



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for September 19, 2014

BOARD DECISIONS

Appellant: Damon J. Brown
Agency: Department of Defense
Decision Number: [2014 MSPB 74](#)
MSPB Docket Number: CH-0752-10-0294-I-2
Issuance Date: September 12, 2014
Appeal Type: Adverse Action
Action Type: Removal

Review of Eligibility to Occupy Non-Critical Sensitive Positions
Property Interest in Eligibility to Occupy Sensitive Position
Constitutional Due Process
Harmful Procedural Error

The appellant was removed from his non-critical sensitive position based on a charge that he was denied eligibility to occupy a sensitive position. Without the benefit of the Federal Circuit's opinion in *Gargiulo v. Department of Homeland Security*, the AJ found under the authority of the Board's decisions in *Conyers/Northover*, that (1) the Board had authority to review the merits of the determination that the appellant lacked the required qualification of eligibility to occupy a sensitive position; (2) that the agency did not prove that the appellant was ineligible to occupy a non-critical sensitive position; and (3) that even if the agency proved its charge, it did not establish that removing the appellant promoted the efficiency of the service. The agency filed a petition for review and the Board invited the parties to file briefs on the possible application of the Court's opinion in *Gargiulo* to the appellant's claims of constitutional due process violations.

Holding: The Board granted the agency's petition for review, denied

the appellant's cross petition for review, reversed the initial decision, and sustained the removal.

1. The Board noted that the Federal Circuit's *en banc* decision in *Conyers* prohibits the Board from reviewing Department of Defense national security determinations concerning the eligibility of an individual to occupy a "sensitive" position, regardless of whether the position requires access to classified information. Here, the appellant's position required him to maintain eligibility to occupy a non-critical sensitive position, he was provided with the requisite procedural protections, and there was no indication in the record that the agency was required to transfer the appellant to a non-sensitive position.

2. Pursuant to *Gargiulo*, denial of an employee's eligibility to occupy a sensitive position is not subject to due process requirements because an employee does not have a property interest in his eligibility to occupy a sensitive position.

3. Employees continue to have a property interest in continued employment that requires the due process rights to notice and a meaningful opportunity to respond prior to being removed. Additionally, if there are "viable alternatives" to an indefinite suspension or removal, due process requires that the employee be given an opportunity to invoke the discretion of the deciding official to select and consider such alternatives. This right does not require that the deciding official consider alternatives that are prohibited, impracticable, or outside management purview. Here, the appellant did not identify any viable alternatives, and record evidence did not show that there were such viable alternatives that were not either prohibited, impracticable, or outside the purview of agency management.

4. The appellant did not prove that the agency committed harmful procedural error when it failed to forward a letter it had received from the appellant's bankruptcy attorney to the agency's internal adjudications office. In this case, the appellant did not identify any particular provision that the agency violated when it determined that the letter should not be sent. Moreover, the appellant did not establish that it was likely that the internal adjudications office would have reached a different conclusion had it know that the appellant had filed a bankruptcy petition.

The U.S. Court of Appeals for the Federal Circuit issued precedential decisions in the following cases:

Petitioner: Robert C. Devlin

Respondent: Office of Personnel Management

Tribunal: U.S. Court of Appeals for the Federal Circuit

Case Number: [2014-3018](#)

MSPB Docket No. SF-0843-13-0210-I-1

Issuance Date: September 12, 2014

Eligibility for Basic Employee Death Benefits

The appellant appealed an Office of Personnel Management (OPM) determination that he was not entitled to Basic Employee Death Benefits (BEDB) on behalf of his mother's estate. At the time of the appellant's father's passing, the appellant's mother and father were married for forty years, and the appellant's father had served as a civilian federal employee for nearly six years. However, before the appellant's mother could file an application for BEDB, she also passed away. The appellant filed an application for BEDB on behalf of his mother's estate, but OPM denied the application, concluding that the appellant's mother was not entitled to BEDB for her deceased husband because she did not submit an application prior to her passing. The appellant appealed the OPM decision to the Board, and the Board affirmed, holding that a spouse's estate may not apply for BEDB after the spouse has passed away.

Holding: The Court affirmed.

1. To qualify for BEDB under 5 U.S.C. § 8442, a current or former spouse must be alive at the time the application for benefits is filed.

