CASE REPORT

DATE: January 19, 2007

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BOARD DECISIONS

Belhumeur v. Department of Transportation
MSPB Docket No. DA-3443-06-0437-I-1
January 11, 2007

Miscellaneous – USERRA/VEOA/Veterans' Rights

HOLDING: The Board lacks jurisdiction over an appeal of an FAA employee claiming that the FAA violated his veterans' preference rights under VEOA when it failed to select him for a position because the FAA, the agency charged with violating his veterans' preference rights, is not subject to 5 U.S.C. § 3330a.

The appellant, an employee with the Federal Aviation Administration (FAA), filed this appeal claiming that the FAA violated his veterans' preference rights under the Veterans Employment Opportunities Act of 1998 (VEOA), when it failed to select him for position. The AJ dismissed the appeal for lack of jurisdiction, finding that VEOA does not apply to the FAA, and that the appellant had not alleged any other basis for jurisdiction.

The Board denied the appellant's PFR, but reopened the matter for the limited purpose of addressing the issue of whether the FAA is excluded by statute from 5 U.S.C. § 3330a. The Board found that it lacks jurisdiction over this appeal because the FAA, the agency charged with violating the appellant's veterans' preference rights, is not subject to 5 U.S.C. § 3330a.

Under 49 U.S.C. § 40122(g)(2), Congress granted the FAA the authority to establish a personnel system that is not subject to the provisions of Title 5, with certain enumerated exceptions. Board jurisdiction over this appeal is not provided by 5 U.S.C. § 2302(b), relating to whistleblower protection;

§§ 3308-3320, relating to veterans' preference; chapter 71, relating to labor-management relations; nor §§ 1204, 1211-1218, 1221, 7512, and 7701-7703, relating to the Board. Section 3330a, which grants the Board jurisdiction over violations of veterans' preference rights, is not among the sections of Title 5 applicable to the FAA. There is nothing in 49 U.S.C. § 40122(g)(2) indicating that Congress intended to grant FAA employees or applicants VEOA appeal rights. FAA employees were not afforded VEOA appeal rights by operation of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century. Thus, the Board has no jurisdiction over a VEOA appeal from an FAA employee or applicant.

O'Leary v. Office of Personnel Management
MSPB Docket No. AT-300A-98-0635-M-1
January 11, 2007

Miscellaneous Agency Actions - Employment Practice

HOLDING: The Supplemental Qualifications Statement (SQS) part of the Social Security Administration ALJ Examination under which the appellant applied meets the basic requirements of 5 C.F.R. § 300.103.

In 1993, the appellant, a staff attorney in the Office of Hearings and Appeals (OHA) of the Social Security Administration (SSA), filed an application under the Administrative Law Judge (ALJ) Examination. The Office of Personnel Management (OPM), which developed and administers that examination, reviewed the appellant's supplemental qualifications statement (SQS) – a document describing the applicant's relevant work experience – and initially assigned him a score of 21, then later lowered his score to 14 after he completed the remaining parts of the ALJ Examination.

The appellant challenged his examination rating by filing an appeal with OPM pursuant to 5 C.F.R. § 300.104(b), and his SQS score was raised to 18. He later filed this employment practice appeal with the Board under 5 C.F.R. § 300.104(a), alleging that the SQS part of the ALJ Examination discriminated against staff attorneys employed in SSA's OHA. That appeal was eventually dismissed by the administrative judge (AJ) for lack of jurisdiction after a hearing. In *O'Leary v. Office of Personnel Management*, 96 M.S.P.R. 548, ¶ 1 (2004), the Board reversed the initial decision. In doing so, it found that it had jurisdiction over the appeal; it noted that the AJ had held a hearing; and, although he had characterized the hearing as one addressing the issue of jurisdiction, the Board found that the parties had in fact addressed the merits of the appeal, that OPM had met its burden of proving that the SQS part of the ALJ Examination met the basic requirements of 5 C.F.R. § 300.103, and that remand was unnecessary. On petition for judicial review, the court concurred with the Board's jurisdictional finding, but found that the appellant was entitled to an additional hearing "because the

hearing that [he] received before the [AJ] was designated jurisdictional." After holding another hearing, the AJ issued an initial decision in which he found that the appellant was not entitled to relief.

