



U.S. Merit Systems Protection Board

CASE REPORT

DATE: January 12, 2007

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BOARD DECISIONS

Talavera v. Agency for International Development,

MSPB Docket No. DC-0752-05-0801-I-2

January 9, 2007

Constitutional Issues/Due Process

- Due Process

Penalty

- Miscellaneous

HOLDING: The agency deciding official did not violate the appellant's due process rights by considering the appellant's false statements in her written reply to the notice of proposed removal in making his penalty determination because it would be appropriate to consider such behavior in assessing the appellant's potential for rehabilitation, which is a relevant consideration in making a penalty determination. Even if the deciding official had considered misconduct outside of that included in the notice of proposed removal, the appellant was not denied any due process because the Board found that the penalty of removal was reasonable.

The agency removed the appellant, a security specialist, on four charges: Misrepresentation of a material fact; providing false information to a supervisor; inattention to duty; and failure to comply with instructions. The appellant filed a discrimination complaint with the agency and after 120 days had elapsed without an agency final decision, the appellant filed an appeal with the Board. Following a hearing, the administrative judge (AJ) found that the agency had proven 3 of the 4 charges, that the appellant had not proven her affirmative defenses of discrimination and retaliation, and that the penalty of removal was reasonable. The appellant petitioned for review, challenging

the AJ's findings and reasserting that the agency violated her due process rights because the deciding official considered matters outside the notice of proposed removal in selecting a penalty.

The Board held that the appellant failed to show any error in the AJ's findings regarding the charges and her affirmative defenses; however, the Board granted the petition to consider the appellant's due process argument that the AJ did not address below. The Board affirmed the removal. The evidence in the record did not support the appellant's allegation that the deciding official considered one piece of information outside the notice of proposed removal. The deciding official did consider another piece of information in his penalty determination, the appellant's false written statements in response to the proposed removal. The Board found that consideration of such information was appropriate in determining a penalty because it clearly went to the appellant's potential for rehabilitation, a relevant consideration in making a penalty determination. Therefore, the consideration of that information by the deciding official when determining an appropriate penalty did not deny the appellant any due process. Furthermore, even if consideration of such information was error by the deciding official, there was no denial of due process because the Board considered the *Douglas* factors and found the penalty of removal to be reasonable.

Hardy v. U.S. Postal Service,

MSPB Docket No. CH-0353-05-0849-I-1

January 10, 2007

Retirement

- Disability Retirement
- Recovery from Disability
- Restoration to Earning Capacity

Miscellaneous Agency Actions

- Restoration to Duty

Defenses and Miscellaneous Claims

- Collateral Estoppel/Res Judicata/Law of the Case

Discrimination

- Physical/Mental Disability – Accommodation

Jurisdiction

- Discrimination Complaints/Mixed Cases
- Miscellaneous

HOLDING: The appellant established jurisdiction over his denial of restoration claim but failed to show that the agency acted arbitrarily and capriciously in delaying restoration while awaiting confirmation from OWCP of his restrictions because there was conflicting medical evidence as to the appellant's recovery from his disability. The Board lacked jurisdiction over the appellant's constructive suspension claim because he

was not a preference eligible postal employee and he was precluded from re-litigating the issue of his veterans' preference status because he had the opportunity to litigate the identical issue in a prior appeal.

The appellant suffered an injury at work which affected his right shoulder and back. He began to receive Office of Workers' Compensation Programs (OWCP) benefits and applied and received a disability retirement. OPM, upon approving his disability retirement requested the agency to separate the appellant, which it did, effective May 3, 2004. On July 21, 2004, the agency offered the appellant a modified position to return to work. The appellant declined, asserting that he was retired. The appellant underwent two medical exams in January and April 2005, both of which found him no longer disabled and OWCP terminated his benefits on July 23, 2005. The appellant reported for work on August 2, 2005 and was told that he was no longer on the rolls. The appellant filed this appeal and a separately docketed involuntary retirement claim with the Board. The involuntary retirement claim was dismissed for lack of jurisdiction because the appellant failed to show he was a preference-eligible employee or a management or supervisory employee. That initial decision became final on May 5, 2006.

In this appeal the appellant made essentially three claims: That he was constructively suspended, that he was denied restoration as a partially recovered employee, and that his denial of restoration was discriminatory, based upon his disability. The Board dismissed the appellant's constructive suspension claim for lack of jurisdiction because the appellant was not a preference eligible veteran. The appellant claimed for the first time on PFR that he was a 5 point preference eligible marine veteran; however, he provided no evidence in support of this claim. Moreover, he was precluded from re-litigating this issue because this identical issue was necessarily litigated in the appellant's previously decided involuntary retirement appeal and the AJ had found that the appellant was not preference eligible after the appellant had a full and fair opportunity to litigate the issue.

