



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for September 18, 2015

BOARD DECISIONS

Appellant: Arthur E. Sherman
Agency: Department of Homeland Security
Decision Number: [2015 MSPB 52](#)
MSPB Docket No.: PH-1221-15-0086-W-1
Issuance Date: September 11, 2015
Appeal Type: Individual Right of Action (IRA) Appeal
Action Type: Retaliation

Contributing Factor
Election of Remedies
Remand for Additional Evidence

The appellant filed a series of three grievances alleging that his 2013 performance evaluation was lowered in retaliation for him disclosing federal contracting violations to his supervisor in 2012. The appellant subsequently filed a complaint with the Office of Special Counsel (“OSC”) alleging that the agency retaliated against him for the disclosure by lowering his 2013 performance evaluation and not granting him a cash award. When the OSC declined to take corrective action, the appellant filed an IRA appeal. The Administrative Judge (“AJ”) dismissed the appeal for lack of jurisdiction based on findings that: (1) the appellant made an election of remedies by grieving the performance evaluation before he filed his complaint with the OSC; and (2) he failed to make a nonfrivolous allegation that his disclosure was a contributing factor in the performance evaluation.

Holding: The Board remanded the case to the regional office for

further adjudication.

1. The Board found that the appellant made a nonfrivolous allegation that his disclosure was a contributing factor in his 2013 performance evaluation under the knowledge/timing test based on the timing of performance evaluation in relation to the appellant's second-line supervisor learning about the appellant's disclosure.

2. The appellant's election to grieve his 2013 performance evaluation under 5 U.S.C. § 7121(g) divested the Board of jurisdiction over that personnel action notwithstanding whether he raised whistleblower retaliation in the initial grievance file. An employee may be deemed to have elected a remedy regardless of whether he raised a prohibited personnel practice in his initial grievance filing.

3. Because neither the parties nor the AJ addressed the issue of whether the appellant properly challenged the denial of a cash award through the negotiated grievance process, a remand was required to determine if the appellant made a binding election to grieve the cash award decision and, if not, whether his disclosure was protected and if it was a contributing factor to the cash award denial.

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

Petitioner: Ricardo Dominico

Respondent: Office of Personnel Management

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

Case Number: [2015-3100](#)

MSPB Docket No. SF-0831-14-0294-I-1

Issuance Date: September 11, 2015

Holding: The court affirmed the Board's final order finding that the petitioner did not qualify for a Civil Service Retirement System annuity because his service was not covered as creditable service.

Petitioner: Shawnte' L. Aaron

Respondent: Merit Systems Protection Board

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

Case Number: [2015-3088](#)

MSPB Docket No. DR-0845-14-0503-I-1

Issuance Date: September 14, 2015

Holding: The court affirmed the Board's dismissal of the appellant's retirement appeal because it was untimely filed and the appellant failed to show good cause for the delay.

Petitioner: Allan W. Carter

Respondent: Office of Personnel Management

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

Case Number: [2015-3137](#)

MSPB Docket No. CH-0831-14-0619-I-1

Issuance Date: September 15, 2015

Holding: The court affirmed the Board's final order that OPM was barred from processing the appellant's survivor annuity change request based on an amended domestic relations order because the order modified an order that was issued after the appellant had already retired.