



## U.S. MERIT SYSTEMS PROTECTION BOARD

### Case Report for July 17, 2015

#### BOARD DECISIONS

**Appellant:** Corey D. Stoglin  
**Agency:** Department of the Air Force  
**Decision Number:** [2015 MSPB 43](#)  
**MSPB Docket No.:** SF-3330-13-1464-B-1  
**Issuance Date:** July 9, 2015  
**Appeal Type:** USERRA  
**Action Type:** Nonselection

#### **USERRA jurisdiction - Air National Guard employees**

The appellant appealed his nonselection for the position of Equal Employment Manager with the Hawaii Air National Guard, alleging that his nonselection violated the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). The administrative judge ("AJ") dismissed his appeal for lack of jurisdiction based on a finding that the appellant failed to nonfrivolously allege a violation of USERRA. The appellant filed a petition for review ("PFR") and the Board granted the PFR and remanded the matter for further consideration, holding that the petitioner's allegations were sufficient to establish Board jurisdiction. On remand, the AJ again dismissed the appeal for lack of jurisdiction, this time doing so because the Hawaii Air National Guard was a state agency, and therefore the appellant was required to bring his USERRA claim in state court. The AJ also found that, in the alternative, the appellant failed to state a claim upon which relief could be granted because a Board order against the Hawaii Air National Guard in the matter would be unenforceable.

**Holding:** The Board vacated its previous holding that it had jurisdiction over the appellant's USERRA claim, vacated the remand initial decision in part, and dismissed the appeal for lack of jurisdiction.

1. For purposes of USERRA, National Guard civilian technicians are considered state employees, and actions under USERRA by such employees must be brought in state court.
2. The Board vacated the portion of the remand initial decision finding that the appellant failed to state a claim upon which relief could be granted, because dismissal on these grounds is improper if an appellant fails to establish jurisdiction over the appeal.

**Appellant:** Carlton E. Hooker, Jr.  
**Agency:** Department of Veterans Affairs  
**Decision Number:** [2015 MSPB 44](#)  
**MSPB Docket No.:** AT-0752-10-0367-B-4  
**Issuance Date:** July 15, 2015  
**Appeal Type:** Furlough  
**Action Type:** Separation Without Pay

### **Collateral Estoppel Res Judicata**

The Board remanded this removal appeal for the purpose of affording the appellant an opportunity to present evidence regarding his affirmative defense of discrimination, and to clarify whether his whistleblowing claim remained an issue in the case. The AJ dismissed the appeal based on the application of collateral estoppel because: (1) the appellant's allegation of retaliation was identical to a prior action he brought in U.S. district court; (2) the decision in the prior action in U.S. district court was based upon the same issues that the appellant raised in his Board appeal; (3) the U.S. district court ruling to dismiss the action based on the appellant's failure to respond to a discovery order was necessary to the court's final judgment; and (4) the appellant had a full and fair opportunity to litigate those issues in U.S. district court.

**Holding:** The Board affirmed the initial decision as modified by the Opinion and Order.

1. The Board found that the AJ misapplied the doctrine of collateral

estoppel because the Board permits simultaneous adjudication of a mixed case appeal before the Board and a U.S. district court.

2. The Board dismissed the appeal based on res judicata because: (1) a prior civil action was rendered by a forum with competent jurisdiction; (2) the prior judgment was a final judgment on the merits of the appellant's removal action; (3) the same cause of action and the same parties were involved in both cases.

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

**Petitioner: Joan Ryan**

**Respondents: Department of Homeland Security, Merit Systems Protection Board**

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

**Case Numbers: [2014-3181](#), [2014-3182](#), [2014-3183](#)**

**MSPB Docket Nos. PH-0752-13-0127-I-1, PH-0752-13-5283-I-1, PH-0752-13-0343-I-1**

**Issuance Date: July 13, 2015**

### **Indefinite Suspension - Security Clearance**

#### **Employee's Right to Transfer After Loss of Security Clearance**

The petitioner's access to classified information was suspended after she was indicted on federal criminal charges. Because her position required her to maintain a top secret security clearance, the agency indefinitely suspended her until the agency made a final determination on her future eligibility for access to classified information. After the petitioner was acquitted of all criminal charges, she filed an appeal of her indefinite suspension with the Board. The administrative judge ("AJ") found that she was not entitled to a termination of the indefinite suspension because the indefinite suspension was based on the suspension of her security clearance, and not the underlying reason for the suspension of the clearance, which was the indictment. The petitioner appealed the decision to the Board, and the Board affirmed. While the petitioner's first appeal was pending, she filed a second appeal, claiming that the agency was unreasonably delaying the adjudication of her clearance. The administrative judge dismissed the claim for lack of jurisdiction, and the Board affirmed again. In the second decision, the Board noted there was no

