



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for March 6, 2015

BOARD DECISIONS

Appellant: David Dean
Agency: Department of Labor
Decision Number: [2015 MSPB 22](#)
MSPB Docket No.: AT-3330-13-0235-I-1
Issuance Date: February 26, 2015
Appeal Type: VEOA
Action Type: Non-Selection

Prohibition of Educational Requirements for Federal Employment Pursuant to 5 U.S.C. § 3308

The appellant filed an appeal under the Veterans Employment Opportunities Act of 1998 (VEOA) alleging that his non-selection for the position of “Recent Graduate” Wage and Hour Specialist was discriminatory because it imposed a minimum requirement of a college degree under the Pathways Recent Graduates Program. The appellant argued that the qualification criteria in the vacancy announcement violated his veterans’ preference rights because there was no showing of a rational basis for the college graduate criterion to justify deviating from the norm of competitive examination. The administrative judge (AJ) found that the appellant established jurisdiction over his VEOA appeal but denied his request for corrective action on the merits. Following the filing of the appellant’s petition for review, the Board requested an advisory opinion from the Office of Personnel Management (OPM) concerning its regulations governing the Pathways Recent Graduates Program.

Holding: The Board denied the petition for review and affirmed

the initial decision.

1. The Board overruled its prior precedent in *Burroughs v. Department of the Army*, 115 M.S.P.R. 656, *aff'd* F. App'x 347 (Fed. Cir. 2011), that 5 U.S.C. § 3308, a provision pertaining to OPM's authority to determine minimum educational requirements, and 49 U.S.C. § 40122(g)(2)(B), a provision relating to laws governing appeal rights of employees of the Federal Aviation Administration, do not constitute independent statutory authority implicating veterans' preference rights. The Board's reliance on these two provisions in *Burroughs* and subsequent precedent were overruled because there was insufficient legislative history and other evidence to conclude that either are related statutory authority for purposes of determining veterans' preference employment claims.
2. Even if the OPM authority under 5 U.S.C. § 3308 was construed to relate to veterans preference, the Pathways Recent Graduates Program comports with this statute because OPM is in the best position to determine whether the duties of a scientific or technical position can be performed by an individual who does not have a prescribed minimum education.
3. The position of "Recent Graduate" Wage and Hour Specialist is specifically designed to provide a first step in a formal career development and advancement program. There was ample justification in the record evidence to show a rational basis for a minimum education requirement for this position. Thus, the Board concluded that the appellant's claim that the Pathways Recent Graduates program's minimum educational eligibility requirement inherently violated his and other veteran's preference rights is unsupported.

Appellant: Jeffrey L. Hamley

Agency: Department of the Interior

Decision Number: [2015 MSPB 23](#)

MSPB Docket No.: DE-1221-14-0041-W-1

Issuance Date: February 27, 2015

Appeal Type: Individual Right of Action (IRA) Appeal

Action Type: Retaliation for Whistleblowing

Mootness

Continuing Violation Doctrine

Compensatory Damages

Before the appellant filed his IRA appeal, and at the conclusion of the Office of

Special Counsel's investigation into the appellant's allegation of whistleblower retaliation, the agency agreed to provide corrective action to the appellant. The appellant then filed an IRA appeal and later stipulated that the only issue for adjudication was whether he was entitled to compensatory damages for conduct occurring in the seven month period between the effective date of the Whistleblower Protection Enhancement Act of 2012 (WPEA) and the date he received relief. In support of this contention, the appellant argued that the agency's action in significantly changing his duties began before passage of the WPEA, and was thus a "continuing action" that included the seven month period following passage of the WPEA. The AJ ruled that the appellant was not entitled to compensatory damages because the conduct and actions at issue in the appeal preceded the WPEA's enactment and the appeal was therefore moot. The appellant argued on petition for review that the significant change to his duties was not a "discrete act" but constituted "continuing conduct" that included the period following passage of the WPEA.

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

1. The continuing violation doctrine is inapplicable in this appeal because the doctrine relates to a determination regarding the timeliness of a claim rather than the availability of damages associated with that claim. Here, the AJ properly dismissed the appeal as moot because the conduct and actions at issue in this appeal all took place before the effective date of the WPEA, and an award of compensatory damages would have an impermissible retroactive effect.

