



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for January 16, 2015

BOARD DECISIONS

Appellant: Jackie Leseman

Agency: Department of the Army

Consolidation: Corps of Engineers/Pacific Ocean v. Department of the Army

Decision Number: [2015 MSPB 5](#)

Docket No.: SF-0752-13-1722-I-1 and consolidation SF-0752-14-0290-I-1

Issuance Date: January 9, 2015

Appeal Type: Adverse Action

Action Type: Furlough

Dismissal for Failure to Prosecute

The appellant appealed the agency's decision to furlough her from her Supervisory Project Officer position. The appeal was later consolidated and the administrative judge (AJ) advised the appellant and other consolidated parties of a scheduled telephonic status conference, a prehearing conference, and the close of record date. The appellant failed to appear at the status conference or prehearing conference, and then failed to respond to the AJ's show cause order directing those appellants who did not respond to prehearing or hearing instructions that their appeal would be dismissed for failure to prosecute if no response was received by a certain date. The AJ then dismissed the appeal with prejudice for failure to prosecute based on a finding that the appellant failed to exercise due diligence in prosecuting her appeal.

Holding: The Board affirmed the AJ's dismissal of the petition for appeal for failure to prosecute.

1. The sanction of dismissal with prejudice may be imposed based on a finding of failure to prosecute only when: (1) a party has failed to exercise basic due diligence in complying with Board orders; or (2) the party has exhibited negligence or bad faith in its efforts to comply. Here, the appellant took no steps to pursue her appeal until she filed her petition for review notwithstanding the warnings that her failure to participate in the appeal could result in the dismissal.

Appellant: James Webb

Agency: Department of the Interior

Decision Number: [2015 MSPB 6](#)

MSPB Docket No.: DA-1221-14-0006-W-1

Issuance Date: January 13, 2015

Appeal Type: Individual Right of Action (IRA) appeal

Action Type: Adverse Action

Protected Disclosures and Policy Disagreements Reasonable Belief Gross Mismanagement

The appellant alleged that he was subjected to several adverse personnel actions based on two protected disclosures he made: (1) a position paper he prepared advocating for a different proposed agency organizational restructuring; and (2) his sending of two separate e-mails expressing concern with certain proposed agency changes. In an initial decision denying the appellant's request for corrective action, the administrative judge found the appellant failed to nonfrivolously allege that his first disclosure was a protected disclosure because it consisted of a policy dispute. With respect to the second alleged protected disclosure the AJ found that, while this disclosure amounted to a nonfrivolous allegation of a protected disclosure because his objection to the proposed change in fees for certain permit applications constituted an allegation of wrongdoing, the appellant failed to establish that he "reasonably believed" that his emails amounted to a protected disclosure because his subsequent emails indicated that he understood the reason for the proposed change and had no problem with the policy.

Holding: The Board denied the petition for review and affirmed the initial decision as modified.

1. The Board clarified its decision in *O'Donnell v. Department of Agriculture*, 120 M.S.P.R. 94 (2013), by holding that general philosophical

or policy disagreements with agency decisions or actions do not constitute protected disclosures unless there is a reasonable belief that the disclosure evidences one of the categories of wrongdoing set forth in 5 U.S.C. § 2302(b)(8)(A).

2. The Board modified the AJ's finding that the appellant made a nonfrivolous disclosure. The Board held that the appellant's e-mail was a discussion about proposed policy, and therefore just a policy discussion, and not a disclosure of any of the situations specified in 5 U.S.C. § 2302(b)(8)(A). The Board vacated the part of the initial decision regarding the appellant's subsequent statements in emails that he now understood and supported the proposed policy change because the test is whether the appellant had a reasonable belief at the time he made the disclosure, not in light of events or conversations occurring thereafter.

