



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for August 8, 2014

BOARD DECISIONS

Appellant: Jennifer J. Erlendson
Agency: Department of Justice
Decision Number: [2014 MSPB 61](#)
Docket Number: SF-4324-13-1061-I-1
Issuance Date: August 4, 2014
Appeal Type: USERRA
Action Type: Discrimination

USERRA Agency Exclusions

The appellant is an Intelligence Analyst with the Federal Bureau of Investigation (FBI). The appellant alleged in her USERRA appeal that she was denied benefits and subjected to a hostile work environment due to her military leave usage. The administrative judge dismissed the appeal for lack of jurisdiction because FBI employees are specifically excluded from filing USERRA appeals with the Board.

Holding: The Board affirmed the initial decision.

1. The FBI is an agency specifically excluded from USERRA jurisdiction in appeals before the Board, whether the employee's claim pertains to reemployment or discrimination.

Appellant: James E. Carney
Agency: Department of Veterans Affairs
Decision Number: [2014 MSPB 62](#)
Docket Number: NY-1221-13-1018-W-1
Issuance Date: August 6, 2014
Appeal Type: Individual Right of Action
Action Type: Adverse Action

Jurisdiction in WPEA Cases Evidence in Jurisdiction Determinations

The appellant filed an Individual Right of Action appeal, claiming that his two suspensions were reprisal for assisting a coworker in a grievance. The administrative judge found that the appellant made a nonfrivolous allegation that he assisted a coworker with a grievance, which counted as protected activity under the Whistleblower Protection Enhancement Act. The administrative judge further found that the appellant failed to make a nonfrivolous allegation that the protected activity was a contributing factor to his suspensions, based on the proposing and deciding officials' sworn statements that they did not know about the appellant's protected activity. Accordingly, the administrative judge dismissed the appeal for lack of jurisdiction.

Holding: The Board granted the petition for review, affirmed a portion of the initial decision, vacated a separate portion of the initial decision, and remanded for further adjudication.

1. The Board now has jurisdiction over claims of reprisal for assisting a coworker in a grievance proceeding. The Board's prior holdings that it did not have jurisdiction in such cases, such as in *Wooten v. Department of Health and Human Services*, 54 M.S.P.R. 143 (1992), and *Rubendall v. Department of Health and Human Services*, 101 M.S.P.R. 599 (2006), were superseded by the passage of the Whistleblower Protection Enhancement Act in 2012.
2. In determining jurisdiction, an administrative judge cannot consider an agency's submissions containing mere factual contradiction of the appellant's alleged facts in support of jurisdiction.

- **The U.S. Court of Appeals for the Federal Circuit did not issue any decisions this week**

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