U.S. Merit Systems Protection Board

CASE REPORT

DATE: January 26, 2007

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BOARD DECISIONS

Del Prete v. U.S. Postal Service
MSPB Docket No. NY-0752-04-0143-I-1
January 18, 2007

Attorney Fees
- Knew Or Should Have Known

HOLDING: The appellant was entitled to reasonable attorney fees in the interest of justice because he prevailed in gaining penalty mitigation due to factors that the agency knew or should have known. However, the award of attorney fees must be limited to legal fees associated only with the appellant's challenge to the penalty and not with his challenge to the sustained charge.

The agency removed the appellant on one charge of breaching the agency's accounting procedures resulting in the loss of postal stock totaling approximately $45,000. On appeal, the administrative judge (AJ) sustained the charge but mitigated the penalty to a 60-day suspension because removal was unreasonable and the deciding official failed to take into account several mitigating factors. Neither party sought review of the initial decision, which became the Board's final decision. The appellant filed a motion for attorney fees. The AJ awarded the requested fees, finding that the appellant was a prevailing party and an award of fees was in the interest of justice because the agency "knew or should have known" that its penalty of removal would not be upheld because of the mitigating factors the deciding official knew of but failed to consider. The agency petitioned for review.

The Board affirmed the AJ's finding that an award of attorney fees was in the interest of justice because the appellant was a prevailing party with

regard to the mitigation of the penalty and because the AJ's decision on the merits, which became the Board's final decision, found that the agency knew of and failed to consider mitigating factors in determining the appropriate penalty. The findings in the Board's final decision on the merits control the determination on attorney fees and those findings cannot be re-litigated.

The Board remanded the appeal to determine the appropriate amount of the award because the appellant only partially prevailed in his appeal and an attorney fee award should be limited to expenses related to the issue on which the appellant prevailed, if it is practicable to do so. The facts and legal theories employed in the appellant's challenge to the penalty were different from and unrelated to those employed in his unsuccessful challenge to the merits of the agency's charge. Therefore, the Board ordered the AJ to determine, if possible, the fees and expenses attributed to the penalty issue only and reduce the award accordingly. If such a segregation of costs is not practicable, the Board ordered the AJ to determine an otherwise appropriate amount by which to reduce the award.

Chairman McPhie dissented, stating that the AJ erred in finding that the deciding official failed to consider mitigating factors. The Chairman stated that the deciding official considered the mitigating factors but simply gave a different weight to them than the AJ did in coming to a penalty decision. Because of this, it was not in the interests of justice to award attorney fees because the agency could not have known that an AJ would disagree with its weighting of the *Douglas* factors and so mitigate the penalty.

Crenshaw v. Broadcasting Board of Governors
MSPB Docket No. DC-1221-06-0097-W-1
January 19, 2007

Whistleblower Protection Act
- Jurisdiction, Generally
Board Procedures/Authorities
- Miscellaneous

HOLDING: *Garcia v. Department of Homeland Security*, 437 F.3d 1322 (Fed. Cir. 2006) does not apply to IRA appeals. An appellant in an IRA appeal is not entitled to a hearing until he has established jurisdiction in his written pleadings by showing that he is an employee and making non-frivolous allegations that he made a protected disclosure and the disclosure was a contributing factor in the agency's personnel action.

The appellant reported alleged violations of safety and environmental requirements to the agency's Office of the Inspector General (OIG) in October 1999 and again in October 2003. He also stated that he expected to be separated by reduction in force (RIF) in retaliation for his reporting of such issues. In September 2000, the appellant accepted a temporary

appointment in a non-career Foreign Service position, which was set to expire in September 2005. In June 2005, the appellant sought corrective action from the Office of Special Counsel (OSC), which determined not to take any action. The appellant was separated in September 2005 and the appellant filed an individual right of action (IRA) appeal with the Board. The administrative judge (AJ) found that the appellant was an employee under 5 U.S.C. § 2105 and so subject to the Whistleblower Protection Act (WPA), but, after a hearing, dismissed the appeal for lack of jurisdiction because the appellant had failed to prove that his disclosures were a contributing factor in the agency's personnel action.

The Board vacated the initial decision and remanded the appeal to determine whether the appellant, in a temporary non-career Foreign Service position, is an employee under 5 U.S.C. § 2105 because the record was not sufficiently developed to make such a determination.

The Board clarified that the AJ had erred in relying on *Garcia v. Department of Homeland Security*, 437 F.3d 1322 (Fed. Cir. 2006) in holding a jurisdictional hearing. Unlike adverse action appeals, *Garcia* is not applicable to IRA appeals and an appellant in an IRA appeal is not entitled to a hearing until he establishes Board jurisdiction. Accordingly, the AJ erred in holding a jurisdictional hearing and erred in dismissing the appeal for lack of jurisdiction because the appellant had failed to prove by preponderant evidence that his disclosures were a contributing factor.

