



U.S. Merit Systems Protection Board

CASE REPORT

DATE: January 5, 2007

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

Lary v. U.S. Postal Service

Fed. Cir. No. 3050; MSPB Docket No. DE-0752-02-0233-C-1
December 21, 2006

HOLDING: The agency materially breached the parties' settlement agreement by failing to timely provide documents necessary for the appellant's disability retirement application; rescission was not an effective remedy because the appellant had missed the deadline for filing his disability retirement application; the Board must order specific performance, i.e., the agency must re-do all steps contemplated by the agreement.

The agency removed the appellant, who suffers from Obstructive Sleep Apnea, for attendance-related problems. On appeal, the parties entered into a settlement agreement, under which the agency agreed, among other things, to timely provide the following three documents, required by 5 C.F.R. § 844.203(a), for the appellant's disability retirement application: The Supervisor's Statement; the Agency Certification of Reassignment and Accommodation Efforts; and the Disability Retirement Checklist. The agency did not timely provide the documents, and ultimately the agency itself filed the appellant's application and the Office of Personnel Management (OPM) rejected it because it was filed more than one year from the appellant's separation.

The appellant filed a petition for enforcement of the settlement agreement, alleging that the agency had breached the agreement. The administrative judge denied the petition for enforcement, finding in pertinent part, that the agency's failure to provide the needed documents in a timely fashion was not a material breach of the settlement agreement. The Board affirmed the compliance decision. Member Sapin dissented, arguing that the

agency had materially breached the settlement agreement because it had prevented the appellant from timely applying for disability retirement.

On appeal, the court vacated the Board's decision and remanded the appeal. The court held that the agency's breach was material because the agency's promise to timely provide the documents was central to the settlement agreement. The court rejected the agency's argument that the breach was not material because, under OPM regulations, the appellant could have filed an incomplete application and avoided missing the deadline. The court stated that this argument is relevant only to the question of whether the appellant could have mitigated damages and not to the materiality of the breach. The court further found that, even if the appellant had filed an incomplete application and thus avoided missing the one-year deadline, he would still have been irreparably harmed by the breach because disability benefits do not begin to accrue until all application requirements have been met and the application is complete.

The court determined that rescission was not an adequate remedy because reinstating the appeal would not change the fact that the appellant missed the OPM deadline. Instead, the court found that the Board must order specific performance -- the agency must re-do all steps contemplated by the agreement. Thus, the Board must order the agency to vacate any and all of the appellant's prior removals, proposed removal letters and PS Form 50's and expunge them from the records and issue a new removal letter, effective on the date of issuance, and a new PS Form 50 indicating medical inability to perform as the reason for removal. The Board must further order the agency to timely provide the required documents, which should reference only the date of removal entered pursuant to the order of specific performance and not any earlier removals. The appellant would then be able to file for disability retirement benefits within one year of the new removal. Finally, because the appellant's previous removals will be expunged, the Board must award back pay and any other relief that the appellant may be due.

FEDERAL CIRCUIT AFFIRMANCES/DISMISSALS (NP)

The following appeals were affirmed:

Elinburg v. U.S. Postal Service, 06-3254; SF-0752-05-0900-I-1 (12/22/06)

Gaston v. Merit Systems Protection Board, 06-3264; NY-3443-06-0036-I-1 (12/22/06)

Waddoups v. Department of the Air Force, 06-3127; DE-0752-04-0252-I-1 (12/21/06)
(Rule 36)

FEDERAL REGISTER NOTICES

71 Fed Reg. 78033 (12/28/06)

OPM issued final regulations to carry out the reporting and best practices requirements of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act) which

requires federal agencies to report annually on certain topics related to federal antidiscrimination and whistleblower protection laws and also requires a comprehensive study to determine the executive branch's best practices concerning disciplinary actions against employees for conduct that is inconsistent with these laws.

71 Fed Reg. 78235 (12/28/06)

OPM requested that the Office of Management and Budget approve a collection associated with the Scholarship for Service Program (a program to increase the number of qualified students entering the fields of information assurance and computer security) Internet webpage.