



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for June 30, 2017

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SUPREME COURT DECISIONS

Petitioner: Anthony W. Perry

Respondent: Merit Systems Protection Board

Case Number: [16-339](#)

Decision Below: [829 F.3d 760](#) (D.C. Cir. 2016)

MSPB Docket Number: [DC-0752-12-0486-B-1, DC-0752-12-0487-B-1](#)

Issuance Date: June 23, 2017

Appeal Type: Adverse Action by Agency

Action Type: Constructive Suspension; Constructive Removal

Constructive Adverse Actions

Mixed Cases

Judicial Review

The Department of Commerce proposed the petitioner's removal for attendance-related reasons, and the petitioner filed an equal employment opportunity (EEO) complaint. During proceedings before the Equal Employment Opportunity Commission, the parties entered into a universal settlement agreement, in which they agreed that the petitioner would serve a

30-day suspension and then retire.

The petitioner filed a Board appeal, claiming that his suspension and his retirement were involuntary. The administrative judge dismissed the appeal for lack of jurisdiction. Ultimately, the Board affirmed, issuing a nonprecedential final order finding that the petitioner failed to establish jurisdiction over his appeal. The Board explained that, although the petitioner raised issues of discrimination in his appeal, it was not a mixed case because the Board lacked jurisdiction over it. The Board therefore gave the petitioner notice of non-mixed case appeal rights and directed him to the U.S. Court of Appeals for the Federal Circuit for judicial review.

The petitioner filed a petition for review with the U.S. Court of Appeals for the D.C. Circuit instead. Although it was clear that the D.C. Circuit lacked jurisdiction over the case, it was less clear whether the case should be transferred to the Federal Circuit or to a Federal district court. The Federal Circuit has jurisdiction over non-mixed cases, whereas mixed cases go to the appropriate district court. The D.C. Circuit held that a “mixed case” is, by statutory definition, a case that both involves discrimination and is within the Board’s jurisdiction. 5 U.S.C. § 7702(a)(1)(A). Because the Board found that this case was not within its jurisdiction, it was not a mixed case, and therefore the court ordered the case transferred to the Federal Circuit.

The Supreme Court granted certiorari to determine the proper forum of judicial review.

Holding: Justice Ginsburg delivered the opinion of the Court, reversing the D.C. Circuit and finding that district court is the proper forum for judicial review of a case involving discrimination that is dismissed for lack of jurisdiction by the Board. Justices Gorsuch and Thomas joined in a dissent.

1. In *Kloeckner v. Solis*, 568 U.S. 41 (2012), the Court held that district court is the proper forum for judicial review of a mixed case whether the Board decides it on the merits or dismisses it on procedural grounds. The question in this case is what the proper forum is when the Board dismisses such a case on jurisdictional grounds.
2. The Court rejected the distinction between procedural and jurisdictional dismissals in this context, explaining that the key to district court review is the employee’s *claim* that an action appealable to the Board violated an antidiscrimination statute listed in 5 U.S.C. § 7702(a)(1). Because the petitioner complained of a personnel action serious enough to appeal to the Board and alleged that it was based on discrimination, he

brought a mixed case.

3. The Court's reading of the statute is supported by policy reasons. First, the distinction between dispositions on merits, jurisdictional, and procedural grounds is "not inevitably sharp" and may in some cases be unworkable. Second, allowing cases such as this one to be appealed to district court avoids the problem of bifurcated review when an employee's claims under civil-service law and antidiscrimination statutes pertaining to a single agency action must be reviewed separately by the Federal Circuit and district court respectively.

4. The dissent would have affirmed the D.C. Circuit on the basis that the plain language of the statute places this case within the Federal Circuit's jurisdiction. The dissent also expressed doubts about whether the majority decision would promote judicial economy and uniformity.

NON-PRECEDENTIAL BOARD DECISION OF NOTE

Appellant: Special Counsel ex rel. Dale Klein
Agency: Department of Veterans Affairs
Docket Number: CB-1208-16-0023-U-7
Issuance Date: June 29, 2017
Appeal Type: Request for Stay (OSC Filed)

Special Counsel Actions
Whistleblower Protection Act
Stays

On May 26, 2016, OSC filed a request for a 45-day stay of a decision of the Department of Veterans Affairs (DVA) to terminate Dr. Klein during his probationary period, effective April 28, 2016. The Board granted OSC's stay request, and subsequently granted several extensions of the stay, which was in place from June 1, 2016, through May 12, 2017. On June 14, 2017, OSC filed another stay request, seeking a 90-day stay of the removal action that DVA had initiated on May 31, 2017 - after the previous stay's expiration. Vice Chairman Robbins denied the stay request without prejudice on the basis that the Board lacked a quorum and thus had no authority to grant the stay extension under current law. He noted, however, that Congress had recently passed legislation amending 5 U.S.C. § 1214 to allow an individual Board member to extend a stay granted under section 1214(b)(1)(A) during periods when the Board lacks a quorum. Once

the legislation was enacted, OSC would be allowed to file a new request for a retroactive extension of the stay. Following the enactment of the legislation, OSC filed such a request

Holding: In a nonprecedential decision, Vice Chairman Robbins granted OSC's request stay in part through July 14, 2017, retroactive to May 13, 2017.

1. On May 25, 2017, and June 14, 2017, respectively, the House and the Senate passed a bill to add the following language to 5 U.S.C. § 1214(b)(1)(B): "(ii) If the Board lacks the number of members appointed under section 1201 required to constitute a quorum, any remaining member of the Board who was appointed, by and with the advice and consent of the Senate, may, upon request by the Special Counsel, extend the period of any stay granted under subparagraph (A)." S. 1083, 115th Cong.
2. On June 27, 2017, President Trump signed the bill into law. Pub. L. No. 115-42, 131 Stat 883. Thus, despite the lack of a quorum, Vice Chairman Robbins was now able to act on OSC's stay request.
3. Under the unusual circumstances of this case, Vice Chairman Robbins found it appropriate to grant OSC's request through July 14, 2017, retroactive to May 13, 2017. The Board's regulations require that the DVA be given an opportunity to comment on any request for an extension, which it would be permitted to do on or before July 6, 2017. Vice Chairman Robbins will rule on the remaining balance of OSC's 90-day stay request at that time.

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