In order to establish jurisdiction and gain a hearing on the merits in an IRA appeal, in addition to showing that he is an employee under 5 U.S.C. § 2105, the appellant's written pleadings must make non-frivolous allegations that he made a protected disclosure and the disclosure was a contributing factor in the agency's personnel action. Although it cannot yet be determined if the appellant is an employee subject to the WPA, the appellant's pleadings did make the requisite non-frivolous allegations to establish jurisdiction and gain a hearing on the merits. Therefore, the Board remanded the appeal for the AJ to determine if the appellant is an employee subject to the WPA. If so, the Board ordered the AJ to find jurisdiction and hold a hearing on the merits of the appellant's IRA appeal.

Kravitz. Department of the Navy
MSPB Docket No. SF-0353-04-0204-B-2
January 19, 2007

Miscellaneous Agency Actions
- Restoration to Duty
Jurisdiction
- Miscellaneous

HOLDING: An application for a vacant position that is pending when an employee receives an OWCP award constitutes a request for restoration.

In a remand decision the AJ found that the appellant was physically disqualified from his position but had failed to timely seek restoration and so the AJ dismissed the appeal for lack of jurisdiction. The Board vacated the remand decision and remanded the appeal for further proceedings.

The right to restoration of a physically disqualified employee applies for 1 year from the date the employee becomes eligible for Office of Workers' Compensation Programs (OWCP) payments. The AJ was correct in finding that the appellant met the definition of a "physically disqualified" employee under 5 C.F.R. § 353.102. However, the appellant may have requested restoration within the 1-year time frame of becoming OWCP eligible because it appears he had an application for a position pending at the time he was granted an OWCP award. The Board has previously held that if an employee who is physically disqualified applies for a vacant position during the 1-year timeframe, that application is construed as a request for restoration. Similarly, the Board held here that an application for a vacant position that is pending on the date the appellant receives an OWCP award also constitutes a request for restoration. Therefore, the Board remanded the appeal for the AJ to determine if the appellant's application was indeed pending at any point during the 1-year timeframe. If so, the AJ must treat that pending application as a proper request for restoration and grant jurisdiction.

Tschumy v. Department of Defense
MSPB Docket No. PH-315H-06-0104-I-1
January 19, 2007

Appointments
- Temporary Appointments
- Miscellaneous/General
Jurisdiction
- Probationers/5 U.S.C. § 7511(a)(1)(A)

HOLDING: 5 C.F.R. § 315.801(e), which mandates probationary periods unless specifically exempted, applies only to authorities described in 5 C.F.R. subparts 315F and 315G, so appointees under subpart 315D are not necessarily required to serve a probationary period. A person serving under a temporary appointment not exceed 1 year is not an "employee" under 5 U.S.C. § 7511.

The appellant began his civilian service in September 2004. He subsequently accepted, in December 2004, a temporary appointment not to exceed 1 year in the competitive service under 5 C.F.R. subpart 315D. The agency separated the appellant for alleged inappropriate conduct in October 2005. The appellant appealed his separation and alleged sex discrimination and retaliation for whistleblowing. The AJ dismissed the appeal for lack of jurisdiction because the appellant was not an "employee" under 5 U.S.C. § 7511 with Board appeal rights and because he had not sought corrective

action from the Office of Special Counsel (OSC) and so could not pursue an IRA appeal.

The Board held that the appellant was not an "employee" in the competitive service under 5 U.S.C. § 7511(a)(1)(A)(ii) because he had not completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less. Even if his appointments between September and December 2004 were not temporary, the appellant's appointment from December 2004 onwards was temporary and limited to 364 days and so he never accumulated 1 year in a non-temporary appointment. Furthermore, the appellant did not gain appeal rights under *Park v. Department of Health & Human Services*, 78 M.S.P.R. 527 (1998) because, when he accepted the temporary appointment, he only had 3 months of civilian service and was serving a probationary period. Therefore, unlike *Park*, the appellant was not an "employee" with appeal rights and so could not unwittingly relinquish any such rights by accepting the temporary appointment.

The AJ found that the appellant was not an "employee" under 5 U.S.C. § 7511(a)(1)(A)(i) either because he was serving a probationary period. There was no mention of a probationary period on the appellant's appointment but the AJ concluded this by reference to 5 C.F.R. § 315.801(e), which states that a person appointed to the competitive service under 5 C.F.R. subparts 315F and 315G serves a 1-year probationary period unless specifically exempted. This was error because the appellant was appointed under 5 C.F.R. § 315.403(b)(1), which is within subpart 315D, and 5 C.F.R. § 315.801(e) applies only to authorities described in subparts 315F and 315G.