Appellant: Alesteve Cleaton
Agency: Department of Justice
Decision Number: [2015 MSPB 24](#)
MSPB Docket No.: DC-0752-14-0760-I-1
Issuance Date: February 27, 2015
Appeal Type: Adverse Action
Action Type: Removal

Felony Convictions for Law Enforcement Officers

The appellant was removed from his position as correctional officer with the Bureau of Prisons for pleading guilty to a felony charge of possession of marijuana with intent to distribute. In May 2014, the court accepted the appellant's plea and found him guilty of possession with intent, and the agency removed the appellant shortly thereafter. The appellant appealed his removal

to the Board, asserting that he was not convicted of the charge, and submitted evidence showing that he was scheduled to appear in court in June 2014 for a hearing on a charge of contempt. The AJ affirmed the removal, finding that the appellant's documentation did not relate to his criminal conviction on the charge of possession with intent. The appellant filed a petition for review and included with it a document issued after the close of the record before the AJ that showed in September 2014, the appellant entered a no-contest plea to the charges of Possession with Intent and Contempt, and a stipulation that the evidence was sufficient to convict him of both charges. The documentation further showed that in November 2014 the court stated it would withhold its finding of guilt for two years on the condition that the appellant comply with the terms of the plea agreement, including two years of supervised probation, and if the appellant violated the agreement, he would be found guilty as originally charged.

Holding: The Board affirmed the decision as modified by the opinion and order to address new evidence submitted on review.

1. An employee appealing his removal under 5 U.S.C. § 7371 can only contest: (1) whether he is a law enforcement officer; (2) whether he was convicted of a felony; or (3) whether the conviction was overturned on appeal.

2. The Board affirmed the removal because the appellant did not submit any evidence showing that his prior felony conviction was overturned, and even if the prior conviction was no longer in effect, the reason it was no longer was in effect was because of his new plea agreement, and not because it was overturned on appeal.

Appellant: Felicia Bills

Agency: Department of the Air Force

Decision Number: [2015 MSPB 25](#)

MSPB Docket No.: DA-0752-13-0170-X-1

Issuance Date: February 27, 2015

Appeal Type: Adverse Action

Action Type: Compliance

Back Pay Requirements

The appellant's removal was reversed by the Board based on its finding that the agency failed to prove any of its charges by preponderant evidence. The administrative judge ordered the agency to cancel the removal, retroactively

restore the appellant to her position, and pay her back pay with interest and benefits in accordance with the regulations of the Office of Personnel Management (OPM). The appellant subsequently filed a petition for enforcement, alleging that the agency failed to: (1) pay interest on the back pay; (2) either reimburse her for amounts withheld for health insurance premiums or pay her for amounts paid for continuation coverage; (3) pay interest on the amounts withdrawn from her retirement accounts; and (4) reimburse her for the penalties she paid based on her early withdrawals from her retirement accounts. The administrative judge found that the agency was not in compliance because it failed to demonstrate that it afforded the appellant the opportunity to make an election of health benefits and failed to show that it complied with the Federal Retirement Thrift Investment Board's (FRTIB) regulations regarding back pay awards, and referred the matter to the Board.

Holding: The Board found the agency to be in compliance and dismissed the petition for enforcement.

1. The Board vacated the initial decision to the extent that it required that the agency show that it informed the TSP record keeper of the back pay award and that it requested FRTIB to provide a computation of interest and lost earnings in accord with applicable regulations. These requirements were based on *Shobert v. Department of the Air Force*, 90 M.S.P.R. 262 (2001), which derived the requirements from 5 C.F.R. §§ 1606.3 and 1606.11, both of which were no longer valid after August 31, 2003. The new governing regulation, 5 C.F.R. § 1605.13, no longer imposes such requirements, and thus, the Board overruled *Shobert* to the extent it requires agencies to comply with 5 C.F.R. §§ 1606.3 and 1606.11.

Appellant: Gregory Einboden

Agency: Department of the Navy

Decision Number: [2015 MSPB 26](#)

MSPB Docket No.: DC-0752-13-0959-I-1

Consolidation No. DC-0752-14-0267-I-1 (Naval Sea Systems Command Dahlgren v. Department of the Navy)

Issuance Date: February 27, 2015

Appeal Type: Adverse Action

Action Type: Furlough

Proof of Efficiency of the Service Standard In Furlough Action

The appellant was furloughed for budgetary reasons. The appellant asserted

on appeal that the agency should not have furloughed him because his salary was paid out of working capital funds (WCF), not an account using appropriated funds. The appellant also alleged that intergovernmental funds are generally exempt from sequestration by statute and that no money was sequestered from the agency's WCF. The AJ found that the furloughs promoted the efficiency of the service in that the furlough was a reasonable management solution to the financial restrictions placed on the agency. The agency offered un rebutted evidence that it had to make significant spending cuts due to a sequestration order and that the furloughs helped to avoid a deficit. He also held that the agency offered sufficient evidence that it imposed the furloughs uniformly with exceptions for limited categories of employees. The AJ further held that the appellants were provided with requisite due process despite the appellants' affirmative defenses that the agency was precluded by a WCF from furloughing them. Finally, the AJ found that even assuming the WCF was exempt from the sequester order there was no proof that the funds were derived from a source other than direct appropriations.