On review, the Board denied the appellant's petition for review, reopened the appeal, and affirmed the initial decision as modified, still finding that OPM proved that the SQS part of the ALJ Examination under which the appellant applied meets the basic requirements of 5 C.F.R. § 300.103.

The Board first reaffirmed its finding that the SQS portion of the ALJ Examination meets the job analysis requirement of 5 C.F.R. § 300.103(a). To satisfy the second of the basic requirements, 5 U.S.C. § 300.103(b), OPM must show that there is a rational relationship between the employment practice and performance in the position to be filled, and demonstration of the existence of this rational relationship must include a showing that the employment practice was professionally developed. The Board clarified that, contrary to the AJ's statement in the initial decision, there is no presumption that an employment practice was professionally developed. Here, the Board found that, while standards that eventually became part of the ALJ examination were not necessarily drafted by professional psychologists, a preponderance of the evidence established that the SQS portion of the examination was itself professionally developed.

To satisfy the third of the basic requirements, 5 C.F.R. § 300.103(c), the employment practice may not discriminate on the basis of a nonmerit factor. The Board found that one of the "benchmarks examples," which OPM uses in calculating an individual's SQS score, supports the appellant's argument that OPM views some aspects of experience as an OHA attorney less favorably than the experience of attorneys in other agencies and other positions. However, a scoring system that favors some kinds of experience over other kinds does not necessarily discriminate against applicants on a nonmerit factor. Here, OPM reasonably rated the experience of others higher than the experience of an OHA attorney. In addition, the Board saw no need to modify its previous findings regarding the effect of the benchmarks' references to job titles. Finally, the appellant did not show error or prejudicial error in any of the AJ's procedural rulings.

Gartner v.Department of the Navy
MSPB Docket No. AT-0752-06-0156-I-1
January 12, 2007

Adverse Action Charges - Absence Related
Penalty – Absence Related

HOLDING: Absences for which the appellant had been previously disciplined cannot form the basis of a subsequent disciplinary action for excessive absences; the *Cook* exception, which allows an agency to take an

adverse action based on approved unscheduled absences when the employee makes excessive use of unscheduled LWOP, does not apply to approved sick leave; the charge of excessive absences was properly sustained based on the appellant's LWOP and AWOL where the *Cook* criteria were satisfied and the evidence showed that the appellant could not return to work because of the continuing effects of her mental illness; the removal penalty was sustained for the charge of excessive absences.

Between December 2004 and June 2005, the appellant was counseled and disciplined for several leave-related violations during the period of January 12 to April 7, 2005. Following additional absences, the agency removed the appellant based on a charge of excessive absence during the period of January 9 to July 23, 2005. On appeal the appellant argued that her removal was improper because all of her absences were approved. The administrative judge (AJ) affirmed the removal action.

On review, the Board stated that it would not consider the appellant's absences for which the appellant had been previously disciplined because an agency may not impose discipline more than once for the same misconduct. Because the notice of proposed removal did not exclude leave-related misconduct for which the appellant had already been disciplined, it was unclear whether the agency was attempting to impose a second round of discipline, at least in part, for the same misconduct. Therefore, the Board stated that it would not consider the appellant's absences from January 12-21, March 29, or April 6 and 7.

In addition, the Board stated that it would not consider the appellant's absences during any period that she was on approved sick leave. The Board thus stated that, for purposes of the charge of excessive absences, it would only consider a total of 333 ½ hours of unscheduled absences consisting of a combination of LWOP and AWOL. The appellant argued that she was on approved medical leave and she submitted medical documentation showing that she was unable to work because of mental illness. Although an adverse action cannot be based on an employee's use of approved leave, an agency can bring an action against an employee for excessive approved absence when the criteria set forth in *Cook v. Department of the Army*, 18 M.S.P.R. 610, 611-12 (1984) are satisfied. The Board found that the *Cook* criteria were satisfied here, and that the evidence showed that the appellant could not return to work because of the continuing effects of her mental illness. The Board thus found that the AJ properly affirmed the agency's removal action based on the charge of excessive absences. Further finding that the deciding official properly evaluated the relevant penalty factors, the Board sustained the appellant's removal.

