



## U.S. MERIT SYSTEMS PROTECTION BOARD

### Case Report for April 8, 2016

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#### BOARD DECISIONS

**Appellant: Edward Bent**

**Agency: Department of State**

**Decision Number: [2016 MSPB 17](#)**

Docket Number: DC-3330-15-0951-I-1 & DC-3330-15-1148-R-1

Issuance Date: April 1, 2016

Appeal Type: Veterans Employment Opportunities Act

Action Type: VEOA - No Otherwise Appealable Action

**VEOA exhaustion**

**Equitable tolling**

The appellant was a preference-eligible veteran. He attempted to apply for a Diplomatic Security Service Special Agent position despite exceeding that position's maximum-entry age restriction. The appellant filed a Board appeal, alleging that the agency violated his veterans' preference rights by refusing to accept his application for the position. The AJ ordered him to prove that he had exhausted his administrative remedies with DOL. The appellant responded with evidence showing that he filed a complaint with DOL after his Board appeal and DOL dismissed the complaint because of the Board appeal. The AJ dismissed the appeal for lack of jurisdiction because the appellant had not filed his complaint with DOL prior to filing his Board appeal.

The appellant filed a petition for review, but also filed a new appeal concerning

the same matter. The AJ dismissed the new appeal without prejudice pending the outcome of his petition for review in the initial appeal, and neither party filed a petition for review of that appeal.

**Holding: The Board reopened the appellant's second appeal, joined it with his first, vacated both initial decisions, and remanded the matter for further adjudication.**

- 1. The Board's practice is to adjudicate an appeal that was premature when filed but ripens while pending before the Board. Because the appellant submitted evidence showing that he had exhausted his remedy with DOL while his first appeal was pending, the AJ erred in finding otherwise.**
- 2. The appellant met his jurisdictional burden under VEOA by (1) proving exhaustion of his administrative remedies with DOL and (2) nonfrivolously alleging that (i) he is preference eligible within the meaning of the VEOA, (ii) the disputed action took place in 2009 (after VEOA went into effect), and (iii) the agency violated his veterans' preference rights by failing to consider him for a position because it imposed an unlawful maximum-entry age requirement.**
- 3. The appellant's complaint to DOL exceeded the 60-day deadline set by the VEOA statute, 5 U.S.C. § 3330a(a)(2)(A). That deadline is not jurisdictional; it is similar to a statute of limitations that is subject to equitable tolling. The Supreme Court has allowed equitable tolling in certain situations, including those where an individual has actively pursued judicial remedies by filing a defective pleading during the statutory period. Accordingly, on remand, the AJ must determine whether the filing deadline should be equitably tolled.**

## COURT DECISIONS

### PRECEDENTIAL:

Petitioner: Angel Canava

Respondent: Department of Homeland Security

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

Case Number: [2015-3083](#)

Issuance Date: April 5, 2016

The appellant was a U.S. Border Patrol Agent. He was indicted on two felony counts, but entered into a plea agreement with the State of Arizona in which he pleaded guilty to "Unlawful Imprisonment by Strangulation, Domestic Violence, a class six undesignated offense." A judgment was entered against him for the "undesignated offense" of unlawful imprisonment.

The agency removed the appellant pursuant to 5 U.S.C. § 7371, which mandates the removal of any law enforcement officer who is convicted of a felony. The appellant invoked arbitration, arguing that he was not convicted of a felony, but only an undesignated offense that is treated like a felony. The arbitrator sustained his removal, and the appellant appealed.

**Holding:** The Court affirmed the arbitrator's decision, upholding the appellant's removal pursuant to 5 U.S.C. § 7371.

1. A prior version of the statute provided discretion, but the current version of section 7371 requires that law enforcement officers convicted of a felony be immediately removed.
2. Although the appellant entered into a plea agreement which provided that his offense would remain "undesignated" and "open-ended," it was appropriate to conclude that he was convicted of a class six felony pursuant to Arizona's A.R.S. § 13-604(A). Under that statute, when a class six felony is left undesignated at sentencing, it is treated as a felony conviction until such time that the judge enters an order designating the offense a misdemeanor.

**NONPRECEDENTIAL:**

**Petitioner:** George Heath

**Respondent:** Department of the Army

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

**Case Number:** [2016-1273](#)

**MSPB Docket No. No. DA-0752-14-0233-B-1**

**Issuance Date:** April 7, 2016

**Holding:** The Court affirmed the underlying decision, which upheld the appellant's removal for failure to carry out assigned duties and failure to observe orders, rules, or procedures where safety to persons or property is endangered. Although the appellant established a prima facie case of whistleblower reprisal for purposes of an affirmative defense, the agency

proved that it would have removed him, notwithstanding his protected disclosure.

**Petitioner:** Joseph Clipse

**Respondent:** Department of Homeland Security

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

**Case Number:** [2016-1209](#)

**MSPB Docket No. No.** [AT-0752-14-0178-I-1](#)

**Issuance Date:** April 7, 2016

**Holding:** The Court affirmed the Board's decision, which upheld the appellant's removal for failure to follow a written directive and lack of candor. Despite the appellant's arguments, the Court found no basis for disturbing the credibility findings of the AJ.

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