



## U.S. MERIT SYSTEMS PROTECTION BOARD

### Case Report for January 22, 2016

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#### BOARD DECISIONS

**Appellant:** Marie Jackson

**Agency:** Department of the Army

**Decision Number:** [2016 MSPB 4](#)

**Docket Number:** AT-0752-15-0504-I-1; AT-531D-14-0638-I-2

**Issuance Date:** January 19, 2016

**Appeal Type:** Adverse Action by Agency

**Action Type:** Removal

#### Settlement agreements

##### OWBPA

At issue on petition for review was the parties' settlement agreement of these two joined appeals, which concerned the appellant's performance-based removal and within-grade increase denial. The settlement agreement included a provision permitting the appellant to revoke it within 7 days from execution "in accordance with the Older Workers' Benefit Protection Act (OWBPA)." The administrative judge dismissed the appeal as settled prior to the expiration of the 7-day period. Subsequently, on the sixth day, the appellant informed the agency that she was revoking the agreement. The appellant then filed the petition for review, seeking to reinstate her appeal.

**Holding:** The Board granted the petition for review, vacated the initial decision, and remanded the appeal to the regional office to resume

adjudication.

1. The Board found that, according to the plain language of the settlement agreement, the appellant was entitled to revoke the settlement agreement within 7 days.
2. It was irrelevant that the appellant did not raise a claim under the Age Discrimination in Employment Act (ADEA) and that the OWBPA does not require that a settlement agreement of a Board appeal contain a 7-day revocation period even if age discrimination is raised. The settlement provided for a 7-day revocation period and the appellant revoked.
3. The revocation clause was not severable. Although the settlement agreement contained a severability provision, it provided for severing unenforceable terms. The revocation clause was not unenforceable, and therefore did not fall within the scope of the severability provision.
4. The revocation clause was not limited to non-ADEA claims, and therefore the Board declined to remand only for adjudication of age discrimination claims as it has done in cases where an appellant sought to set aside a settlement agreement that did not comply with the OWBPA and did not contain a revocation clause.

**Appellant:** Lisa J. Hess

**Agency:** United States Postal Service

**Decision Number:** [2016 MSPB 5](#)

**Docket Number:** AT-0752-14-0058-I-2

**Issuance Date:** January 21, 2016

**Appeal Type:** Adverse Action by Agency

**Action Type:** Removal

**Mixed-case appeals**

**Mootness**

**Whistleblower reprisal**

The agency removed the appellant for an attendance-related charge, and she filed the instant appeal, raising equal employment opportunity (EEO) affirmative defenses and whistleblower reprisal. The agency then rescinded the removal and returned the appellant to status quo ante. The administrative judge therefore found the removal action moot. He further found that the appellant failed to present a genuine issue of material fact regarding her EEO affirmative defenses, and dismissed them without a hearing. Finally, he found that, as a postal employee, she was not entitled to seek damages under

5 U.S.C. § 1221; therefore, he dismissed her whistleblower reprisal affirmative defense as moot.

**Holding:** The Board granted the petition for review, affirmed the findings in the initial decision that the appellant's removal claim and whistleblower reprisal affirmative defense were moot, but vacated the dismissal of the appellant's EEO affirmative defenses and remanded them for a hearing.

1. The Board found that the administrative judge properly dismissed the removal and whistleblower reprisal claims as moot. With regard to the appellant's removal claim, the agency properly returned the appellant to status quo ante by rescinding all references to her removal and returning her in a nonpay status prior to the effective date of her removal. The agency was not required to cancel the appellant's preremoval absence without leave (AWOL) status because doing so would place her in a more advantageous position than she was in prior to her removal.

2. With regard to the appellant's whistleblower reprisal claim, the appellant can raise an affirmative defense of whistleblower reprisal. However, as a postal employee, she cannot seek attorney fees or damages under 5 U.S.C. § 1221. Because there is no additional relief that the Board could order in connection with this claim, it is also moot.

3. Where, as here, an appellant raises claims of prohibited discrimination in connection with an otherwise appealable action, the Board may only decide such claims after the record is complete. Therefore, the appellant is entitled to her requested hearing on her claims of sex and disability discrimination and EEO reprisal. The Board vacated the initial decision with regard to the appellant's EEO affirmative defenses, and remanded those claims for a hearing.