support for the proposition that the Board could end her suspension based solely on the amount of time that has elapsed since her acquittal. The agency eventually revoked the petitioner's security clearance, and afterward the petitioner filed a third MSPB appeal. In the third appeal, the petitioner claimed that the basis for her indefinite suspension was amended when her security clearance was revoked, because the revocation was based on reasons not specified in the notice of proposed suspension. The AJ dismissed the appeal, because the new details in the clearance revocation did not change the basis of her indefinite suspension. The Board affirmed, holding that the revocation of her clearance did not change the basis for her indefinite suspension.

**Holding: The Court affirmed.**

- 1. An indefinite suspension based on a loss of security clearance is not subject to a *Douglas* mitigation analysis.**
- 2. When a security clearance is required for a position and the employee does not have one, the Board does not have the authority to inquire into the feasibility of transfer to an alternative position not requiring a security clearance unless a substantive right to such a transfer is available from some other source.**
- 3. An agency has broad discretion to determine the length of time needed to evaluate whether the revocation of a suspended security clearance is appropriate.**
- 4. The new grounds for the revocation of the petitioner's security clearance did not change the basis of her indefinite suspension, which remained the loss of the clearance itself, and not the reasons for the loss of the clearance.**

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

**Petitioner:** John Paul Jones III

**Respondent:** Department of Health and Human Services

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

**Case Numbers:** [2015-3038](#)

**MSPB Docket Nos.** DE-3330-12-0137-I-2, DE-3330-12-0338-I-2

**Issuance Date:** July 10, 2015

**Holding:** The court affirmed the Board's final order denying the petitioner's request for corrective action under the Veterans Employment Opportunities Act because substantial evidence supports the Board's finding that the petitioner's experience did not involve the requisite work for the position.

**Petitioner:** Michael R. Jones

**Respondent:** Merit Systems Protection Board

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

**Case Numbers:** [2015-3043](#)

**MSPB Docket No.** SF-3443-13-4830-I-1

**Issuance Date:** July 13, 2015

**Holding:** The court affirmed the Board's final order dismissing the petitioner's appeal for lack of jurisdiction based on a finding that the Office of Personnel Management ("OPM") had not yet issued a final decision on his retirement application.

**Petitioner:** Londer B. Davis

**Respondent:** Merit Systems Protection Board

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

**Case Numbers:** [2015-3087](#)

**MSPB Docket No.** DA-0752-10-0023-C-1

**Issuance Date:** July 13, 2015

**Holding:** The court affirmed the Board's final order dismissing the petitioner's petition for enforcement as untimely because the petitioner failed to provide any explanation for the untimely filing of his petition.

**Petitioner: Michael A. Nichols**

**Respondent: Merit Systems Protection Board**

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

**Case Numbers: [2015-3064](#)**

**MSPB Docket No. AT-3443-14-0159-I-1**

**Issuance Date: July 13, 2015**

**Holding:** The court affirmed the Board's final order dismissing the petitioner's appeal for lack of jurisdiction because the petitioner failed to demonstrate that OPM applied an illegal employment practice to him.

**Petitioner: Michael B. Graves**

**Respondent: Department of Veterans Affairs**

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

**Case Numbers: [2014-3159](#)**

**MSPB Docket No. SF-3330-09-0570-X-1**

**Issuance Date: July 14, 2015**

**Holding:** The court affirmed the Board's final order that the agency complied with its prior final order because substantial evidence supported the Board's finding that the agency provided the petitioner a proper reconstructed hiring process.

**Petitioner: Julia A. Holland**

**Respondent: Merit Systems Protection Board**

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

**Case Numbers: [2015-3034](#)**

**MSPB Docket No. DC-3443-14-0014-I-1**

**Issuance Date: July 14, 2015**

**Holding:** The court affirmed the Board's final order dismissing the appeal for lack of jurisdiction based on its finding that the appellant did not suffer an adverse action.

## EQUAL EMPLOYMENT OPPORTUNITY COMMISSION DECISION

Complainant v. Anthony Foxx, Secretary, Department of Transportation  
(Federal Aviation Administration)

Appeal Number: [0120133080](#)

Issuance Date: July 15, 2015

**Discrimination - Sexual Orientation Discrimination in Federal Employment**

**Holding:** The Equal Employment Opportunity Commission held that a complaint of discrimination based on sexual orientation brought by a Supervisory Air Traffic Control Specialist constitutes a complaint of sex-based discrimination.

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