Holding: The Board denied the petition for review and affirmed the agency's furlough action to clarify the AJ's nexus analysis.

1. Although the appellants asserted that the agency had adequate funding to avoid furloughs, it was reasonable for the Department of Defense to consider its budget situation holistically, rather than to isolate each individual military department's situation within the Department of the Navy.
2. Vice Chair Wagner dissented, noting that in order for the agency to show that the furlough will promote the efficiency of the service, there must be some indication that it was reasonably foreseeable that the savings from the furlough would address the budgetary challenges.

Appellant: Socorro Thome

Agency: Department of Homeland Security

Decision Number: [2015 MSPB 27](#)

MSPB Docket No.: DA-0752-12-0339-I-1

Issuance Date: February 27, 2015

Appeal Type: Adverse Action

Action Type: Removal

**Due Process Violation Based on Misrepresentation of Charge
Sex Discrimination**

Right to Light Duty Under the Pregnancy Discrimination Act

In her position as a Customs and Border Protection Officer (CPBO), the appellant was required to be available for rotating shifts and overtime assignments and to carry and maintain proficiency in the use of a firearm. Following a period of approved leave due to pregnancy, the appellant's physician released her to work without restrictions with the exception that she be provided frequent breaks for breastfeeding. Thereafter, the appellant submitted a request from her son's pediatrician requesting the following accommodations in her work: that she be assigned to light duty while breastfeeding and until her son was one-year-old due to a concern that she might be exposed to contaminants which could be transmitted to her son through breast milk, that she be relieved from alternating shifts in order to avoid disruption of breast milk production tied to sleep and circadian rhythm, and that she avoid the indoor gun range due to the presence of vaporized lead. Several months later, the agency issued the appellant an "option letter" directing her to return to full duty or resign because it could not accommodate her light duty restrictions with certainty. The agency then issued a notice proposing her "non-disciplinary removal" based on a charge of unavailability for duty inasmuch as her presence was needed to carry out the agency's mission and that her decision to breastfeed was a personal choice. The deciding official affirmed the removal noting that the appellant was medically able to perform her duties but chose to make herself unavailable and that the appellant's accommodation requests were "literally impossible to fulfill." In her appeal before the Board, the appellant alleged that the agency violated her due process rights, that the agency unlawfully disciplined her for taking approved leave, and that the agency engaged in sex and disability discrimination, and retaliated against her. The AJ reversed the removal of due process grounds because the agency deciding official considered evidence not cited in the proposal notice nor included in accompanying materials to the appellant. The AJ did not sustain the appellant's other claims.

Holding: The Board denied the agency's petition for review, granted the appellant's cross-petition, affirmed the reversal of the removal and the AJ's rulings on the appellant's affirmative defenses of disability discrimination and reprisal, vacated the AJ's finding on sex discrimination in violation of the Pregnancy Discrimination Act of 1978, and remanded the case for further adjudication on that claim.

- 1. The Board affirmed the AJ's finding that the agency violated the appellant's due process rights by failing to provide adequate notice of the**

charges against her because the agency erroneously characterized the action as non-disciplinary when the appellant's removal was, in fact, a disciplinary action based on a charge of misconduct due to her alleged refusal to return to duty. Here, the "options letter" was essentially an order to return to full duty and was indistinguishable from a charge of failure to follow instructions.

2. The Board found that the appellant's claim of disability discrimination fails because neither pregnancy nor lactation are impairments covered under the Americans with Disabilities Act.

3. The Board remanded the appellant's Pregnancy Discrimination Act claim for further adjudication pending issuance of the Supreme Court's opinion in *Young v. United Parcel Service* on the issue of whether the PDA permits a "pregnancy neutral" policy of granting light duty exclusively to employees who have on-the-job injuries and/or disabilities under the ADA.

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

Petitioner: Diane King

Respondent: Department of the Army

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

Case Number: [2015-3005](#)

MSPB Docket No. AT-1221-12-0143-W-3

Issuance Date: March 4, 2015

Holding: The Court affirmed the Board's denial of the petitioner's request for corrective action based on its finding that the respondent proved by clear and convincing evidence that it would have removed the petitioner even if she had not made protected disclosures due to her conduct within the workplace.

Petitioner: Corazon McDonald

Respondent: Department of the Army

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

Case Number: [2014-3220](#)

MSPB Docket No. DA-0752-12-0344-C-1

Issuance Date: March 4, 2015

Holding: The Court affirmed the Board's denial of the petitioner's petition for enforcement based on its finding that the agency made all reasonable efforts to restore the petitioner to her original position.

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