



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for September 8, 2017

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.

COURT DECISIONS

PRECEDENTIAL:

Petitioner: Jason John Piccolo

Respondent: Merit Systems Protection Board

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

Case Number: [2016-2374](#)

Issuance Date: September 7, 2017

Individual right of action (IRA) appeals

Nonfrivolous allegations

Contributing factor

The petitioner was a Detention and Deportation Officer at the Department of Homeland Security. He filed an IRA appeal with the Board, claiming that the agency took personnel actions against him in retaliation for a disclosure that he made concerning the agency's practice of releasing unaccompanied alien children to non-family sponsors with criminal records.

The administrative judge dismissed the appeal for lack of jurisdiction, finding that the petitioner failed to make a nonfrivolous allegation that his disclosure

was a contributing factor in the contested personnel actions. On appeal to the Federal Circuit, the Board conceded that the administrative judge's ruling was the product of legal error.

Holding: The court reversed the Board's decision and remanded the appeal for an adjudication of the merits, including the appellant's requested hearing.

1. The Board has jurisdiction over an IRA appeal if the petitioner has exhausted all administrative remedies and makes nonfrivolous allegations that he made a protected disclosure that was a contributing factor in a personnel action.

2. The Board must separate the issue of jurisdiction from that of the merits. At the jurisdictional stage, the petitioner need only make nonfrivolous allegations of a protected disclosure that was a contributing factor in reprisal.

3. In this case, the administrative judge arrived at his jurisdictional determination by considering evidence that pertained to the merits of the case, i.e., an affidavit in which the alleged retaliating official disclaimed any knowledge of or motive to retaliate for the petitioner's disclosure.

4. The court has also required that petitioners in IRA appeals be provided "notice of deficiencies before a claim is finally dismissed" and "an opportunity to cure" their pleadings where specific details are "readily available."

NONPRECEDENTIAL:

Dullas v. Office of Personnel Management, No. [2017-1683](#) (Sep. 7, 2017) (SF-0831-16-0165-I-1) (affirming Board's decision that upheld the Office of Personnel Management's final decision denying the petitioner's application for Civil Service Retirement System benefits on the basis that the petitioner, a Philippine shipyard worker, lacked the requisite covered service).