suitability
  Board Procedures/Authorities
  - Close of the Record

  The appellant petitioned for review of an initial decision that affirmed a negative suitability determination by OPM. This determination was based on the appellant's

negative answer on a question on Optional Form 306, which asked whether she had been fired from any job for any reason, quit after being told that she would be fired, or left any job by mutual agreement because of specific problems during the last 5 years. OPM found that the appellant was required to answer "yes" because she had resigned from previous federal employment after being told she would be fired for failing a drug test. The administrative judge (AJ) decided the case based on the written record because the appellant withdrew her request for a hearing. The AJ affirmed OPM's negative suitability determination, finding that the "no" answer was intentionally false.

Holdings: The Board affirmed the initial decision as modified, still affirming OPM's negative suitability determination:

1. The AJ erred in issuing the initial decision before receiving and considering the appellant's "Written Statement in Lieu of Oral Argument."

a. The AJ erred to the extent that she found that the appellant's attorney was precluded from filing the pleading by non-electronic means simply because the appellant had registered as an e-filer. Appellants and their representatives can make separate determinations whether to register for e-filing, and e-filers are permitted to file pleadings by non-electronic means.

a. This pleading was timely filed, as it was delivered to the commercial delivery service prior to the close of the record. It does not matter that the pleading was not received until after that date.

2. The AJ's error did not affect the disposition of the case. After considering the pleading, the Board agreed with the AJ's determination that the appellant's response to the question was intentionally false.

- **Appellant: Stephen W. Gingery**
  Agency: Department of the Treasury
  Decision Number: 2009 MSPB 59
  Docket Number: CH-3330-08-0673-I-1
  Issuance Date: April 21, 2009
  Appeal Type: Veterans Employment Opportunities Act

Board Procedures/Authorities
- Dismissals Without Prejudice
USERRA/VEOA/Veterans' Rights

The appellant petitioned for review of an initial decision that dismissed his VEOA appeal without prejudice to refiling. The appellant alleged that his veterans' preference rights were violated in connection with his application for a position as a Contact Representative with the IRS. The vacancy announcement stated that applicants would need to complete a Telephone Assessment Program (TAP) to evaluate customer service competence and that passing the TAP was a requirement for selection. The agency notified the appellant that he failed to pass the TAP and would not be considered for selection. It also notified him that the agency would be requesting a passover from OPM under 5 U.S.C. § 3318. In his appeal to the Board, the appellant argued that the agency improperly disqualified him from consideration based on his performance on the

TAP without asking OPM for permission to pass him over and concurrently notifying him of the proposed Passover in violation of § 3318(b). Before a passover request was sent to OPM, the agency received the results of the appellant's fingerprint check, which revealed that he had been sentenced to 12 months of probation and ordered to undergo anger management assessment for numerous violations of law. The agency then prepared and submitted a passover request to OPM based both on the results of the fingerprint check and the appellant's performance on the TAP. Over the appellant's objection, the AJ dismissed the appeal without prejudice, ordering the appellant to refile no later than 30 days after OPM's determination on the agency's passover request, or 3 months after the initial decision became a final decision, whichever was later.

Holdings: The Board affirmed the initial decision as modified, still dismissing the appeal without prejudice to its refiling.

1. The AJ did not abuse her discretion in dismissing the appeal without prejudice over the appellant's objection.

a. An AJ has wide discretion to control the proceedings before her, and a dismissal without prejudice is appropriate when it is in the interests of fairness, due process, and administrative efficiency.

b. The appellant's arguments are an attempt to reach the merits of the appeal, which are irrelevant to the issue whether the AJ abused her discretion is dismissing the appeal.

c. The AJ correctly concluded that dismissing the appeal pending OPM's action on the passover request promotes administrative efficiency and avoids a lengthy continuance.

2. The Board reopened the appeal on its own motion to modify the AJ's instructions regarding refiling, adopting the holding in a USERRA case, *Milner v. Department of Justice*, 87 M.S.P.R. 660 (2001), that a case will be considered automatically refilled by the date set forth in the dismissal order, unless there is evidence that the appellant has abandoned the case. Under the circumstances of this case, requiring the appellant to refile the appeal at the risk of waiving his appeal rights places an unnecessary burden on him.

- **Appellant: Emma Agbenyeke**
  Agency: Department of Justice
  Decision Number: 2009 MSPB 60
  Docket Number: DC-0752-06-0196-I-1
  Issuance Date: April 21, 2009
  Appeal Type: Adverse Action by Agency
  Action Type: Removal

Timeliness – PFR

The appellant petitioned for review of a 2006 initial decision that dismissed her appeal of an allegedly involuntary retirement for lack of jurisdiction. Almost 3 years after the deadline for timely filing, the appellant submitted a petition for review.

Holdings: The Board dismissed the petition for review (PFR) as untimely filed without good cause shown.