LaMell v. Armed Forces Retirement Home
MSPB Docket No. AT-3443-06-0657-I-1
January 12, 2007

Reduction in Force – Bona Fides
Jurisdiction - Miscellaneous

HOLDING: Although the AJ correctly found that the Board lacks jurisdiction over the appellant's placement on administrative leave, the Board remanded the appeal for the AJ to clarify whether the appellant intended to appeal her separation by RIF; the RIF may have been in the nature of an adverse action where the agency issued a notice of proposed removal under ch. 75, and the record was unclear as to whether the proposed removal was rescinded prior to the RIF.

In February 2005, the appellant, who was employed at the Armed Forces Retirement Home in Gulfport, Mississippi, was placed on administrative leave for disciplinary reasons. On August 10, 2005, the agency issued a notice of proposed removal under 5 U.S.C. chapter 75 and rescinded a March 2005 notice of proposed removal, explaining that it never issued a decision on the March proposed removal because the facility was evacuated and closed following Hurricane Katrina. Since the facility could remain closed for as long as 18 months due to damage caused by the hurricane, the appellant and other employees of the Armed Forces Retirement Home were separated pursuant to a reduction in force (RIF). The appellant appealed her placement on administrative leave. Without addressing the appellant's separation pursuant to the RIF nor the proposed removal, the administrative judge (AJ) dismissed the appeal for lack of jurisdiction.

On review, the Board stated that the AJ correctly found that the Board lacks jurisdiction over the appellant's placement on administrative leave, and that the Board, thus, could not consider her discrimination claims. The Board further found that the record below, including the appellant's reference to her "terminat[ion]," the appellant's submission of the RIF separation proposal notice, and the agency's submissions, should have alerted the AJ to clarify whether the appellant intended to appeal her separation by RIF. Therefore, the Board remanded the case for the AJ to address and, if necessary, adjudicate, the RIF matter. Finally, the Board stated that, because there is nothing in the record to indicate that the proposed removal was rescinded prior to the RIF, it could not eliminate the possibility that the RIF might have been in the nature of an adverse action, i.e., based on reasons personal to the appellant and not directed to her position.

Thornton v. Office of Personnel Management
MSPB Docket No. PH-0845-06-0098-I-1
January 12, 2007

Retirement – Annuity Overpayment
Timeliness – New Evidence/Argument
New Evidence

HOLDING: The Board remanded this appeal of OPM's denial of the appellant's request for a waiver of collection of an overpayment to OPM for a new computation of the amount of the annuity overpayment where OPM submitted new and material evidence on review that the appellant was receiving OWCP benefits and a FERS disability retirement annuity concurrently.

The appellant applied for and was granted a disability retirement under the Federal Employees Retirement System (FERS) in January 2005. The appellant began receiving monthly estimated interim annuity payments while OPM calculated the exact amount of his annuity. When OPM finalized its calculation of the appellant's retirement annuity in June 2005, it concluded that he had been overpaid and proposed to collect the overpayment in installments. OPM denied the appellant's request for a waiver of the collection of the overpayment. In a June 19, 2006 initial decision (ID), the AJ affirmed OPM's decision.

The Board summarily denied the appellant's petition for review (PFR). OPM filed an untimely cross PFR, included a declaration in support of its request that the Board waive the time limit for filing a cross PFR, and submitted a letter it received from the Office of Workers' Compensation Programs (OWCP) advising OPM that the appellant had been receiving OWCP benefits since January 5, 2004, and that on August 1, 2006, the appellant elected to receive OWCP benefits instead of an OPM annuity. OPM's representative also submits a sworn statement asserting that OPM did not receive the OWCP letter until August 22, 2006, and that the representative did not learn of the letter until September 18, 2006, when he was first assigned to this case. In his application for a retirement annuity, the appellant informed OPM that he had not applied for and was not receiving OWCP benefits. The Board found that: The OWCP letter was new and material; OPM had established good cause for the delay in filing its cross PFR; and the OWCP letter was of sufficient weight to warrant an outcome different from that of the ID because the appellant was not entitled to receive both OWCP benefits and a FERS disability retirement annuity. Further finding that this new evidence will require a new computation by OPM of the amount of the annuity overpayment made to the appellant, the Board accordingly remanded this matter to OPM.