With respect to the appellant's restoration claims, the Board lacked jurisdiction over his claim that the agency's July 21, 2004 job offer was so unreasonable as to be a denial of restoration because the appellant provided no evidence to show that the appellant had requested restoration at the time. In fact, the record showed that the appellant expressed no desire to return to duty at the time. The appellant did request restoration in August 2005, after his OWCP benefits were terminated. He made sufficient non-frivolous allegations to establish Board jurisdiction because he was separated due to a compensable injury, there was some medical evidence that he was recovered to some degree, the agency acknowledged that he requested restoration in August 2005, and he alleged that the agency's response to his request was effectively a denial of restoration and was arbitrary and capricious.

Having established jurisdiction, the appellant failed to prevail on the merits. Unlike previous cases where an agency's delay in restoring an

employee may have been arbitrary and capricious in the face of unrebutted medical evidence of the appellant's recovery, the agency was faced in this case with conflicting medical evidence that the appellant was either fully recovered or only partially recovered, if at all. Moreover, OWCP had yet to make a final determination as to the appellant's restrictions, if any. Accordingly, the agency's decision to await OWCP's final determination did not constitute an arbitrary and capricious denial of restoration. Furthermore, the appellant's refusal to cooperate with the agency's Manager of Personnel Services and OPM to facilitate his restoration undermines his argument that the agency acted arbitrarily and capriciously in filling two positions after he had requested restoration.

Having found jurisdiction over the appellant's restoration claim, the Board addressed his discrimination claim and found that he failed to prove any discrimination. He failed to articulate a reasonable accommodation under which he could perform. He failed to show that the agency acted under a misperception that he was more disabled than was the case. He failed to show that the agency believed he was unable to performance the major life activity of a job. He failed to present evidence that he was disparately treated as compared to a similarly situated employee.

Jensen v. Department of Agriculture,
MSPB Docket No. CH-1221-05-0844-W-1
January 10, 2007

Whistleblower Protection Act

- Protected "Disclosure"
- Miscellaneous

HOLDING: The appellant's disclosures were not protected under the WPA because she failed to establish that she reasonably believed that the information she disclosed evidenced a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. The AJ erred in finding that the agency conceded that the appellant's disclosures were protected under the WPA because such a question is a matter of mixed fact and law and stipulations on such matters are not binding.

The appellant, a supervisory computer specialist with the agency, alleged that after she testified in another employee's EEO proceeding the agency began taking adverse personnel actions against her. She also alleged that these continued after she was interviewed by the agency's Office of the Inspector General (OIG), specifically that she was reassigned to a non-supervisory position. The information she supplied to the OIG concerned the quality and reliability of the work provided to the agency by a subcontractor and her disagreement with her supervisor, Denise Hoffman, about the

continued use of that subcontractor and the propriety of the billing for the subcontractor's work.

Having exhausted the process at the Office of Special Counsel (OSC), the appellant filed an individual right of action (IRA) appeal with the Board. The administrative judge (AJ) found that her testimony at the EEO proceeding is protected under 5 U.S.C. § 2302(b)(9), not the Whistleblower Protection Act (WPA) such that the Board lacks jurisdiction over that claim in an IRA appeal. The AJ found that the appellant proved that her disclosures to the OIG were protected under the WPA and were a contributing factor in the agency's decision to reassign her. However, the AJ also found that the agency, via Denise Hoffman's sworn statement, had proved by clear and convincing evidence that it would have reassigned the appellant to the non-supervisory position absent the protected disclosures.

The Board affirmed the AJ's finding that it lacked jurisdiction over the EEO testimony because it is not protected under the WPA. The Board found that the appellant had not proven that her disclosures to the OIG were protected because the evidence in the record did not show that she reasonably believed that her disclosures evidenced a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. The AJ erred in finding the disclosures to the OIG were protected by relying on the agency's alleged stipulation to that effect in one of its filings. Firstly, this interpretation of the agency's filing was erroneous. Secondly, and more importantly, the question of whether a disclosure is protected under 5 U.S.C. § 2302(b)(8) is a matter of mixed fact and law and stipulations relating to such matters are not binding.

[Jenkins v. Department of the Treasury](#),
MSPB Docket No. DA-0752-050485-I-1
January 10, 2007

Adverse Action Charges

- Miscellaneous/Procedures

Board Procedures/Authorities

- Authority of Administrative Judges/Board

Penalty

- Miscellaneous

HOLDING: The agency's charge of failure to timely file a personal federal income tax return did not require the agency to prove that such a failure was willful because the proposing official specified that the agency was charging the appellant with willfully failing to timely file, and, in the alternative, failing to timely file whether willful or not. The Board was not precluded from considering the reasonableness of the penalty by prior settlement agreements between the agency and the appellant in

which the appellant surrendered her Board appeal rights because the agency made no mention of the settlement agreements in the notice of proposed removal. The Board was not precluded from reviewing the penalty of removal, which would have been mandatory for the charges here sustained under Section 1203 of the IRS Restructuring & Reform Act of 1998 (RRA), because the agency did not rely on the RRA's procedures in removing the appellant.