- **Appellant: Eric Smart**
  Agency: Department of Justice
  Decision Number: 2009 MSPB 61
  Docket Number: SF-315H-08-0709-I-1
  Issuance Date: April 21, 2009
  Action Type: Probationary Termination

Jurisdiction

The appellant petitioned for review of an initial decision that dismissed his appeal of a termination during his probationary period for lack of jurisdiction. At issue was the appellant's termination from his appointment as a Deputy U.S. Marshall in 1991. The appellant filed an EEO complaint in 1992 alleging that his termination was the result of race discrimination, but the EEOC affirmed the agency's decision in 1994. The appellant filed his appeal with the Board in 2008. Without addressing timeliness, the AJ dismissed the appeal for lack of jurisdiction under 5 C.F.R. § 315.806(b), noting that the appellant did not assert that his probationary termination was based on either partisan political reasons or marital status.

On PFR, the appellant asserted that the AJ failed to consider his previous federal employment, noting that he began his federal career in 1979.

Holdings: The Board vacated the initial decision, and remanded the appeal for further adjudication:

1. Under *McCormick v. Department of the Air Force*, 307 F.3d 1339 (Fed. Cir. 2002), a competitive service employee serving a probationary period is nevertheless entitled to appeal to the Board if he "has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less." The Board was unable to determine from the existing record whether the appellant met this criterion.

2. The AJ failed to provide explicit information, as required by *Burgess v. Merit Systems Protection Board*, 758 F.2d 641 (Fed. Cir. 1985), as to how the appellant could show that his prior service could be "tacked' to his probationary period; nor did he receive explicit information as to how he could meet the definition of an "employee" under 5 U.S.C. § 7511(a)(1)(A)(ii). A remand was therefore necessary.

- **Appellant: Aysha Cambridge**
  Agency: Department of Justice
  Decision Number: 2009 MSPB 62
  Docket Number: CB-7121-09-0005-V-1
  Issuance Date: April 21, 2009
  Action Type: Arbitration

Arbitration/Collective Bargaining-Related Issues

The appellant requested review of an arbitration decision that sustained her removal.

Holdings: The Board granted the appellant's request for review and sustained the arbitrator's decision:

1. The Board has jurisdiction over the request, as the subject matter of the grievance (a removal) is one over which the Board has jurisdiction, the appellant alleges discrimination under 5 U.S.C. § 2302(b)(1), and the arbitrator has issued a final decision.

2. The appellant failed to show that the arbitrator erred as a matter of law in interpreting civil service law, rule, or regulation in sustaining the charges, in considering the appellant's affirmative defenses, including sex discrimination, or in sustaining the removal penalty.

- **Appellant: James Vena**
  Agency: Department of Labor
  Decision Number: 2009 MSPB 64
  Docket Number: CB-7121-08-0024-V-1
  Issuance Date: April 23, 2009
  Action Type: Arbitration

Arbitration/Collective Bargaining-Related Issues

The appellant requested review of an arbitration decision that sustained his removal.

Holdings: As in *Cambridge*, the Board granted the appellant's review, but found that the appellant failed to show that arbitrator erred in sustaining the removal.

- **Petitioner: Special Counsel**
  Respondent: Robert Wilkinson
  Decision Number: 2009 MSPB 63
  Docket Number: CB-1216-06-0006-B-1
  Issuance Date: April 23, 2009
  Appeal Type: Disciplinary Action - Hatch Act
  Action Type: All Original Jurisdiction Cases

Special Counsel Actions
- Hatch Act

This case was before the Board to review the administrative law judge's (ALJ's) Recommendation to approve a settlement agreement in which the parties agreed that the employing agency (Environmental Protection Agency) would suspend the appellant for 30 days without pay for violating the Hatch Act by engaging in political activity while on duty in a government building and occupied in the discharge of his official duties.

Holdings: The Board adopted the ALJ's recommendation, finding that the agreement is lawful on its face, that the parties freely entered into the settlement

agreement, understood its terms, and intended to have the agreement entered into the record for purposes of enforcement by the Board.

- **Appellant: Dennis J. Leeds**
  Agency: United States Postal Service
  Decision Number: 2009 MSPB 65
  Docket Number: CH-0752-07-0155-X-2
  Issuance Date: April 23, 2009
  Appeal Type: Adverse Action by Agency
  Action Type: Constructive Adverse Action

  Compliance

  The AJ identified 3 issues in the appellant's petition for enforcement, which alleged that the agency was not in compliance with the settlement agreement that resolved his appeal of the agency's action placing him in enforced leave status for more than 14 days. The AJ found the agency in compliance with its obligations with respect to 2 of these issues, but not as to the third, which provided for a lump-sum payment to the appellant. The AJ found that the agency had not yet made the required payment, but that it had provided the calculations for the payment it planned to make.

  Before the full Board, the agency provided evidence that it had paid the appellant the lump sum. The appellant disputed the calculation of the lump-sum payment.

