



## U.S. MERIT SYSTEMS PROTECTION BOARD

### **Case Report for December 23, 2016**

**Note:** These summaries are descriptions prepared by individual MSPB employees. They do not represent official summaries approved by the Board itself, and are not intended to provide legal counsel or to be cited as legal authority. Instead, they are provided only to inform and help the public locate Board precedents.

#### **BOARD DECISIONS**

**Appellant:** Michael R. Palafox  
**Agency:** Department of the Navy  
**Decision Number:** [2016 MSPB 43](#)  
**Docket Number:** SF-0752-16-0219-I-1  
**Issuance Date:** December 20, 2016  
**Appeal Type:** Adverse Action by Agency  
**Action Type:** Indefinite Suspension

#### **Adverse Action Charges**

- Failure to Meet a Condition of Employment

#### **National Security Determinations**

- Access to Classified Information

#### **Due Process**

The appellant occupied a Shipfitter Supervisor position that required access to classified information. Following an investigation into illegal drug use by shipyard employees, the Shipyard Commander suspended the appellant's access to classified information, based on allegations that he had falsely denied using marijuana during his employment. The agency then indefinitely suspended the appellant for failure to meet a condition of employment based on the suspension of his access to classified information. In the decision letter, the deciding official stated that he concurred with the proposing official's finding that carrying the appellant on administrative leave or reassigning him to a position not requiring access to classified information were not viable alternatives. On appeal, the appellant conceded that his position required access to classified information, and that his access had been suspended, but argued that the agency denied him due process. The administrative judge sustained the indefinite suspension, and the appellant petitioned for review.

**Holding:** The Board affirmed the initial decision and sustained the indefinite suspension action.

1. Due process requires, at a minimum, that an employee being deprived of his property interest be given the opportunity to be heard at a meaningful time and in a meaningful manner. The opportunity to respond is important for two reasons. First, an adverse action will often involve factual disputes and consideration of the employee's response may clarify such disputes. Second, even where the facts are clear, the appropriateness of the penalty might not be, and in such cases the employee must receive a meaningful opportunity to invoke the discretion of the decision maker.
2. As to the facts underlying the proposed action, the agency provided due process by informing the appellant of the basis for the indefinite suspension, i.e., that his position required access to classified information and that his access had been suspended. The agency further complied with 5 U.S.C. § 7513 by informing the appellant of the specific reasons for the suspension of his access to classified information.
3. Regarding the penalty, the appellant argued that he was denied a meaningful opportunity to persuade the deciding official to reassign him instead of imposing the proposed indefinite suspension, because reassignment would have been inconsistent with agency policy. However, assuming the agency did have such a policy (which the agency denied), due process does not require that a deciding official consider alternatives that are prohibited, impracticable, or outside management's purview. The Board further found that the deciding official had discretion to carry the appellant on administrative leave if he believed the allegations underlying the suspension of his access to classified information were not well founded, and the appellant received a fair opportunity to present rebuttal evidence before the final

penalty determination.

4. Finally, the Board found no merit the appellant's argument that he was denied due process with respect to the suspension of his access to classified information. It is well settled that employees do not have a liberty or property interest in access to classified information, and that the termination of that access therefore does not implicate any due process concerns.

**Appellant:** Richard L. Miller  
**Agency:** Office of Personnel Management  
**Decision Number:** 2016 MSPB 44  
**Docket Number:** DE-0831-14-0340-I-1  
**Issuance Date:** December 20, 2016  
**Appeal Type:** Retirement

**Retirement - CSRS**  
- Creditable Service

The appellant had a long and complicated history of civilian and military service, of which two periods are of particular relevance to this appeal. During the first relevant period, from August 27 to October 25, 1990, the appellant was both a civilian employee with the Defense Intelligence Agency (DIA) and an Air Force reservist. He was called to active duty effective August 27, 1990, entered LWOP status with the DIA effective that same date, and was separated from the DIA the following year.

The next pertinent period began August 22, 1994, when the appellant was reinstated to a civilian position with the DIA, and ended December 22, 1995, when he retired from the DIA under a Voluntary Early Retirement Authority (VERA). In the interim, effective September 1, 1994, he also retired from active duty with the Air Force under a Temporary Early Retirement Authority (TERA). However, the Air Force Board for Correction of Military Records (AFBCMR) later corrected the appellant's records to retroactively designate the period beginning September 1, 1994, as active military duty. As a result of this correction, he no longer met the requirements of his VERA and TERA retirements, and they were cancelled. He eventually returned to civilian service with the DIA until his final retirement in 2012.

