



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for July 21, 2017

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COURT DECISIONS

PRECEDENTIAL:

Petitioners: Judith Miskill, AFGE Local 1923

Respondent: Social Security Administration

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

Case Number: [2016-1598](#)

Arbitrator's Decision No. BW-2014-R-004

Issuance Date: July 20, 2017

The agency removed Ms. Miskill for violations of the its time and attendance policy. The American Federation of Government Employees submitted a grievance on her behalf. The designated agency official denied the grievance, and the union invoked arbitration. In preparation for the arbitration hearing, Ms. Miskill requested turnstile records and time reports of eight other individuals in her component. Upon professional analysis of these records, Ms. Miskill argued that the penalty of removal was too harsh because the eight other employees had committed the same or similar violations as she had, but none of them had been investigated or charged with misconduct. The Arbitrator sustained Ms. Miskill's removal after finding that the comparators were not similarly situated to her because possible disciplinary action regarding these other employees was still pending an investigation.

Ms. Miskill appealed the arbitration decision to the court. The agency

argued that the Collective Bargaining Agreement (CBA), which provides that “[a]n arbitrator may only consider issues that were raised at the last step of the grievance process,” precluded the arbitrator from considering Ms. Miskill’s comparator evidence, which she raised for the first time during arbitration.

Holdings:

- (1) Declining to interpret “issue” as narrowly as suggested by the agency, the court found that Ms. Miskill sufficiently raised the issue of disparate treatment during the grievance process by arguing that her removal was not in compliance with the requirements of *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305 (1981), which requires agencies, in determining the appropriate penalty, to consider the consistency of the penalty with those imposed upon other employees for the same or similar offenses.
- (2) The court found, however, that the arbitrator erred by imposing a “categorical rule of exclusion” that similarly situated employees under investigation could not be comparators. The court explained that, although the fact that a comparator employee is under investigation is a factor to be considered in determining whether that comparator is similarly situated, it is not a complete bar.
- (3) The court vacated the arbitration decision and remanded the matter to the arbitrator.

Petitioner: Laurence M. Fedora

Respondent: Merit Systems Protection Board

Intervenor: U.S. Postal Service

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

Case Number: [2015-3039](#)

MSPB Docket No. SF-0752-0433-I-1

Issuance Date: July 20, 2017

The appellant petitioned for rehearing en banc of the court’s panel decision in *Fedora v. Merit Systems Protection Board*, 848 F.3d 1013 (Fed. Cir. 2017), which dismissed his untimely filed petition for review with the court for lack of jurisdiction on the grounds that the timeliness requirement of 5 U.S.C. § 7703(b)(1)(A) is jurisdictional in nature and is not subject to equitable tolling.

The court requested supplemental briefing in light of the Supreme Court’s holding in *Perry v. Merit Systems Protection Board*, 137 S. Ct. 1975 (2017), which held that the proper forum for review of the Board’s

jurisdictional dismissal of a mixed case is district court, not the Federal Circuit. A mixed-case appeal is one in which an employee complains that a personnel action serious enough to appeal to the Board was based on discrimination.

The appellant elected to abandon his discrimination claims to avoid the jurisdictional concern addressed in *Perry*, and the Government agreed to the waiver. The court thus found that it had jurisdiction over the appeal.

The court denied the appellant's petition for panel rehearing and his petition for rehearing en banc.

The dissent would have granted the appellant's petition for rehearing en banc to revisit the issue of whether the filing deadline in § 7703(b)(1)(A) is properly defined as a jurisdictional requirement.

Petitioner: Robert D. Vocke, Jr.

Respondent: Merit Systems Protection Board

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

Case Number: [2016-2390](#)

MSPB Docket No. DC-1221-13-1266-W-1

Issuance Date: July 20, 2017

The appellant filed a petition for rehearing en banc of the panel decision dismissing his untimely filed petition for review. The appellant sought review of the Board's decision dismissing his individual right of action appeal for lack of jurisdiction. In the panel decision, the court found that it lacked jurisdiction because the timeliness requirement of 5 U.S.C. § 7703(b)(1)(A) is jurisdictional in nature and is not subject to equitable tolling.

The court denied the appellant's petition for panel rehearing and his petition for rehearing en banc.

The dissent would have granted the appellant's petition for rehearing en banc for the reasons stated in the dissent from denial of the petition for rehearing en banc in *Fedora v. Merit Systems Protection Board*, No. 15-3039.

Petitioner: Jeffery S. Musselman

Respondent: Department of the Army

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

Case Number: [2016-2522](#)

MSPB Docket No. DA-1221-14-0499-W-3

Issuance Date: July 20, 2017

The appellant filed an untimely petition for review of the Board's final order denying his request for corrective action in an individual right of action appeal. He subsequently requested an initial hearing en banc.

The court denied the appellant's petition for hearing en banc.

The dissent would have granted the appellant's petition for hearing en banc for the reasons stated in the dissent from denial of the petition for rehearing en banc in *Fedora v. Merit Systems Protection Board*, No. 15-3039.

NONPRECEDENTIAL:

Sweeting v. Merit Systems Protection Board, [No. 2016-2540](#) (July 19, 2017) (MSPB Docket No. AT-315H-16-0389-I-1) (Rule 36 affirmance).

Henley v. Merit Systems Protection Board, [No. 2016-2176](#) (July 19, 2017) (MSPB Docket No. AT-0752-15-0087-I-1) (accepting the appellant's waiver of his discrimination claims to retain jurisdiction and affirming the Board's dismissal of his alleged involuntary resignation appeal for lack of jurisdiction).

Jones v. Department of Health and Human Services, [No. 2017-1353](#) (July 17, 2017) (MSPB Docket Nos. DE-4324-15-0474-I-1, DE-4324-15-0499-I-1) (affirming the Board's denial of the appellant's request for corrective action in his joined Uniformed Services Employment and Reemployment Rights Act of 1994 appeals; finding that the Board did not abuse its discretion in terminating the appellant's hearing based on the appellant's "rude and disrespectful conduct which regularly escalate[d] from advocacy to contumaciousness"; and finding no merit to the appellant's allegations of "targeted delays" by the Board or his allegations that the Board supports discrimination against veterans).

Warrender v. Office of Personnel Management, [No. 2017-1679](#) (July 14, 2017) (MSPB Docket No. DC-0845-15-1135-I-1) (affirming the Board's final order affirming the Office of Personnel Management's decision denying the appellant's request for waiver of an overpayment paid under the Federal Employees Retirement System).