Boykin v. U.S. Postal Service
MSPB Docket No. SF-0752-06-0593-I-1
January 11, 2007

Timeliness – e-Appeal

HOLDING: The appellant showed good cause for his 1-day delay in filing his e-appeal.

On May 2, 2006, the appellant filed an appeal of his demotion electronically (e-appeal) 1-day late. The administrative judge dismissed the appeal as untimely filed without good cause shown. On review, the Board granted the appellant's PFR, vacated the initial decision, and remanded the appeal for adjudication of the merits. The Board found that its records support the appellant's representative's account that: On May 1, 2006, he accessed the Board's e-filing site; he repeatedly received "timed out" messages and was unable to continue with the process; he made multiple attempts to log on again but was unsuccessful; and he was able to complete the filing process the following day. Furthermore, several users reported having problems using e-appeal around May 1-3, 2006, and the incidence of problems was higher than usual at that time. For these reasons and based on the minimal delay and the absence of a claim of prejudice by the agency, the Board found that the appellant showed good cause for the untimely filing of his appeal.

Tolbert v. Small Business Administration
MSPB Docket No. AT-315H-06-0175-I-1
January 12, 2007

Jurisdiction – Probationers/5 U.S.C. § 7511(a)(1)(A)

HOLDING: Where the appellant did not request a hearing, the Board weighed the evidence he offered that his termination was based on pre-appointment reasons against the agency's evidence that he was terminated for post-appointment reasons and found the latter more persuasive, and, thus, dismissed this appeal for lack of jurisdiction.

The appellant appealed his termination during his probationary period, asserting that the agency terminated him for pre-appointment reasons and submitting a letter that he claimed proved this. He did not request a hearing. The agency contended that the appellant was terminated for post-appointment reasons and submitted supporting documentation. The AJ issued an initial decision dismissing the appeal for lack of jurisdiction apparently based on the agency's stated reason for the termination, without considering the appellant's proffered evidence. On petition for review, the Board found that,

to the extent the AJ erred in failing to properly weigh the record evidence in assessing the appellant's jurisdictional assertions, his error provides no basis for reversal of the initial decision because the appellant's evidence was insufficient to meet his burden of proof, especially when weighed against the agency's evidence indicating that he was terminated for post-appointment reasons. Therefore, the Board dismissed the appeal for lack of jurisdiction.

Rainone v. Office of Personnel Management
MSPB Docket No. NY-831E-05-0277-X-1
January 16, 2007

Compliance – Dismissal on Proof
Retirement
- Annuities
– Disability

HOLDING: OPM correctly relied on a certified corrected Individual Retirement Record (IRR) from the employing agency in determining the appellant's last day in pay status for purposes of calculating his disability retirement annuity.

In *Rainone v. Office of Personnel Management*, 102 M.S.P.R. 88 (2006), the Board ordered OPM to award the appellant a disability retirement. In response to the appellant's petition for enforcement, OPM submitted evidence indicating that it had awarded the appellant a disability retirement using July 28, 2000, as the last day in pay status (LDPS), and had issued payment for back pay and his annuity. A corrected individual retirement record (IRR) in the record set forth July 28, 2000 as the appellant's LDPS. The AJ issued a Recommendation that the Board find OPM only in partial compliance because OPM should have calculated the appellant's annuity as of June 19, 1999.