  Holdings: Finding that the agency had correctly calculated the amount of the lump-sum payment under the settlement agreement, the Board concluded that the agency was in compliance and dismissed the petition for enforcement.

- **Appellant: Willaim B. Groseclose**
  Agency: Department of the Navy
  Decision Number: 2009 MSPB 66
  Docket Numbers: SF-1221-08-0524-W-1
  SF-1221-08-0635-W-1
  Issuance Date: April 24, 2009
  Appeal Type: Individual Right of Action (IRA)

  Whistleblower Protection Act
  - Jurisdiction
  - Exhaustion of OSC Remedy
  - Protected Disclosure
  - Danger to Public Health or Safety
  - Contributing Factor
  Defenses and Miscellaneous Claims
  - Res Judicata

  The appellant petitioned for review of two initial decisions in which he alleged that he made numerous whistleblowing disclosures and that a number of personnel actions were taken in reprisal. In the first, the AJ dismissed the appeal for lack of jurisdiction, finding that a number of claims were barred under the doctrine of res judicata because

they had been raised in a prior IRA appeal. In the second, the AJ dismissed the appeal without prejudice because the outcome of the appellant's petition for review in the first current IRA appeal could affect the scope of the second current IRA appeal.

Holdings: The Board joined the appeals under 5 C.F.R. § 1201.36, vacated the initial decisions, and remanded the joined appeal for further adjudication:

1. In cases involving multiple alleged protected disclosures and multiple alleged personnel actions, an appellant establishes jurisdiction over his IRA appeal if he makes a nonfrivolous allegation that at least one alleged personnel action was taken in retaliation for at least one alleged protected disclosure.

2. Under 5 U.S.C. § 1214(a)(3), an IRA appellant is required to seek corrective action from OSC before seeking corrective action from the Board, and the Board's jurisdiction is limited to issues raised before OSC, including subsequent correspondence with OSC as well as the initial complaint.

3. The appellant has exhausted the OSC process with respect to at least 11 alleged disclosures and 3 personnel actions. In addition, he raised several additional disclosures and personnel actions before OSC that do not appear to have been raised in either IRA appeal. If the appellant wishes to raise these matters in the joined appeal, he will have the opportunity to do so on remand.

4. The Board determined that the appellant made at least one nonfrivolous allegation of a protected disclosure—an email in which he expressed his belief that his immediate supervisor and another employee mishandled a situation in which there was a potential for workplace violence. This constituted a nonfrivolous allegation of a disclosure of a substantial and specific danger to public health or safety under the 3 factors identified in *Chambers v. Department of the Interior*, 515 F.3d 1362 (Fed. Cir. 2008): (1) the likelihood of harm resulting from the danger; (2) when the alleged harm may occur (a harm likely to occur in the immediate or near future is more indicative of a protected disclosure); and (3) the nature and seriousness of the harm.

5. Under the knowledge/timing test of 5 U.S.C. § 1221(e), the appellant nonfrivolously alleged that his protected disclosure was a contributing factor in at least 2 personnel actions.

6. Although some of the alleged protected disclosures in the present joined appeal were also raised in the prior IRA appeal that has been fully adjudicated, the claims are not the same, in that the appellant is alleging that new personnel actions were taken in retaliation for those (and other) disclosures. Accordingly, none of the appellant's claims in the present joined appeal are barred by the doctrine of res judicata.

- **Appellant: Patricia L. Lemons**
  Agency: Department of the Army
  Decision Number: 2009 MSPB 67
  Docket Number: AT-0752-08-0456-I-1
  Issuance Date: April 24, 2009

Appeal Type: Adverse Action by Agency
Action Type: Suspension - Indefinite

Timeliness – PFR
Miscellaneous Agency Actions
Indefinite Suspensions
Board Procedures/Authorities
Withdrawal of Appeal

The appellant sought review of an initial decision that dismissed her appeal of an indefinite suspension as withdrawn. In February 2008, the agency indefinitely suspended the appellant from her position as a Supervisory Logistics Management Specialist pending the completion of a criminal investigation into her alleged misconduct. In May 2008, her representative filed a letter stating that the appellant requested leave to withdraw the appeal with prejudice, and the AJ issued an initial decision dismissing the appeal as withdrawn. In January 2009, the appellant filed a new pleading with the regional office in which she alleged, inter alia, that the agency had improperly continued the indefinite suspension. The regional office forwarded the pleading to the Clerk of the Board for docketing as a petition for review. Before the Board, the appellant contended that she withdrew her appeal based on the representations of the agency that criminal charges were pending, but that no charges had been filed and it appeared that no action had occurred on the criminal investigation for more than a year. She asserted that, even if the indefinite suspension was proper at the time it was imposed, the agency's continuation of the suspension was now improper. The agency contends criminal charges are still pending against the appellant, and that it has no control over when charges will be filed.