Despite this, the appellant was not an "employee" under 5 U.S.C. § 7511(a)(1)(A)(i), because both the Board and the Federal Circuit Court of Appeals have interpreted that section not to include persons serving under temporary appointments of less than 1 year.

Hamiel v. U.S. Postal Service
MSPB Docket No. AT-0752-06-0252-I-1
January 19, 2007

Jurisdiction
- Suspensions
Hearings
- Right to a Hearing

HOLDING: The appellant established entitlement to a jurisdictional hearing on his constructive suspension claim by making non-frivolous allegations that he requested to return to work after an absence for medical reasons and that the agency had denied his request.

The appellant was absent from work due to diagnosed narcolepsy and shoulder surgery. He was cleared by his doctors to return to work on May 23, 2005 and he requested to do so, within certain restrictions. The agency informed the appellant that he could not work within his requested restrictions and did not permit him to return until August 18, 2005. The appellant filed an appeal alleging a constructive suspension for the period of time between his request to return in May and his return to duty in August. The AJ dismissed the appeal for lack of jurisdiction without a hearing, finding that the appellant had failed to present sufficient evidence to show that the agency knew he had received medical clearance or that the agency could assess if an appropriate light duty position was available.

The Board vacated and remanded the decision, finding that the appellant had established entitlement to a jurisdictional hearing, under *Garcia v. Department of Homeland Security*, 437 F.3d 1322 (Fed. Cir. 2006), by making non-frivolous allegations that he requested to return to work after an absence for medical reasons and the agency had denied his request.

Chairman McPhie dissented, stating that the appellant's request to return to work in May 2005 did not address his narcolepsy, only his shoulder ailment, and his second request to return to work in July 2005 was also incomplete. The Chairman states that the Board should defer to the agency's reasonable decision to delay the appellant's return to work until August 2005, when he finally provided complete information on both his ailments and their necessary work restrictions.

Special Counsel, ex rel. Waddell v. Department of Justice
MSPB Docket No. CB-1208-06-0020-U-4
January 19, 2007

Special Counsel Actions
- Stays
Whistleblower Protection Act
- Stays

HOLDING: The Board granted OSC's request for a 60-day extension of the previously-granted stay of the agency's reassignment of Special Agent Waddell.

The Office of Special Counsel (OSC) requested an additional 60-day extension of the previously granted stay of the agency's reassignment of Special Agent Waddell. OSC stated that it needed the extension to complete its legal analysis and determine what further action was warranted. Viewing the evidentiary record, which had not changed significantly since the granting of OSC's initial stay request, in the light most favorable to OSC, the Board found OSC's prohibited personnel practice claim was not clearly unreasonable and so granted the request for a further 60-day extension of the

stay. Given that this was OSC's third 60-day extension, in addition to the initial 45-day stay, the Board stated that, absent any unusual circumstances, this will be the final extension of the stay.

Durr v. Department of Veterans Affairs
MSPB Docket No. AT-1221-04-0293-B-1
January 24, 2007

Whistleblower Protection Act
- Contributing Factor
- Danger to Public Health or Safety
- Gross Mismanagement
- Protected Disclosure

HOLDING: A protected disclosure made after the agency has already proposed the personnel action at issue in an IRA appeal cannot, as a matter of law, have contributed to that agency action and so does not meet the non-frivolous allegation standard for Board jurisdiction over and IRA appeal.

The appellant brought an individual right of action (IRA) appeal against the agency's proposed admonishment. The agency rescinded the proposed action and the administrative judge (AJ) dismissed the appeal as moot. The Board vacated the initial decision and remanded the appeal because of the appellant's requests for consequential damages and attorney fees. On remand, the AJ dismissed the appeal for lack of jurisdiction because the appellant failed to make non-frivolous allegations that he reasonably believed his two disclosures evidenced a substantial and specific danger to public health and safety and gross mismanagement, respectively.

The Board affirmed the AJ with regard to the research funding allegation, finding that a reasonable person could not reasonably believe that the appellant's dissatisfaction with his inability to do research evidenced gross mismanagement. With regard to the appellant's allegations concerning the agency's frequently non-functioning computer systems at the Bay Pines, Florida VA Medical Center, the Board found that these did meet the non-frivolous allegation standard for a protected disclosure. The appellant's allegations in a September 2003 letter to the Office of Special Counsel (OSC) that the frequent systems failures endangered patients evidenced a reasonable belief in a substantial a specific danger to public health and safety. However, the relevant disclosure to OSC came two months *after* the agency had issued its proposed admonishment. As a matter of law, the protected disclosure could not have contributed to the proposed admonishment. Therefore, the appellant failed to non-frivolously allege that his protected disclosure contributed to the agency's personnel action and so he failed to establish Board jurisdiction.