**Appellant:** Beverly Martin

**Agency:** United States Postal Service

**Decision Number:** [2016 MSPB 6](#)

**Docket Number:** DC-0752-15-0108-I-1

**Issuance Date:** January 21, 2016

**Appeal Type:** Adverse Action by Agency

**Action Type:** Suspension - Indefinite

**Mixed-case appeals**

**Settlement agreements**

**Suspensions - constructive and nonconstructive**

The parties entered into a settlement agreement that resolved the appellant's EEO complaints. In pertinent part, the appellant agreed to retire effective July 2011, and the agency agreed to enhance its contributions to her retirement for the 3 previous years. However, in April 2012, the parties learned that OPM did not approve the enhanced retirement contributions. Therefore, in October 2012, the agency reinstated the appellant retroactive to July 2011. The agency designated the period between July 2011 and October 2012 as leave without pay (LWOP). After filing an EEO complaint, the appellant timely filed the instant appeal, in which sought back pay for the LWOP period, as well as alleging EEO reprisal and discrimination. The administrative judge dismissed the appeal without a hearing, finding that the Board lacked jurisdiction. He reasoned that the appellant was not constructively suspended between July 2011 and October 2012, because her decision to retire in July 2011 was knowing and voluntary.

**Holding:** The Board granted the petition for review, reversed the initial decision, canceled the appellant's July 2011 to October 2012 nonconstructive suspension, ordered the agency to pay back pay for this period, and remanded the appeal for adjudication of the appellant's EEO reprisal and discrimination claims.

1. The Board found that the administrative judge erred in analyzing the LWOP period as a constructive suspension. The term "constructive suspension" is properly reserved for appeals where the appellant alleges that leave that appeared to be voluntary was not. Here, the leave was not even ostensibly voluntary. Therefore, the appellant suffered a nonconstructive suspension within the Board's jurisdiction.
2. Because the agency suspended the appellant without an opportunity to be heard, it violated her Fifth Amendment due process rights, and the suspension could not be sustained.
3. Finally, because the suspension was an appealable action, the appellant was entitled to a decision on her EEO reprisal and discrimination claims. The Board remanded for the appellant to receive her requested hearing on these claims.

## COURT DECISIONS

### PRECEDENTIAL:

**Petitioner: Raymond Muller**

**Respondent: Government Printing Office**

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

**Case Number: [2015-3032](#)**

**Petition for review from arbitration**

**Issuance Date: January 15, 2016**

**Adverse actions - demotion**

**Arbitration review**

The agency demoted the appellant, and he elected to challenge his demotion through the negotiated grievance procedure rather than file a Board appeal. The agency denied the grievance, and the union timely invoked arbitration. However, the arbitrator dismissed the grievance as non-arbitrable. He reasoned that the master agreement required the arbitration hearing to take place within 4 months after the union filed notice of its decision to proceed to arbitration. Although the arbitrator was selected before the 4 months elapsed, the arbitration hearing did not take place before the deadline expired. On this basis, the arbitrator found that the grievance had automatically terminated.

**Holding: The Court reversed and remanded.**

- 1. Because Muller's demotion arose under 5 U.S.C. § 7512, the arbitrator's award is reviewed under 5 U.S.C. § 7703(c), which requires the court to set the decision aside if (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence.**
- 2. The 4-month deadline from the master agreement is directed to the parties collectively and the arbitrator. Further, the master agreement does not provide for any consequence in the event of noncompliance with the deadline. Therefore, the deadline is a goal, not a requirement, and the arbitrator erred in concluding that the contractual provision obligated him to terminate the arbitration.**
- 3. Further, there is no past practice between the parties of dismissal under the circumstances here. Rather, the agency presented evidence of a past practice of closing arbitration when the union was not diligent in**

selecting an arbitrator before the 4-month deadline. Muller's situation was different because the parties selected the arbitrator, and the case was in the arbitrator's hands, three weeks before the 4-month deadline passed.

Prost, J. wrote a separate, concurring opinion. Although she agreed with the outcome, she disagreed that the 4-month deadline was a mere housekeeping rule. Instead, if the delay were solely attributable to one party, which was not the case here, she would find it appropriate to enforce the deadline against the party responsible.

**NONPRECEDENTIAL:**

**Petitioner:** Christopher Harvey Hare

**Respondent:** National Credit Union Administration

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

**Case Number:** [2015-3214](#)

**MSPB Docket No.** PH-3443-14-0638-B-1

**Issuance Date:** January 21, 2016

**Holding:** The court dismissed for lack of jurisdiction this appeal of the agency's reconstruction of its hiring process, finding that Hare must first appeal to the Board.

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