Following his final retirement, OPM issued a reconsideration decision finding that the appellant had 15 years, 3 months, and 29 days of creditable service for purposes of his CSRS annuity. In making that calculation, OPM excluded certain periods of civilian service, including both August 27 to October 25, 1990, and August 22, 1994, to December 22, 1995. This appeal followed.

Relying on OPM's *CSRS and FERS Handbook for Personnel and Payroll Officers* (Handbook), the administrative judge found that the appellant was potentially entitled to civilian service credit for August 27 through October 25, 1990, if he was required to make, and did make, a military service deposit for that period. The administrative judge

further found that the appellant was entitled to civilian service credit from August 22, 1994, through December 22, 1995. OPM petitioned for review.

**Holding:** The Board reversed the initial decision and affirmed OPM's reconsideration decision.

1. Under 5 U.S.C. § 8332(c)(1)(A), a Federal employee covered under the CSRS who, like the appellant, first became an employee before October 1, 1982, is generally entitled to have active-duty military service performed before his separation included as creditable service for purpose of calculating a CSRS annuity. However, section 8332(c)(2) provides that an employee usually cannot receive both military and civilian service retirement credit for the same periods:

If an employee or Member is awarded retired pay based on any period of military service, the service of the employee or Member may not include credit for such period of military service unless the retired pay is awarded—

- (A) based on a service-connected disability—
  - (i) incurred in combat with an enemy of the United States; or
  - (ii) caused by an instrumentality of war and incurred in line of duty during a period of war as defined by section 1101 of title 38; or
- (B) under chapter 1223 of title 10 (or under chapter 67 of that title as in effect before the effective date of the Reserve Officer Personnel Management Act).

5 U.S.C. § 8332(c)(2); *see also* 5 C.F.R. § 831.302(a)(2). In addition, section 8332(j) provides that, absent a deposit, post-1956 military service is excluded from civilian service credit once an employee becomes eligible for Social Security old-age benefits.

2. During the period from August 27 to October 25, 1990, the appellant was simultaneously employed as a civilian at DIA and performing active-duty military service for the Air Force. Relying on section 22A6.1-2(A) of the Handbook, the administrative judge found that, because the appellant was on leave of absence from his civilian position, he was entitled to CSRS service credit if he was required to make, and did make, a military service deposit for that period. However, the Board agreed with OPM that awarding the appellant CSRS credit for this period was contrary to the plain language of 5 U.S.C. § 8332(c)(2), which precludes the award of double credit for overlapping periods of civilian and military service, except under circumstances not applicable here. Thus, in the absence of proof that the appellant waived his military retirement service credit, he could not receive CSRS credit for the same period, regardless of whether he made or could have made a deposit. The Board noted that the Handbook is entitled to deference in proportion to its "power to persuade," but found that it was not persuasive because it did not explain why the general prohibition against an individual receiving both civilian and military

service for the same period, as delineated in 5 U.S.C. § 8332(c)(2) and its implementing regulation, would not apply in this situation.

3. During the period from August 22, 1994, to December 22, 1995, the appellant was employed as a civilian at DIA. However, as a result of AFBCMR correcting his military service dates, his military records were corrected to reflect continuous military service during this period. The administrative judge found that the appellant was entitled to civilian service credit for this period based on section 22A6.1-4(B) of the Handbook, which provides for CSRS service credit when a court awards a former service member retroactive military reinstatement with back pay and allowances. Section 22A6.1-4(B) further provides that neither a deposit for military service, nor waiver of military service, is required. The Board again found that the Handbook was not persuasive, because it did not explain why the general prohibition against an individual receiving both civilian and military service credit for the same period would not apply in this situation. The Board further found that, in the absence of proof that the appellant waived his military retirement service credit, he was not entitled to CSRS credit for the relevant period.

**Appellant:** Alvern C. Weed  
**Agency:** Social Security Administration  
**Decision Number:** [2016 MSPB 45](#)  
**Docket Number:** DE-1221-09-0320-P-2  
**Issuance Date:** December 21, 2016  
**Appeal Type:** Motion for Damages

**VEOA/Veterans' Rights**  
- Damages  
**Statutory Interpretation**

In 2008, the appellant, a 10-point compensable preference-eligible veteran, filed appeals in which he alleged, inter alia, that the agency violated his veterans' preference rights and discriminated against him in violation of USERRA. Specifically, he alleged that, between 2006 and 2007, the agency filled four vacancies in its Kalispell, Montana office under the noncompetitive authority of the Federal Career Intern Program without providing public notice of the vacancies or otherwise providing him with an opportunity to compete for the vacancies. The administrative judge initially dismissed the VEOA and USERRA appeals for lack of jurisdiction. The Board reversed and remanded, and the appeals were later joined with an individual right of action (IRA) appeal.