Appellant: Ty K. Sanders

Agency: Department of Homeland Security

Decision Number: [2015 MSPB 7](#)

MSPB Docket No.: DA-0752-13-0313-I-1

Issuance Date: January 15, 2015

Appeal Type: Adverse Action

Action Type: Removal

Interim Relief Effective Date

Post-Removal Medical Evidence

Weight of Medical Evidence

The appellant appealed his removal as a Customs and Border Protection Officer (CBPO) based on a charge of inability to perform the essential duties of his position. The removal was issued based on two separate psychiatrists finding the appellant unable to continue working for the agency following an incident with the appellant's supervisors. The appellant appealed his removal, and while his appeal was pending before the administrative judge (AJ), the appellant was evaluated by two other psychiatrists of his choosing, who both found him fit for duty. After conducting a hearing, the AJ reversed the removal, finding that new medical evidence showed the appellant had recovered from the condition that prevented him from performing his duties. In issuing this ruling, the AJ gave more weight to the appellant's chosen psychiatrists over the agency's chosen psychiatrists. The AJ ordered the agency to provide interim relief to the appellant, and the appellant filed a petition for enforcement, alleging that the agency only provided back pay retroactive to a date near the date of the initial decision, and not all the way

back to the date of his removal.

Holding: The Board affirmed the initial decision in part and reversed the initial decision insofar as it reversed the agency's removal action.

- 1. An order for interim relief is effective only as of the date of the issuance of the initial decision.**
- 2. The Board will consider post-removal medical evidence regarding whether, while the appeal is pending, the appellant continues to suffer from the medical condition that makes him unfit for duty.**
- 3. The Board reversed the initial decision based primarily on its finding that the assessments by the agency's chosen psychiatrists held greater weight than the appellant's chosen psychiatrists' assessments. The Board made this finding based on the fact the agency's chosen psychiatrists had significant experience evaluating the psychiatric conditions of CBPOs, while the record did not reflect the same for the appellant's chosen psychiatrists.**

Appellant: Ross Vasallo

Agency: Department of Defense

Petitioner: Office of Personnel Management

Decision Number: [2015 MSPB 8](#)

MSPB Docket No.: PH-3330-13-0049-R-1

Issuance Date: January 15, 2015

Appeal Type: Request for Reconsideration

Action Type: Non-Selection

Definition of "Agency"

The appellant applied for a position within a different component of the Defense Contract Management Agency (DCMA) than where he was employed, but his application was rejected due to his failure to submit an SF-50 as part of his application package. The appellant appealed his non-selection, alleging that his VEOA rights were violated because the agency denied him the opportunity to compete for a vacant position for which the agency making the announcement would accept applications outside its own workforce. On appeal, the AJ concluded that because the vacancy announcement specified that it was applicable only to certain DOD components, the agency did not violate the appellant's VEOA rights because it did not accept applications from individuals outside of DOD. The Board reversed the AJ and found that the agency did violate VEOA. It held that the term "agency," as used in the

statute, referred only to DCMA, and not to DOD at large, and therefore the agency did allow applications from persons outside its workforce. OPM then filed a petition for reconsideration, arguing that the Board's interpretation of the term, "agency," was incorrect.

Holding: The Board granted the petition for reconsideration and reversed its prior decision.

1. The Board reversed its prior decision based on OPM's definition of "agency," as found in 5 C.F.R. § 315.611 and 5 U.S.C. § 105. OPM's definition of the term, as used by VEOA, referred to all of DOD, and not just DCMA.

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

Petitioner: Larry A. Griswold

Respondent: Office of Personnel Management

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

Case Number: [2014-3186](#)

MSPB Docket No. DE-0842-13-0232-I-1

Issuance Date: January 12, 2015

Holding: The Court affirmed the Board's decision affirming OPM's decision to exclude the appellant's military service from the calculation of his annuity supplement because under controlling statutory authority the calculation of an annuity supplement specifically exempts military service.

Petitioner: Velma Ruth Thomas

Respondent: Office of Personnel Management

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

Case Number: [2014-3143](#)

MSPB Docket No. AT-0841-13-0546-I-1

Issuance Date: January 13, 2015

Holding: The Court affirmed the Board's decision finding that the appellant was entitled to a supplemental annuity based on her period of reemployment but not a redetermination of annuity rights upon her retirement.

Petitioner: Denise L. Robinson

Respondent: Merit Systems Protection Board

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

Case Number: [2014-3176](#)

MSPB Docket No. DC-0752-13-0580-I-1

Issuance Date: January 15, 2015

Holding: The Court affirmed the Board's decision dismissing the underlying appeal for lack of jurisdiction based on a finding that the appellant failed to nonfrivolously allege that her resignation was the product of coercion, duress, or misrepresentation.

[MSPB](#) | [Case Reports](#) | [Recent Decisions](#) | [Follow us on Twitter](#) | [MSPB Listserv](#)