



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for April 1, 2016

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BOARD DECISIONS

Appellant: Steven P. Pirkkala
Agency: Department of Justice
Decision Number: [2016 MSPB 16](#)
Docket Number: AT-0752-15-0454-I-1
Issuance Date: March 31, 2016
Appeal Type: Adverse Action by Agency
Action Type: Removal

Election of Remedies
Effect of an untimely grievance
Untimely Board appeal

In March 2009, the agency removed the appellant, and informed him that he could challenge his removal through the negotiated grievance procedure, a Board appeal, or the equal employment opportunity complaint process. The appellant filed an untimely grievance challenging his removal, which the agency rejected. Subsequently, the appellant's union indicated that it would invoke arbitration on his behalf. However, prior to the scheduled arbitration hearing, the union decided that it would not represent the appellant or invoke arbitration on his behalf because he was not a dues paying member of the union. Therefore, on August 27, 2009, the arbitrator notified the appellant that he would not proceed with the arbitration.

Five years and 7 months later, on March 27, 2015, the appellant filed a Board appeal challenging his removal. The administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant had elected to pursue his removal through the negotiated grievance process.

Holding: The Board vacated the initial decision and found that the Board had jurisdiction over the appeal, but dismissed the appeal as untimely filed without good cause shown for the delay.

1. The Board had jurisdiction over the appeal. Pursuant to the plain language of 5 U.S.C. § 7121(e)(1), which references an employee who “timely files a grievance,” the untimely filing of the appellant’s grievance precluded it from being considered a valid election of remedies. Therefore, because the appellant did not effectively elect another forum to challenge his removal, the Board had jurisdiction over the appeal.

2. The appeal was untimely filed without good cause shown for the delay.

- a. There was no indication that the appellant was aware that the union would refuse to represent him, in violation of Federal labor law, at the time that he grieved his removal. Therefore, the appellant established good cause for his delay in filing until August 27, 2009, when the arbitrator informed him that the arbitration would not proceed because he lacked union representation.
- b. However, the appellant did not file his Board appeal until 5 years and 7 months later. Even assuming that the appellant’s anxiety and depression affected his ability to timely file his appeal, he failed to establish good cause for his delay in filing between August 27, 2009, when the arbitrator made it clear that the union would not represent him, and August 10, 2010, when medical evidence reflected that he began treatment for his conditions.

COURT DECISIONS

PRECEDENTIAL:

Petitioner: Shirley R. Hicks

Respondent: Merit Systems Protection Board

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

Case Number: [2016-1091](#)

MSPB Docket No.: AT-1221-15-0217-W-1

Issuance Date: March 22, 2016

Individual Right of Action (IRA) Appeal

Whistleblower Protection Enhancement Act (WPEA) Retroactivity

In 1989, the agency removed the appellant from her position as a Secretary. The appellant filed a Board appeal challenging her removal, and the Board mitigated the penalty of removal to a 60-day suspension. Subsequently, in 1990, the agency effected a new removal action. More than two decades later, in July 2014, the appellant contacted the Office of Special Counsel (OSC), alleging that the agency had removed her in 1990 in retaliation for making protected disclosures and in reprisal for filing her Board appeal. After OSC terminated its investigation, the appellant filed an IRA appeal with the Board. The administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant failed to raise a nonfrivolous allegation that she made a protected disclosure under 5 U.S.C. § 2302(b)(8). In addition, the administrative judge found that the Board lacked jurisdiction over the appellant's claim that the agency removed her in retaliation for filing her prior Board appeal, because at time of the appellant's removal, the Whistleblower Protection Act (WPA) did not authorize IRA appeals based on reprisal for protected activity under 5 U.S.C. § 2302(b)(9). The Board affirmed the initial decision.

Holding: The Court affirmed the Board's decision dismissing the appeal for lack of jurisdiction.

1. Effective December 27, 2012, the WPEA expanded IRA appeal rights under 5 U.S.C. § 1221(a) to include claims for corrective action based on prohibited personnel practices described in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), and (D). However, this expansion of appeal rights does not apply retroactively to events that occurred before the effective date of the WPEA. Therefore, the WPEA does not provide jurisdiction over the appellant's claims that the agency removed her in 1990 in retaliation for filing her prior Board appeal.

2. The court expressly declined to address whether other provisions of the WPEA may apply retroactively.

NONPRECEDENTIAL:

Petitioner: Damian C.A. Phillip
Respondent: Merit Systems Protection Board
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Number: [2016-1002](#)
MSPB Docket No. DC-1221-15-0642-W-1
Issuance Date: March 11, 2016

Holding: The court affirmed the Board's decision dismissing the appellant's IRA and probationary termination appeal for lack of jurisdiction. The appellant failed to raise a nonfrivolous allegation that he made a protected disclosure under 5 U.S.C. § 2302(b)(8), or that his probationary termination was based on partisan political reasons or marital status.

Petitioner: Bencie Black
Respondent: Office of Personnel Management
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Number: [2015-3223](#)
MSPB Docket No. DC-0831-14-1113-I-1
Issuance Date: March 11, 2016

Holding: The court affirmed the Board's decision dismissing the appellant's claims for Civil Service Retirement System retirement benefits as barred by the doctrines of res judicata and collateral estoppel where the appellant had litigated these claims and obtained a final decision in a prior Board appeal.

Petitioner: Linda Jwanouskos
Respondent: Department of Homeland Security
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Number: [2016-1086](#)
MSPB Docket No. DC-0752-15-0127-I-1
Issuance Date: March 11, 2016

Holding: The court affirmed the Board's decision dismissing the appellant's claims challenging her removal as barred by the doctrine of collateral estoppel, and dismissing her claims regarding her disability

retirement for lack of jurisdiction because there was no evidence that OPM had issued a final decision on those claims.

Petitioner: Taylor M. Sharpe
Respondent: Environmental Protection Agency
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Number: [2015-3413](#)
MSPB Docket No. DA-0752-14-0034-I-1
Issuance Date: March 14, 2016

Holding: Per Rule 36, the court affirmed the Board's decision sustaining the appellant's indefinite suspension based on his arrest for charges of violating his probation.

Petitioner: Lee Johnson
Respondent: Department of the Navy
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Number: [2015-3174](#)
MSPB Docket No. SF-1221-14-0828-W-1
Issuance Date: March 17, 2016

Holding: Per Rule 36, the court affirmed the Board's decision denying the appellant's request for corrective action in an IRA appeal.

Petitioner: Nancy E. Whitaker
Respondent: Merit Systems Protection Board
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Number: [2015-3085](#)
MSPB Docket No. CH-3330-14-0634-I-1
Issuance Date: March 18, 2016

Holding: Per Rule 36, the court affirmed the Board's decision dismissing the appellant's Veterans Employment Opportunities Act of 1998 (VEOA) appeal as untimely.