In a remand initial decision, the administrative judge granted corrective action in the VEOA appeal, but denied corrective action in the USERRA and IRA appeals. On petition for review, the Board affirmed the remand initial decision, and ordered the agency to reconstruct the hiring process for the four vacancies. The agency did not reconstruct

the hiring process, but within 30 days of the Board's order it made a job offer retroactive to September 5, 2006, the date on which it filled the first of the positions in question. The appellant, who had already retired in 2008, did not accept the offered position.

The appellant then filed a petition for damages seeking compensation for lost wages and benefits, expenses he incurred as a result of the violation, and liquidated damages based on his assertion that the agency's violation was willful. In an addendum initial decision, the administrative judge found that the appellant was entitled to lost wages—but not benefits—from September 5, 2006, the selection date of the first of the four positions, until such time as he was placed in the position or declined the position at issue, i.e., October 17, 2012. The administrative judge further found that the appellant's request for retirement service credit for that period was premature, because OPM had not issued a final determination on that issue. Regarding the appellant's claim for liquidated damages, the administrative judge found that the agency did not willfully violate the appellant's veterans' preference rights, because it had a good faith belief that it was not necessary to reconstruct the hiring process when it had promptly offered the appellant a position. The administrative judge also found that the Board was not authorized to award the appellant consequential damages or front pay as remedies under VEOA. The appellant petitioned for review.

**Holding:** The Board granted the appellant's petition for review and affirmed the addendum initial decision as modified by the Opinion and Order, awarding the appellant compensation for lost benefits as well as lost wages.

1. Regarding the claim for liquidated damages, the Board agreed with the administrative judge that the agency did not willfully violate the appellant's veterans' preference rights by failing to comply with the Board's order to reconstruct the hiring process. A violation is willful under 5 U.S.C. § 3330c(a) when the agency either knew or showed reckless disregard for whether its conduct was prohibited. Reconstruction of the selection process may be appropriate when it is unknown whether a veteran would have been selected for a position. However, reconstruction is not required when it is clear that the agency would have selected the veteran absent the VEOA violation. Here, the agency determined that it would have been obligated to select the appellant for any of the four positions at issue, and it made him an offer of a position within 30 days of the Board's order. Under these circumstances, the record did not establish that the agency knew or showed a reckless disregard of whether its offer of one of the positions at issue, as opposed to reconstructing the selection process, could be considered a violation of a statute or regulation relating to veterans' preference.

2. The Board agreed with the appellant that he was entitled to full status quo ante relief, including both lost wages and benefits. Under 5 U.S.C. § 3330c(a), if the Board determines that an agency has violated VEOA, it "shall . . . award

compensation for *any loss of wages or benefits* suffered by the individual by reason of the violation involved.” Relying on a footnote in *Williams v. Department of the Air Force*, 116 M.S.P.R. 245, ¶ 1 n.1 (2011), the administrative judge found that the statutory language permits an award of lost wages or lost benefits, but not both, and he awarded lost wages only. However, the Board noted, the word “or” has both an inclusive sense (i.e., A or B [or both]), and an exclusive sense (i.e., A or B [but not both]). The Board concluded that, when read as a whole, the phrase “any loss of wages or benefits” requires the Board to award compensation for both wages *and* benefits if both types of losses have occurred. The Board found that this broad interpretation is consistent with VEOA’s remedial purpose and legislative history. In addition, the Board observed that similar statutes, including VEOA’s predecessor statute, the Veterans’ Reemployment Rights Act, as well as USERRA, have been interpreted as authorizing an award of both lost wages and benefits. Accordingly, the Board overruled the footnote in *Williams* and found that the appellant was entitled to be compensated for any loss of wages and benefits he suffered from September 4, 2006, until October 17, 2012. The Board further found that the term “benefit” should be construed to include CSRS service credit and Social Security credit for the period at issue.

3. Finally, the Board agreed with the administrative judge that the Board is not authorized under VEOA to award consequential damages or front pay as remedies. Nothing in the statute indicates that the Board is authorized to award out-of-pocket expenses, and the Board may not create new remedies that Congress may have overlooked.