



U.S. Merit Systems Protection Board

CASE REPORT

DATE: April 6, 2007

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BOARD DECISIONS

[Mahaffey v. Department of Agriculture, 2007 MSPB 93](#)

MSPB Docket No. SF-0432-04-0668-I-2

March 30, 2007

Board Procedures/Authorities

- **Adjudicatory Error**

Defenses and Miscellaneous Claims

- **Prohibited Personnel Practices**

HOLDING: The administrative judge erred in not addressing some of the appellant's defenses because he was required to make findings of fact and conclusions of law on all material issues presented, and, when the Board has jurisdiction, 5 U.S.C. § 7702(a)(1) entitles an appellant to a Board decision on his discrimination claims. The Board was not required to determine whether sexual orientation is covered by 5 U.S.C. § 2302(b)(10), prohibiting discrimination on the basis of conduct not adversely affecting performance, because the appellant's evidence was insufficient under any view of the statute.

The appellant was removed from his position for unacceptable performance. On appeal he challenged the merits of the agency's evaluation of his performance and also raised several defenses, including discrimination on the basis of age, religion, disability and sexual orientation, and reprisal for prior EEO activity. The administrative judge (AJ) upheld the agency's action, finding that it proved by substantial evidence that appellant's performance standards were valid, that they were communicated to him, that he failed to meet one critical element of his standards, and that he was given a reasonable

opportunity to improve. The AJ did not address the appellant's discrimination or retaliation claims.

On review, the appellant challenged the AJ's fact findings on the merits and his failure to adjudicate some of his defenses. The Board found that the appellant's mere disagreement with the AJ's fact findings did not warrant full review, but found that the AJ erred by not addressing all of the appellant's defenses (other than the disability claim that he abandoned). Since the appellant had waived a hearing and submitted evidence in support of his claims after being placed on notice of the burden and elements of proof to establish them, the Board found that it could address them without a remand on the basis of the documentary record.

The Board then proceeded to determine whether the appellant met his burden of proving that the agency's reasons for its actions were pretextual and motivated by unlawful discrimination. The Board found that the appellant failed to prove discrimination on the basis of age or religion or retaliation for EEO activity because his evidence was no more than unsupported, subjective belief or unwarranted interpretations of supervisors' statements or actions. Addressing the appellant's contention that the agency violated 5 U.S.C. § 2302(b)(10) by discriminating against him on the basis of his sexual orientation and related political activities, the Board determined that the appellant's evidence was no more than speculation and that it was therefore unnecessary to decide whether the statute covers sexual orientation discrimination since there was insufficient evidence to support a violation under any view of the statute.

[West v. Office of Personnel Management, 2007 MSPB 94](#)

MSPB Docket No. DA-0831-06-0235-I-1

March 30, 2007

Retirement

- Court/Domestic Relations Orders

HOLDING: Where the court order purporting to award intervenor a portion of appellant's annuity stated that it was "intended to be a 'qualified domestic relations order' ... in accordance with ERISA and a related provision of the Internal Revenue Code," but made no reference to part 838 of 5 CFR, and where the order did not clearly indicate that its provisions concerning CSRS benefits were drafted in accordance with the terminology used in that part, and where the annuity-apportioning provision of the order was ambiguous, the Board held that the court order was not acceptable for processing.

The appellant, who was covered by the Civil Service Retirement System (CSRS), was divorced from the intervenor in 1993 and the divorce decree included a section pertaining to the division of the marital estate. The Office

of Personnel Management (OPM) accepted the decree as a qualifying domestic relations order acceptable for processing and began paying the annuity, including a retroactive payment covering the period beginning after the appellant's last day in a pay status. The appellant appealed OPM's interpretation of the court order and the intervenor participated in the proceeding. After the administrative judge (AJ) found that the formula OPM had used in calculating the intervenor's share of the annuity was inconsistent with the language of the divorce decree, OPM sought review, asserting that it had erred in finding the divorce decree to be a court order acceptable for processing under 5 C.F.R. part 838.

On review, the Board agreed that the court order at issue is not one acceptable for processing under part 838 of 5 C.F.R. The Board noted that the court order failed to meet the requirements established by OPM for acceptance of a court order, that is, the order at issue did not expressly refer to 5 C.F.R. part 838 or state that the provisions of the order concerning CSRS benefits were drafted in accordance with the terminology used in part 838. While the Board recognized that the absence of the express reference and statement set out in OPM's regulation at 5 C.F.R. part 838 does not necessarily preclude the award of an annuity, where, as here, there is a dispute concerning the meaning of the order's annuity-apportioning provision, and there is no showing that the parties or the court understood or intended that any ambiguity in the order would be resolved under OPM's interpretive rules in 5 C.F.R. part 838, the order may not be accepted for processing under that part. The Board noted that the intervenor is not without a remedy because she may ask the court that issued the order for clarification and may then present the clarifying order to OPM for a new determination.

