



## U.S. MERIT SYSTEMS PROTECTION BOARD

**Case Report for May 29, 2015**

### **BOARD DECISIONS**

**Appellant:** Ilan Fouks  
**Agency:** Department of Veterans Affairs  
**Decision Number:** [2015 MSPB 37](#)  
**MSPB Docket No.:** NY-3443-14-0380-I-1  
**Issuance Date:** May 22, 2015  
**Appeal Type:** Adverse Action  
**Action Type:** Demotion

#### **Employee Appeal Rights for Reductions in Grade and Pay Involuntary Acceptance of Reduction in Grade and Pay**

After the appellant was selected for a Supervisory General Engineer position at the GS-13(8) level, the agency notified him that that an error had been made in setting his grade and pay and that he was only entitled to be paid at the GS-12(10) level. The appellant filed an appeal alleging that his grade and pay were reduced. The administrative judge (AJ) dismissed the appeal for lack of jurisdiction because the agency was authorized under 5 C.F.R. § 752.401(b)(15) to reduce the appellant's grade and pay to correct a rate of pay contrary to law or regulation.

**Holding:** The Board remanded the case for further adjudication.

1. While an employee's appeal rights are limited when an agency acts pursuant to 5 C.F.R. § 752.401(b)(15) to correct an error in an employee's rate of pay, the administrative judge erred in relying on this provision to dismiss the appeal for lack of jurisdiction because the appellant was not

appealing a correction in his basic rate of pay but instead was appealing a reduction in pay and grade.

2. Because there was an issue of whether the appellant relied on agency-supplied misinformation to his detriment in his decision to voluntarily accept a reduction in grade, a remand was required to determine whether he voluntarily accepted a reduction in grade.

## **The U.S. Court of Appeals for the Tenth Circuit issued the following nonprecedential decision this week:**

**Petitioner:** Fred Johnson

**Respondent:** Department of Veterans Affairs

**Tribunal:** U.S. Court of Appeals for the Tenth Circuit

**Case Numbers:** [14-9619](#)

**MSPB Docket No.** DE-1221-14-0012-W-1

**Issuance Date:** May 22, 2015

**Holding:** The Court affirmed the Board’s final decision dismissing the petitioner’s IRA appeal for res judicata because the petitioner’s reprisal claim could have been brought in his prior arbitration over his removal. Section 108 of the Whistleblower Protection Enhancement Act included the so-called “all circuit review” provision, under which an individual - for a period of two years - could appeal certain final orders or decisions of the Board to the United States Court of Appeals for the Federal Circuit or “any other court of appeals of competent jurisdiction.” 5 U.S.C. § 7703(b)(1)(B). On September 26, 2014, Congress extended this provision for three additional years. PL 113-170, 128 Stat. 1894 (2014). Petitioner appealed the final decision of the Board in this matter to the United States Court of Appeals for the Tenth Circuit under that provision of law.

- **The U.S. Court of Appeals for the Federal Circuit issued no MSPB decisions this week.**