The Board found that the agency was in compliance and dismissed the appellant's petition for enforcement as moot. The appellant's IRR as maintained by the employing agency is the basic record used in determining his annuity, and OPM is entitled to rely on the information contained in the IRR unless and until the IRR is amended by the employing agency. Although the Board stated in *Rainone* that the appellant's LDPS was June 19, 1999, and that he was disabled from performing useful and efficient service in his position of record during the period from June 19, 1999, to his voluntary retirement on January 31, 2004, the corrected certified record of the appellant's IRR shows that his LDPS was July 28, 2000. Moreover, it appears that this corrected date was predicated on the employing agency's pay documentation that the appellant worked in the year 2000 for one pay period. Thus, based on the documentation, it appears that although the appellant may have been disabled from performing useful and efficient service in his position since June 19, 1999, his pay had not "ceased" for purposes of

5 U.S.C. § 8345(b)(1), if he returned to a pay status prior to his separation. Because the record shows that OPM relied on a certified corrected IRR for a LDPS of July 28, 2000, in light of the employing agency's record that the appellant returned to a pay status in 2000, the Board found that OPM properly relied on the IRR for this information to calculate the appellant's disability retirement annuity.

Finally, the Board found that it is without jurisdiction to order OPM to obtain a corrected certified IRR from the appellant's employing agency, and that, instead, the appellant's remedy is to petition the employing agency to amend his IRR and to forward it to OPM for the commencement of a different disability date if so determined by the employing agency.

DISMISSALS-SETTLEMENT/WITHDRAWN

The following appeal was dismissed as withdrawn pursuant to a settlement agreement:
Stroup v. Department of Homeland Security, NY-1221-04-0192-W-4 (1/10/07)

The following case was dismissed as settled:
Neal v. Department of the Treasury, MSPB Docket No. DE-0752-01-0338-X-1 (1/12/07)

FEDERAL CIRCUIT AFFIRMANCES/DISMISSALS (NP)

The following appeals were affirmed:
Ward v. Office of Personnel Management, 06-3353, AT-831E-06-0053-I-1 (1/11/07)
Hunter v. Department of the Air Force, 06-3355, DA-0752-06-0258-I-1 (1/11/07)
Bush v. Office of Personnel Management, 06-3173, DC-0831-05-0452-I-1 (1/11/07)
Kostishak v. Merit Systems Protection Board, 06-3280, DC-0831-05-0679-I-1 (1/12/07)
Theus v. Department of Transportation, 06-3141, DA-1221-05-0009-W-2 (1/16/07)
Brent v. Department of Justice, 06-3153, AT-0752-05-0514-I-1 (1/16/07)
Smart v. Merit Systems Protection Board, 06-3283; DE-1221-05-0505-W-1 (1/16/07)
Tavarez v. Office of Personnel Management, 06-3394, SF-831E06-0217-I-1 (1/16/07)
Wade v. Department of Labor, 06-3266, SF-0752-05-0640-I-1 (1/17/07)
Fisher v. Office of Personnel Management, 06-3324, DE-0845-05-0500-I-1 (1/17/07)
Douglas v. Department of Agriculture, 07-3029, AT-0752-06-0373-I-1 (1/17/07)
Brown v. Department of the Navy, 07-3064, AT-1221-05-0493-B-1 (1/17/07)

A petition for rehearing en banc was denied in the following case:
Zgonc v. Department of Defense, 06-3265, DC-1221-06-0306-W-1 (1/17/07)

The court recalled the mandate and reinstated the appeal:
Jones v. U.S. Postal Service, 07-3054, AT-0752-06-0027-I-1 (1/16/07)

FEDERAL REGISTER NOTICES

72 Fed. Reg. 1267 (1/11/07)

OPM issued final regulations to amend the incentive awards regulations. The amended regulations clarify that if agencies grant rating-based awards, they must base such awards on a rating of record of "Fully Successful" (or equivalent) or higher. In addition, agencies must ensure that rating-based awards granted make meaningful distinctions based on levels of performance.

72 Fed. Reg. 1911 (1/17/07)

The Office of Personnel Management issued a final rule to amend the Federal Employees Health Benefits regulations regarding discontinuance of a health plan to include situations in which a health plan becomes incapacitated, either temporarily or permanently, as the result of a disaster.