Holdings: The Board forwarded the appellant's pleading to the regional office for docketing as a separate appeal challenging the continuation of the indefinite suspension:

1. If Considered as a PFR, the appellant's January 2009 pleading must be dismissed as untimely filed without good cause shown for the delay. She did not explain why her more than 6-month delay in filing while she waited for criminal charges to be filed reflected due diligence or ordinary prudence.

2. The matter is properly forwarded to the regional office as a new appeal challenging the continuation of the indefinite suspension.

a. To be valid, an indefinite suspension must have an ascertainable end, that is, a determinable condition subsequent that will bring the suspension to a conclusion. To permit the agency to take an unlimited amount of time to determine what action to take while keeping the appellant on indefinite suspension would run contrary to the requirement that an indefinite suspension have an ascertainable end.

b. The parties have raised an issue of fact as to whether the condition subsequent that would terminate the appellant's suspension has occurred so as to trigger the agency's obligation to end the indefinite suspension. It is

therefore appropriate to remand the case to the regional office for further adjudication.

- **Appellant: Niexie F. Gray**
  Agency: Government Printing Office
  Decision Number: 2009 MSPB 68
  Docket Number: DC-0752-08-0473-I-1
  Issuance Date: April 24, 2009
  Appeal Type: Adverse Action by Agency
  Action Type: Removal

  Defenses
  - Privileged Conduct
  Penalty

  The appellant petitioned for review of an initial decision that sustained his removal on misconduct charges: (1) improper personal conduct, disruption in the workplace, making statements that caused anxiety in the workplace; (2) using racially inappropriate language; and (3) using insolent language and behavior. All 3 charges stemmed from the appellant's actions and statements on a single day after having a disagreement with his supervisor about a work task. Following the disagreement, the appellant went to the medical unit to obtain medical documentation to leave for the day. When he got there, he told a nurse that he needed to go home because he "might do something bad to my supervisor." Shortly thereafter, this nurse and a second nurse overheard the appellant muttering comments, as "I'm going to kill him; "I'm going to kill . . . my supervisor, he keeps harassing me, I'm tired of his shit"; "I am going to kill him with a machete." The agency's Safety Manager and his associate were called, and suggested that they go to a conference room to talk things over. During this conversation, the appellant made similar statements: "I'm gonna cut that nigger [his supervisor] into pieces," that he was "going to kill your supervisor, and chop him up in pieces," and "I am going to kill that nigger."

  After a hearing, the AJ sustained the charges, finding that the appellant had made the statements attributed to him. The AJ rejected the appellant's defense that his statements were privileged because they were made in the course of medical treatment, finding that, even if the appellant went to the medical unit to receive a medical diagnosis, he lost the benefit of the privilege by making the same type of comments to the Safety Manager and his associate, who were third parties not subject to the privilege protections. The AJ also rejected the defense of retaliation for protected EEO activity, and found that the removal penalty was within the bounds of reasonableness.

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

  1. The Board sustained the AJ's findings that the appellant made the statements attributed to him to support the first two charges. The AJ correctly found that the appellant's statements were disruptive in that they frightened both nurses, and as to the second charge, there is no doubt that the appellant's use of the word "nigger" was racially inappropriate.

2. The Board rejected the defense that the appellant's statements were privileged.

a. This case could be distinguished from *Larry v. Department of Justice*, 76 M.S.P.R. 348 (1997), and *Powell v. Department of Justice*, 73 M.S.P.R. 29 (1997), in which employees were charged with making threats based on statements made to an Employee Assistance Program psychotherapist or counselor. Nevertheless, the policy concerns expressed in these decisions are relevant here, and the Board expressed serious concern as to whether it is appropriate for an agency to take action against an employee on the basis of statements made to medical professionals during the course of obtaining medical treatment when those statements are protected by a legally-recognized privilege. Whether the appellant's statements in the medical unit fell within the privilege could not be determined from the present record.

b. The Board need not determine whether the appellant's statements were covered by a privilege that precludes their use in the removal action, because his repetition of similar statements to the Safety Manager and his associate defeats any privilege, and contrary to his assertions, he was not compelled to go to the conference room and make any such statements.

3. Because the first two sustained charges warranted the penalty of removal, it was unnecessary to address the third charge.

- **Appellant: Paul E. Wright**
  Agency: Office of Personnel Management
  Decision Number: 2009 MSPB 69
  Docket Number: SF-0842-08-0642-I-1
  Issuance Date: April 24, 2009
  Appeal Type: FERS - Regular Retirement Benefits
  Action Type: Retirement/Benefit Matter

Retirement
- Annuities

Both parties petitioned for review of an initial decision that affirmed OPM's determination that he was ineligible to receive a FERS retirement annuity. After being removed from the Postal Service, the appellant filed an application for a refund of his FERS retirement deductions, which OPM granted, issuing a refund of $12,215.03. The appellant thereafter applied for a Deferred or Postponed Retirement. OPM denied the application on the ground that the refund of his retirement deductions made him ineligible to receive a retirement annuity. On appeal to the Board, it was learned that there was a discrepancy regarding the appellant's marital status when he applied for and received the refund. The application for the refund indicated he was single, but other records indicated he was married. The appellant advised the AJ that the information on the application was an inadvertent error, and that he was in fact married. During a telephonic conference, OPM's representative advised that the appellant's incorrect information "would not affect OPM's decision with regard to the appellant's application, and that his wife would need to initiate an action to contest the refund of the appellant's retirement deductions in order for the agency to consider the propriety

of the refund." The AJ issued a notice to the wife informing her of her right to participate in the appeal as an intervenor. When she did not respond, the AJ issued an initial decision affirming OPM's determination.