Beaudette v. Department of the Treasury
MSPB Docket No. DE-0752-04-0112-B-1
January 24, 2007

Defenses/Miscellaneous Claims
- Miscellaneous
Jurisdiction
- Reassignment
- Reduction in Pay/Rank/Grade

HOLDING: The appellant's PFR was denied. Member Sapin issued a dissenting opinion and Chairman McPhie issued a concurring opinion in response. No constructive demotion claim lies when the agency either created a new position with additional duties or, as part of a "planned management action," reclassified a position with additional duties.

In 2001, the agency created a new GS-14 position to replace a GS-13 position in which the appellant was one of seven incumbents. The agency interviewed all the incumbents and promoted all except the appellant to the new GS-14 position. The seventh GS-14 position remained unfilled. In 2003, the agency reassigned the appellant and his replacement was soon promoted to the vacant GS-14 position. The appellant appealed to the Board, alleging a constructive demotion. The administrative judge (AJ) dismissed the appeal for lack of jurisdiction because the appellant, while he retained the GS-13 position, was not performing the duties of the GS-14 position in the two years between the creation of the GS-14 position and the appellant's reassignment.

A constructive demotion occurs when an employee is reassigned from a position that is subsequently reclassified upward due to a new classification or correction of a classification error. This did not occur here because the agency created a new GS-14 position with distinct duties and responsibilities from the appellant's GS-13 position. This was not a reclassification. Regardless, even if characterized as a reclassification, a reclassification with the addition of duties resulting from a "planned management action," as here, cannot constitute a constructive demotion.

Member Sapin dissented, stating that she would find jurisdiction because the appellant made non-frivolous allegations that the agency did reclassify and upgrade his GS-13 position after he was reassigned and that the appellant non-frivolously alleged that he performed the duties of the GS-14 position between 2001 and 2003.

COURT DECISIONS

Letz v. Department of the Interior
Fed. Cir. No. 06-3180; MSPB Docket No. DE-0842-05-0189-I-2

January 22, 2007

Retirement
- Service Credit – Firefighter/Law Enforcement Provision

HOLDING: A change in the agency's determination of the type of retirement credit or coverage available to a position was not a "significant change in the position" under 5 C.F.R. § 542.804(c), because it did not affect the duties or responsibilities of the position. Therefore, such a determination by the agency did not afford the appellant a 6-month window to protest the determined level of FF/LEO credit coverage. An agency has no affirmative duty to advise employees on requests for firefighter credit.

An employee can qualify for an enhanced annuity as a firefighter under 5 U.S.C. § 8401 and 5 C.F.R. § 842.803 by applying for enhanced annuity service credit if he served at least three years in a "rigorous" firefighter position. Service in a "secondary" firefighter position is then also creditable if such service immediately follows at least three years in the "rigorous" position. In January 1997 the appellant sought firefighter retirement service credit for his employment starting in August 1994. In October 1998 and January 1999, the agency determined that the appellant's current and prior positions were covered as secondary/administrative for firefighter credit. In May 1999 the appellant challenged the agency's coverage determinations. The agency denied his request for firefighter credit because he did not timely file his application and the Board affirmed the agency's denial.

If a position is not already approved for firefighter credit, an employee must apply for such credit within 6 months of entering the position or of any significant change in the position. The appellant failed to request firefighter credit within the required six-months of any of his appointments, or within 6 months of the special one-time deadline of November 1, 1995 that was established by the agency. The appellant argued that the agency's coverage determinations were a significant change to his position, enabling him to apply. The agency's coverage determinations were not significant changes in the positions because in no way did they change the type of work or duties or responsibilities of the positions. Therefore, the agency's coverage determinations did not provide the appellant with a 6-month window of protest.

The Court also extended its holding in *Bingaman v. Department of the Treasury*, 127 F.3d 1431 (Fed. Cir. 1997), which held that an agency has no affirmative duty to advise employees on requests for law enforcement officer credit, to apply equally to firefighter credit.

FEDERAL CIRCUIT AFFIRMANCES/DISMISSALS (NP)

The following appeals were affirmed:
Wilson v. Office of Personnel Management, 06-3227, DA-831E-05-0339-I-1 (1/18/07)
Metcalfe v. Merit Systems Protection Board, 06-3398, SE-0752-06-0352-I-1 (1/19/07)
Brown v. Merit Systems Protection Board, 06-3220, DA-0752-05-0591-I-1 (1/22/07)

FEDERAL REGISTER NOTICES

72 Fed. Reg. 2203-2209 (Jan. 18, 2007)

OPM proposed to amend its regulations governing Federal employment suitability, 5 C.F.R. part 731. The proposed regulations would: authorize agencies to debar from employment for up to three years those found unsuitable, extend the suitability process to those applying for or who are in positions that can be non-competitively converted to the competitive service, provide additional procedural protections for those found unsuitable for Federal employment, and clarify the scope of authority for the Merit Systems Protection Board to review actions taken under the regulations. OPM also proposed changes to make the regulations more readable.