[Azbill v. Department of Homeland Security, 2007 MSPB 95](#)

MSPB Docket No. DE-1221-06-0058-W-1

March 30, 2007

Whistleblower Protection Act

- Jurisdiction, Generally

Board Procedures/Authorities

- Adjudicatory Error

The Board reopened appellant's IRA appeal to address the issue of jurisdiction where the AJ dismissed the appeal, apparently for lack of jurisdiction, after adjudicating the appeal under the standards applicable to a determination on the merits. The Board held that it was error to assume jurisdiction and then reject a whistleblower reprisal claim on the merits; rather, the Board must first address jurisdiction before proceeding to the merits. In contrast, the Board may resolve the merits issues in any order it deems most convenient. Here, the Board found that appellant, a Customs and Border Patrol (CBP) Officer working a "mixed-tour" schedule, established jurisdiction by showing that he exhausted his administrative remedies before OSC and made a nonfrivolous

allegation that his disclosure of an agency official's violation of Utah law was a contributing factor in the reduction in his working hours. The Board found, however, that the agency showed by clear and convincing evidence that it would have limited the appellant's "mixed-tour" hours even in the absence of whistleblowing where the evidence shows that the agency decided to eliminate the hours of all "mixed-tour" CBP Officers.

[Wright v. U.S. Postal Service, 2007 MSPB 96](#)

MSPB Docket No. DC-0353-06-0717-I-1

March 30, 2007

Jurisdiction

Timeliness

- Notice of Time Limit/Appealable Matter

HOLDING: Since the agency's failure to provide an appellant with notice of the right to appeal its action normally justifies a waiver of the time limit to file an appeal, the jurisdictional issue here of whether the agency took an appealable action is inextricably intertwined with the timeliness issue and must therefore be addressed first.

The appellant was a nonpreference eligible City Carrier with the Postal Service. She filed an appeal with the Board on July 18, 2006, alleging that the agency violated her restoration rights as a partially recovered employee, but her appeal did not describe the factual basis of her claim. The administrative judge (AJ) ordered her to show that her appeal was timely or that there was good cause for her delay. She responded that the Board should waive the time limit because the agency did not inform her of her appeal right when it denied her request for restoration. The agency moved to dismiss the appeal as untimely. The agency noted that on April 11, 2006, the appellant had filed an appeal alleging a constructive suspension on March 8, 2006, that was based on the same operative facts as her restoration claim. The agency argued that she failed to show why she could not have timely raised her restoration claim in that earlier appeal.

The AJ dismissed the appeal as untimely, finding that the appellant failed to show good cause for her failure to file her restoration claim at the time she filed her earlier appeal. He found that the agency's failure to inform appellant of her appeal rights did not provide good cause because she did not show due diligence in filing her appeal upon becoming aware of her appeal right.

On review, the Board indicated that there was a jurisdictional issue in the case and stated that to establish jurisdiction over a restoration claim as a partially recovered employee an appellant must allege facts that would show, if proven, that the agency's denial of her request for restoration was "arbitrary and capricious." Although it found that the appellant failed to allege such facts, the Board also found that the AJ did not inform her of the jurisdictional pleading requirements for a restoration appeal and that

therefore the record was insufficient for determining whether the Board had jurisdiction. With respect to the timeliness issue, the Board noted that, if the agency denied the appellant's request for restoration and failed to notify her of her appeal rights, its failure would normally justify a waiver of the time limit. Thus it concluded that the jurisdictional and timeliness issues were inextricably intertwined and that the jurisdictional issue must be addressed first. Accordingly, it remanded the case for the AJ to do so, after providing the appellant proper notice of the jurisdictional pleading requirements in a restoration appeal and giving her the opportunity to further address the jurisdictional and timeliness issues.

DISMISSALS-SETTLEMENT/WITHDRAWN

Glenn A. Meyers v. Office of Personnel Management, CH-0841-06-0779-I-1 (3/30/07)
Michael W. Bendig v. Office of Personnel Management, CH-844E-07-0001-I-1 (4/04/07)

FEDERAL CIRCUIT AFFIRMANCES/DISMISSALS (NP)

The following appeals were affirmed:

Cheryl L. Long v. U.S. Postal Service, 2007-3010, CH-0752-05-0699-I-2 (4/04/07)
Rajan Zed v. U.S. Postal Service, 2007-3019, SF-0752-06-0251-I-1 (4/04/07)

The following appeals were dismissed:

Raymond H. Wilkes v. Department of the Treasury, 06-3294, CH-0432-04-0774-I-1 (4/03/07)
Janet K. Hufenbach v. Merit Systems Protection Board, 07-3089, CH-844E-06-0656-I-1 (4/04/07)
Kelsey L. Hebron v. U.S. Postal Service, 07-3117, DC-0752-0319-I-1 (4/04/07)
Robert P. Beaudette v. Department of the Treasury, 07-3133, DE-0752-04-0112-I-1 (4/04/07)
Steven L. Whittenburg v. Department of Homeland Security, 07-3136, AT-0831-06-0473-I-1 (4/04/07)
Mary Jo A. Stauner v. Merit Systems Protection Board, 07-3121, SF-0752-00-0262-I-2 (4/04/07)

The court recalled the mandate and reinstated the appeal:

Patrick N. Sweeney v. Department of Homeland Security, 07-3091, DA-0752-05-0534-I-2 (4/03/07)