On PFR, OPM states that it erred when it accepted and processed the appellant's refund request without verifying his marital status, and that it misadvised the AJ regarding the spouse's burden to contest the approval of a refund request. It asked the Board to vacate the initial decision and remand the matter to OPM to issue a new decision regarding the validity of the refund application and the effect of that decision on the appellant's application for a retirement annuity.

Holdings: The Board granted OPM's request and remanded the matter to OPM. It denied the appellant's PFR, which appeared to ask the Board to reopen his appeal of his removal from the Postal Service.

- **Appellant: Juan Pagan**
  Agency: United States Postal Service
  Decision Number: 2009 MSPB 70
  Docket Number: NY-0752-09-0037-I-1
  Issuance Date: April 24, 2009

Jurisdiction

The appellant petitioned for review of an initial decision that dismissed his appeal for lack of jurisdiction. After serving several years as a craft employee, the appellant, a preference-eligible veteran, received an appointment as a Postal Police Officer. Before accepting that appointment, he signed a memorandum acknowledging that his appointment was subject to a 180-day probationary period, during which the agency could separate him from service at any time, and that the would have no right to reinstatement to his former position if he were separated from the Police Officer position. The agency terminated the appellant's employment less than 1 year after his appointment. On appeal to the Board, the AJ found that the appellant was not an employee entitled to appeal a removal action under 5 U.S.C. chapter 75 because he lacked 1 year of current continuous service in the same or similar positions.

Holdings: The Board denied the appellant's PFR, but reopened the appeal on its own motion to vacate the initial decision and remand the appeal to the regional office for further adjudication:

1. A preference-eligible Postal Service employee has Board appeal rights under chapter 75 only if he has completed 1 year of current continuous service in the same or similar positions. The AJ correctly found that the appellant failed to make a nonfrivolous allegation that he had 1 year of current continuous service as a Police Officer, or in a similar position.

2. Nevertheless, an employee must receive notice from his employing agency regarding the effect of a change in position before he can relinquish an agency appointment with adverse action appeal rights to accept another appointment within the agency that lacks such appeal rights. An employee who has not knowingly consented to the loss of appeal rights is deemed not to have accepted the

new appointment and to have retained the rights incident to the former appointment.

3. Although the memorandum the appellant signed advised him that he would serve a 180-day probationary period, it did not state that he would temporarily lose his chapter 75 appeal rights as well.

4. Under *Burgess v. Merit Systems Protection Board*, 758 F.2d 641 (Fed. Cir. 1985), an appellant must receive explicit information on what is required to establish an appealable jurisdictional issue. As the appellant was not provided with appropriate information under the circumstances of this case, a remand is necessary.

- **Appellant: Mary L. Miklosz**
  Agency: United States Postal Service
  Decision Number: 2009 MSPB 71
  Docket Number: DE-0752-07-0422-X-1
  Issuance Date: April 24, 2009
  Appeal Type: Adverse Action by Agency
  Action Type: Suspension - Indefinite

Compliance

This case was before the Board on the AJ's Recommendation finding the agency in partial noncompliance. In the merits proceeding, the Board reversed a suspension. Before the Board, the only issue still in contention was whether the appellant is entitled to 5 hours of differential pay for the July 4, 2007 holiday.

Holdings: The Board found the agency in continued noncompliance, concluding that the appellant was entitled to the differential pay she was seeking:

1. When calculating the amount of overtime pay due as a part of back pay, the Board has held that it may be calculated either on the basis of the employee's prior assignments or the experience of similarly situated employees. An appellant's entitlement to holiday pay is computed on the same basis.

2. Both parties relied on the appellant's prior history of working on holidays. The Board found that the appellant's past history indicated a likelihood that she would have worked the July 4th holiday had she been given the opportunity. Had the appellant worked on July 4, 2007, she would have been entitled to night differential premium for this work. Accordingly, the Board found that the appellant is entitled to the additional pay she sought.