The U.S. Court of Appeals for the Federal Circuit issued nonprecedential decisions in the following cases:

Petitioner: Sylvia E. Booker

Respondent: Office of Personnel Management

Tribunal: U.S. Court of Appeals for the Federal Circuit

Case Number: [2014-3106](#)

MSPB Docket No. SF-0831-14-0118-I-1

Issuance Date: September 15, 2014

Entitlement to Former Spouse Survivor Annuity

The appellant appealed an Office of Personnel Management (OPM) determination that she was not entitled to a former spouse survivor annuity benefit. The appellant had divorced from the decedent/annuitant in 2002, and the divorce decree provided that the appellant would receive a portion of the decedent/annuitant's pension and other retirement investments at the time of his retirement, but there was no specific provision for death benefits. In 2012, the decedent died while still employed by the Federal Government. At the Board, the administrative judge affirmed the denial. The Board affirmed, holding that the divorce decree contained no provision for a survivor annuity for the appellant, and that the divorce decree only addressed decedent's retirement annuity, which he never had the chance to receive and which would, in any event, cease upon his death.

Holding: The Court affirmed.

1. A court order awarding a former spouse survivor annuity must (1) identify the retirement system, and (2) expressly state that the former spouse is entitled to a former spouse survivor annuity by using terms like "survivor annuity," "death benefits," or "former spouse survivor annuity." Here, the divorce decree contained neither a provision for a survivor annuity, nor any other terminology that could fairly be read as awarding a survivor annuity.

Petitioner: Norman L. Schumacher

Respondent: Office of Personnel Management

Tribunal: U.S. Court of Appeals for the Federal Circuit

Case Number: [2014-3110](#)

MSPB Docket No. CH0831-14-0199-I-1
Issuance Date: September 15, 2014

Untimely Filed Request for OPM Reconsideration

The appellant filed an untimely request for reconsideration of an OPM denial of his request that his reduction in retirement benefits be discontinued. OPM dismissed the request as untimely, and the AJ and the Board affirmed because the appellant had not shown that circumstances beyond his control prevented him from making a timely reconsideration request.

Holding: The Court affirmed.

1. A request for reconsideration of an OPM initial decision must be received by OPM within 30 calendar days from the date of the original decision. OPM has discretion to extend the time limit if the individual shows that he was not notified of the time limit and was not otherwise aware of it, or that he was prevented by circumstances beyond his control from timely requesting reconsideration. Here, OPM had no discretion to extend the time limit because the appellant did not dispute that his request was untimely or that he received OPM's letter notifying him of the deadline.

Petitioner: Jerridene H. Moore

Respondent: Merit Systems Protection Board

Tribunal: U.S. Court of Appeals for the Federal Circuit

Case Number: [2014-3089](#)

MSPB Docket No. AT-0752-11-0881-I-1

Issuance Date: September 16, 2014

Untimely Filed Petition for Review

In August 2011, the appellant appealed her removal from the federal service. In November 2011, the administrative judge dismissed her appeal on the grounds of collateral estoppel, and mailed a copy of the decision to the appellant's address of record. In June 2013, the appellant filed an untimely petition for review with the Board, and stated that her untimeliness should be waived due to issues with her health, her housing status, and her ability to receive mail. The Board denied the appellant's request, holding that she failed to rebut the presumption that she received the initial decision in a timely fashion. The Board also held that her failure to monitor her case in the preceding 18 months was negligent.

Holding: The Court affirmed.

1. The Court found that the Board did not abuse its discretion in finding that the petitioner did not provide good cause for her untimely filing. The petitioner had significant experience with Board procedures, did not change her address of record, had actually responded to other documents sent to that address, and was not diagnosed with her medical condition until 18 months after her filing deadline.

Petitioner: Carol A. Trufant

Respondent: Department of the Air Force

Tribunal: U.S. Court of Appeals for the Federal Circuit

Case Number: [2013-3168](#)

MSPB Docket No. DC-0752-92-0492-C-3

Issuance Date: September 16, 2014

Res Judicata

In 1992, the appellant settled her Board appeal of her removal from the Air Force. One year later, the appellant filed a petition for enforcement with the Board, claiming the settlement agreement was invalid. The Board dismissed the petition and the Federal Circuit affirmed, holding that her allegations were frivolous. In 2000, the appellant filed another petition for enforcement with the Board, claiming that the agency was required by the settlement agreement to remove certain documents from her file. The Board again dismissed her appeal, holding that it was barred by *res judicata*, and the Federal Circuit affirmed. In 2012, the appellant filed a third petition for enforcement with the Board, again claiming the agency violated the settlement agreement by failing to remove documents from her file. The Board dismissed her petition, holding that *res judicata* barred her claim.

Holding: The Court affirmed.

1. The appellant's claims were barred by *res judicata* because they were, or should have been, litigated in prior proceedings.