The agency removed the appellant based upon two charges: failure to timely file a 2002 personal federal income tax return; and failure to properly file the 2002 tax return. The administrative judge (AJ) did not sustain the first charge, finding that the appellant did not *willfully* fail to timely file and that in fact she did not fail to timely file her 2002 return. The AJ sustained the second charge, finding that she willfully understated her 2002 tax liability. The AJ upheld the removal as reasonable upon the second charge alone. The appellant filed a petition for review (PFR) and the agency filed a cross-PFR.

The Board denied the appellant's PFR for failure to meet the review criteria. The Board granted the agency's cross-PFR, affirmed the initial decision, as modified, and upheld the removal. The Board sustained the first charge because the AJ erred in finding that the agency had to prove that the appellant acted willfully in failing to timely file a return, as required by Sections 1203(b)(8) and (b)(9) of the RRA, codified at 26 U.S.C. § 7804. The agency charged the appellant with failure to timely file a return in violation of Section 1203 *and other laws, rules or regulations*, which did not require a showing of intent. Even though the agency did not prove intent, it still proved the charge in the alternative. The AJ also erred in finding that the appellant in fact did timely file her 2002 return because the appellant only filed a partial return by the deadline of April 15, 2003, failing to file a required schedule, which rendered her return untimely under the agency's policy.

The agency argued that two settlement agreements between the appellant and the agency, wherein the appellant surrendered her Board appeal rights, prevented the Board from reviewing the reasonableness of the penalty. The Board disagreed because the notice of proposed removal made no mention of the settlement agreement and the Board is required to review the agency's decision solely on the grounds invoked by the agency in that notice of proposed removal. Furthermore, it would be error for the agency to rely on matters affecting the penalty it imposes without including those matters in the proposal notice.

The agency also argued that the Board lacked authority to review the penalty because a violation of Section 1203(B)(9) of the RRA, which the AJ found, subjected the appellant to mandatory removal. The Board disagreed because the agency did not go through the RRA's proscribed procedures for imposing a mandatory removal. In deciding upon removal, the deciding

official considered the Board's *Douglas* factors rather than forwarding the case to the Commissioner's Review Board for mitigation consideration, as required by the RRA procedures. Therefore, having sustained both charges, the Board determined that the agency had considered the relevant *Douglas* factors and found that removal was the maximum reasonable penalty.

FEDERAL CIRCUIT AFFIRMANCES/DISMISSALS (NP)

The Court affirmed the Board's decision in the following appeals:

Donn A. Kerr v. Department of the Army, 2006-3315; CH-0752-05-0648-I-1 (1/9/07)

Wayne L. Louie v. Department of the Treasury, 2006-3320, -3396; SF-1221-06-0134-W-1, SF-1221-06-0546-W-1 (1/9/07)

Christopher P. Teacher v. Merit Systems Protection Board, 2006-3333; SF-3443-06-0278-I-1 (1/10/07)

Deborah M. Melton v. Department of Health & Human Services, 2006-3346; DC-0752-05-0498-C-1 (1/10/06)

The Court dismissed the following appeals:

Tyrone L. Boswell v. Office Of Personnel Management, 07-3031; AT-831E-06-0365-I-1 (1/4/07)

Kim R. Baird v. Department Of The Army, 07-3046; CH-0752-06-0377-I-1 (1/4/07)

Sheldon B. Shanoff v. Office Of Personnel Management, 07-3049; PH-844E-05-0598-I-1 (1/4/07)

Daniel R. Jones v. United States Postal Service, 07-3054; AT-0752-06-0027-I-1 (1/4/07)

Richard A. Conrad v. United States Postal Service, 07-3058; PH-0752-06-0462-I-1 (1/4/07)

Alfred W. Williams v. Office Of Personnel Management, 07-3062; PH-831E-06-0310-I-1 (1/9/07)

The Court denied the petition for rehearing:

Cornelio Layao v. Office Of Personnel Management, 05-3105; SE-0831-03-0362-I-1 (1/4/07)

Errata:

Porter v. Merit Systems Protection Board (NP) (1/4/07)

Fed. Cir. No. 2006-3279; MSPB Docket No. DC-315H-03-0146-C-1

Decided December 29, 2006

Page 3, line 1 of the slip opinion, replace "became" with – because – .