- **Appellant: Steven L. Frank**
  Agency: Office of Personnel Management
  Decision Number: 2009 MSPB 72
  Docket Number: SF-0831-07-0721-I-1
  Issuance Date: April 24, 2009
  Action Type: Retirement/Benefit Matter

Retirement
- Survivor Annuity

The appellant petitioned for review of an initial decision that affirmed OPM's reconsideration decision denying his request for a survivor annuity. The appellant requested a survivor annuity benefit under 5 U.S.C. § 8341 as an unmarried dependent child of a deceased federal employee who is incapable of self-support because of a mental or physical disability incurred before the age of 18. Before OPM, the appellant stated that he was mentally retarded, and that he had been receiving Social Security Disability Insurance payments since 1993 (he would have turned 18 about 10 years earlier). On appeal to the Board, the appellant claimed he was a mentally disabled child who was incapable of self-support, that he was homeless, that he had no telephone, and that he had been unable to obtain relevant records to support his claim. The AJ urged the appellant to make efforts to obtain access to a telephone through a nonprofit organization or other assistance, and stated that this would make it possible to discuss the law and facts relevant to his appeal and to discuss whether a dismissal without prejudice would be appropriate to allow him additional time to obtain supporting evidence. The appellant did not respond. Based on the written record, the AJ affirmed OPM's reconsideration decision, finding that the appellant failed to carry his burden of proving that he was incapable of self-support because of a mental or physical disability incurred before age 18.

Holdings: The Board vacated the initial decision and remanded the appeal to the regional office to determine if *French* procedures are appropriate:

1. Although the PFR was untimely filed, and includes documents that are dated well before the record closed below, the Board found good cause for the untimeliness and considered the additional evidence.

2. In *French v. Office of Personnel Management*, 810 F.2d 1118 (Fed. Cir. 1987), the court instructed the Board to establish procedures for obtaining representation for appellants in some cases involving entitlement to disability retirement benefits, finding that, if there is "an apparently nonfrivolous claim of past incompetence by one presently incompetent," the Board and OPM must take an "active role" in ensuring that the apparently incompetent appellant not be charged with the task of establishing his case alone. Although this is not a disability retirement case, the same concerns are applicable.

3. The Board concluded that the evidence of record was sufficient to call into doubt the appellant's mental competency to prosecute his appeal pro se. Accordingly, the Board remanded the case to the regional office so that the AJ may determine whether *French* procedures should be invoked.

- **Appellant: Robert A. Nunes**
  Agency: Office of Personnel Management
  Decision Number: 2009 MSPB 73
  Docket Number: SF-0831-08-0582-I-1
  Issuance Date: April 24, 2009
  Action Type: Retirement/Benefit Matter

Retirement
- Survivor Annuity

The appellant petitioned for review of an initial decision that affirmed OPM's reconsideration decision that denied his request to increase the amount of his spouse's survivor annuity on the ground that the request was untimely filed. When the appellant retired in 2005, he elected a reduced annuity with a partial survivor annuity for his spouse. In February 2008, he sought to increase the amount of the survivor annuity, stating that, when he was completing his original annuity election, he had intended to provide the maximum possible survivor annuity for his spouse, but that he obtained misleading advice from an unnamed retirement counselor at his employing agency. He said he did not realize that his election was not what he intended until he received a notice from OPM in January 2008. OPM denied the request because the appellant failed to make a timely change to his survivor annuity election, i.e., within 18 months of his retirement as required by 5 C.F.R. § 831.622(b)(1).

On appeal to the Board, the appellant contended that he had received nothing from OPM regarding his ability to change the amount of his survivor annuity election within the first 18 months after his retirement. OPM, however, adduced evidence showing that it had met statutory obligations to send the appellant annual notices of survivor annuity election rights. Without making any finding regarding the appellant's testimony that he had not received the statutorily-imposed notice of election rights, the AJ found that the notice proffered by OPM was sufficient to inform the appellant of his survivor annuity election rights. The AJ found that, under *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), OPM "cannot be estopped from enforcing a statutorily-imposed eligibility requirement."

On PFR, the appellant argued that the annual statutorily-imposed notice of survivor annuity election rights sent by OPM to all annuitants was inadequate. While not admitting that he received the annual notice, he argued that he could not have learned of his potential election rights from the notice that OPM proffered.

Holdings: The Board vacated the initial decision and remanded the appeal for further adjudication:

1. Without reaching the issue whether the appellant was advancing a new argument on review that is based on new and material evidence not previously available, the Board granted the appellant's PFR, as he suggested that, if the AJ had considered his testimony that he did not receive the annual notice, the AJ would have reached a different result. Because the AJ made no credibility findings in this regard, a remand is necessary.

2. The Board also clarified the law applicable to the 18-month window in which an annuitant may elect or increase the amount of a survivor annuity.

a. The AJ based his analysis on the wrong statutory provision, 5 U.S.C. § 8339(k)(2), which applies to situations in which a retiree's marital status changes after retirement. The appellant's marital status had not changed, and the applicable statute is 5 U.S.C. § 8339(o), which provides, inter alia, that a retiree "may, during the 18-month period beginning on the date of the

retirement of such employee or Member, elect to have a greater portion of the annuity of such employee or Member so used." This provision also requires that OPM, on an annual basis, inform each employee or Member who is eligible to make an election of their right to do so and the applicable procedures.

b. There are 3 bases for waiving a statutory or regulatory deadline: (1) The statute or regulation may itself provide for waiver under certain circumstances; (2) an agency's affirmative misconduct may preclude enforcement of the deadline under the doctrine of equitable estoppel; and (3) an agency's failure to provide a notice of rights and the applicable filing deadline may warrant a waiver of the deadline if a statute or regulation requires that such notice be given.

c. Here, both the second and third bases for waiver have possible application, and need to be explored on remand.

- **Appellant: Wayne Upshaw**
  Agency: Consumer Product Safety Commission
  Decision Number: 2009 MSPB 74
  Docket Number: DC-0731-08-0563-I-1
  Issuance Date: April 24, 2009
  Appeal Type: Suitability

  Miscellaneous Agency Actions
  - Suitability
  Jurisdiction

The appellant petitioned for review of an initial decision that dismissed his suitability appeal for lack of jurisdiction. The appellant accepted the agency's offer for the SES position of Chief Financial Officer. Before the appellant completed the necessary paperwork for the position, the agency received a copy of his Official Personnel File (OPF) from the Library of Congress, where the appellant was most recently employed, which documented his 2007 termination during his probationary/trial period, information which the appellant had not previously provided the Consumer Product Safety Commission. The agency then rescinded the offer of employment. In his appeal to the Board, the appellant alleged that the agency made a negative suitability determination and removed him from the Chief Financial Officer position. The agency responded that it had made no determination regarding the appellant's suitability for federal employment, but instead withdrew the job offer before the appellant was officially appointed to the position. After considering the parties' responses to her jurisdictional order, the AJ dismissed the appeal without holding a hearing. She found that, because the agency's determination to withdraw the offer was based on the appellant's concealment of the fact that he had been terminated from his last position, the agency made a suitability determination involving a material, intentional false statement or deception or fraud in examination or appointment, but that this determination was outside the scope of its delegated authority and beyond the Board's jurisdiction. The AJ further found that, to the extent the appellant argued that

he was removed from the position, there was no evidence showing that the appellant was ever appointed by the authorizing authority or that he effectively entered on duty.

Holdings: The Board vacated the initial decision and remanded the case to the regional office for a jurisdictional hearing:

1. While the Board generally has no jurisdiction over a candidate's non-selection for a position in the federal civil service, it does have jurisdiction over certain matters involving suitability for employment in positions in the competitive service and career appointments in the SES. A suitability determination is directed toward whether the "character or conduct" of a candidate is such that employing him would adversely affect the integrity of efficiency of the service.

2. If the evidence shows that a candidate was actually found qualified for the position at issue, and the agency later removed him from consideration based on one of the reasons set forth under OPM's suitability guidelines involving the "character or conduct" of the candidate, the Board may conclude that the candidate was subjected to an appeable "constructive suitability determination."

3. After considering the Supreme Court's decisions in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), and *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), the Board determined that OPM's revised suitability regulations, which became effective June 16, 2008, and which would exclude a "denial of appointment" as an appealable action, cannot be applied retroactively to the present appeal.

4. When an appellant makes a nonfrivolous allegation that the Board has jurisdiction over an appeal, the appellant is entitled to a hearing on the jurisdictional issue. While an AJ may consider the agency's documentary submissions, she may not weigh evidence and resolve conflicting assertions without a hearing.

5. Here, taking the appellant's allegations as true, he made a nonfrivolous allegation that the agency made a constructive suitability determination, which OPM authorized it do within its delegated authority, when it rescinded the offer of employment after receiving his OPF from the Library of Congress. A jurisdictional hearing is therefore required.

COURT DECISIONS

- **Petitioner: Floyd J. Adamsen**
  Respondent: Department of Agriculture
  Court: U.S. Court of Appeals for the Federal Circuit
  Docket Number: 2008-3222 (DE-0432-07-0345-I-1)
  Issuance Date: April 23, 2009

  Performance-Based Actions
  - OPM Approval of Performance Appraisal Systems
  - Opportunity to Demonstrate Acceptable Performance

Mr. Adamsen, who had been a soil research scientist, challenged the Board's affirmance of his removal for unacceptable performance under 5 U.S.C. chapter 43. The issues on appeal were: (1) whether OPM had approved the agency's performance appraisal system under which he was removed; (2) whether the agency gave him an opportunity to demonstrate that his work was acceptable; and (3) whether his job requirements were feasible.

Holdings: The court affirmed the Board's ruling on the latter two issues, but held that the record was inadequate to determine whether OPM had approved the performance appraisal system under which Adamsen was removed. The court therefore vacated the Board's decision in this regard, and remanded the case for the Board to develop the record and make additional findings and conclusions on this issue.

1. If an agency makes changes to a previously-OPM-approved performance appraisal system that significantly alter an employee's performance standards and obligations, OPM review of those changes is necessary to achieve compliance with the basic purpose underlying the OPM-approved requirement.

2. The record shows that OPM approved the agency's performance appraisal system that covered the petitioner in 1986, but that changes to this performance appraisal system were made in 1995, 1998, and 2003. On the present record, the court could not determine what changes the agency made, how significant those changes were, and what impact, if any, they had on the agency's determination that Adamsen's performance had been inadequate. Nor could the court determine whether the agency was required to, or did, submit those changes to OPM for approval or whether OPM approved them. Accordingly, a remand was necessary for the Board to develop the record and make findings on these issues.

3. Adamsen had an opportunity to demonstrate acceptable performance on the specific deficiency relied on by the agency in effecting his removal, even though it was not referenced in the performance improvement plan (PIP) he underwent. This requirement was specifically communicated in the performance plan itself, and again in a memorandum after the completion of the PIP.

4. Adamsen's contention that acceptable job performance was not feasible was not supported by the record.

- **Petitioner: Rickey D. Carrow**
  Respondent: Merit Systems Protection Board
  Intervenor: Department of Veterans Affairs
  Court: U.S. Court of Appeals for the Federal Circuit
  Docket Number: 2008-3267 (DC-3443-07-0780-I-1)
  Issuance Date: May 1, 2009

Jurisdiction

Mr. Carrow petitioned for review of a Board decision dismissing his appeal of his termination for lack of jurisdiction. After serving 5 years as an orthotist with the Department of the Army, Carrow applied for and received an appointment to an

orthotist-prosthetist position with the Department of Veterans Affairs, with no break in service. The vacancy announcement specified that the new position was excepted from the competitive service under Title 38 and was subject to the completion of a probationary period. In addition, the DVA's SF-50 stated that the petitioner was appointed to a temporary, full-time position pursuant to 38 U.S.C. § 7405(a)(1), and that his employment status would remain "indefinite," or "temporary," pending certification by the Orthotist-Prosthetist Professional Standards Board. Four months after his appointment, Carrow was terminated for "unacceptable performance issues."

On appeal to the Board, Carrow argued that he was entitled to the procedural protections afforted to permanent, full-time employees in the competitive service, and that he had not knowingly surrendered the civil service rights he had earned in his previous position with the Army. In the initial decision dismissing the appeal for lack of jurisdiction, the AJ found that Carrow had voluntarily accepted a temporary appointment under 38 U.S.C. § 7405(a)(1), and because that provision allows the DVA to appoint certain health care professionals "without regard to civil service or classification laws, rule, or regulations," Carrow had forfeited any appeal rights he had in his previous position with the Army. In the alternative, the AJ held that Carrow was ineligible for appellate rights under 5 U.S.C. § 7511 because he was a temporary, probationary, and nonpreference eligible employee in the excepted service, who could not satisfy the requirement of two years of current continuous service "in an Executive agency," because he had not completed two years of service within the DVA. The full Board denied Carrow's petition for review.

Holdings: The court vacated the Board's decision and remanded for further proceedings:

1. Carrow voluntarily accepted a temporary appointment under 38 U.S.C. § 7405(a)(1).

a. Despite contrary evidence in the record suggesting that Carrow was "transferred" from his previous competitive service position within the Army, the court held that the AJ correctly characterized him as a probationary employee who had been appointed pursuant to 38 U.S.C. § 7405(a)(1).

b. The court rejected Carrow's contention that he was not adequately apprised of the relevant terms and conditions of his appointment within the DVA.

c. The court agreed with the AJ that Carrow failed to demonstrate any prejudice from the DVA's failure to follow its own internal notice procedures.

2. The AJ erred in ruling that the petitioner's appointment under § 7405(a)(1) automatically excluded him from coverage under the civil service laws governing appeals from adverse employment actions. Although individuals appointed under § 7405(a)(1) are generally excluded from civil service protections, there is a limited exception to this rule for health care professionals appointed to positions listed in § 7401(3), which includes orthotist-prosthetists. For these individuals, "all matters

relating to adverse actions . . . shall be resolved under the provisions of Title 5 as though such individuals had been appointed under that title."

3. The AJ erred in holding that the petitioner could not qualify as an "employee" under 5 U.S.C. § 7511(a)(1)(C)(ii) on the ground that this provision requires 2 years of current continuous service in the same Executive agency.

- **a. OPM, which is entrusted with administering the statutory provisions governing the rights of federal employees to appeal adverse actions to the Board, has reasonably construed the statute as not requiring that the 2 years of current continuous service be performed within the same agency.**
- **b. The Board has similarly ruled in published decisions that the service need not be performed within the same agency.**

4. The DVA and MSPB's additional argument—that the petitioner had not been employed for 2 years "under other than a temporary appointment limited to 2 years or less"—must be remanded for further adjudication. The AJ did not address this issue, which the court found would be best addressed by the Board in the first instance. Remand was therefore appropriate.