U.S. Merit Systems Protection Board

CASE REPORT

DATE: February 2, 2007

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BOARD DECISIONS

***Galwey v. U.S. Postal Service*,**
MSPB Docket No. AT-0752-06-0045-I-1
January 26, 2007

Retirement - Disability Retirement
Board Procedures/Authorities - Miscellaneous

HOLDING: The Board suspended its consideration of the appellant's PFR of the ID that affirmed his removal and remanded the appeal to the regional office for the AJ to determine whether the agency has a duty to file a disability retirement application on the appellant's behalf.

The agency proposed the appellant's removal based on charges of failure to be regular in attendance and failure to provide medical documentation or other acceptable evidence. After the agency issued its decision to remove the appellant, he filed a grievance that the parties settled by agreeing, in part, that the appellant would immediately submit a release of his medical records to the agency, authorizing the agency to send a copy of his medical records and pertinent information to a pre-designated psychiatrist. The agency, citing the appellant's failure to provide a medical release, removed the appellant in September 2005 based on his noncompliance with the settlement agreement. The appellant appealed to the Board, and the AJ affirmed the appellant's removal and denied his affirmative defenses.

On review, the Board found that the medical evidence raised questions regarding the appellant's ability to work, his competence to file a disability retirement application, and the agency's possible responsibility for filing a disability retirement application on the appellant's behalf. Both the Civil

Service Retirement System and the Federal Employees' Retirement System mandate that an agency file a disability retirement application on an employee's behalf where the employee meets the service requirements for a disability retirement annuity and where the following circumstances are met: (1) The agency has issued a decision to remove the employee; (2) the agency concludes, after its review of medical documentation, that the cause for the employee's unacceptable performance, attendance or conduct is disease or injury; (3) the employee is institutionalized, or the agency concludes, based on its review of medical and other information, that the employee is incapable of making a decision to file an application for disability retirement; (4) the employee has no personal representative or guardian; and (5) the employee has no immediate family member who is willing to file an application on his behalf. Given the medical evidence, the Board ordered the agency to show cause why the Board should not order it to file and prosecute to conclusion an application for disability retirement on the appellant's behalf.

The Board found that the agency failed to show cause why this case should not be remanded for further proceedings. The Board also found that the agency should have concluded that the appellant was incapable of making a decision to file a disability retirement application based on the October 2003 psychiatric evaluation, in which the appellant was diagnosed as suffering from Delusional Disorder and a high level of paranoia that could, instead, be Chronic Paranoid Schizophrenia.

The Board next found that, based on the record before the Board, it could not determine whether the remaining circumstances exist that would require the agency to act on the appellant's behalf by filing a disability retirement application for him, i.e., whether the cause of the appellant's removal was actually his mental condition, whether the appellant has a personal representative or guardian, and whether the appellant has no immediate family member who is willing to file an application on his behalf. The Board therefore remanded the appeal for the AJ to determine whether the agency has a duty to file a disability retirement application on the appellant's behalf. Accordingly, the Board suspended its consideration of the appellant's PFR.

***McIntosh v. Office of Personnel Management*,**
MSPB Docket No. AT-831M-06-0461-I-1
January 31, 2007

Board Procedures/Authorities
- Reopening and Reconsideration
Retirement – Annuity Overpayment

HOLDING: The Board sua sponte reopened the appeal to address the Board's jurisdiction where the issue was wrongly decided in the initial decision; the Board has jurisdiction over the appellant's claim that OPM

should waive recovery of the overpayment that arose when OPM failed to withhold from her annuity the correct amount for her life insurance premiums even though the Board lacks jurisdiction over the overpayment determination itself.

The appellant is an annuitant under the Civil Service Retirement System Offset. The Office of Personnel Management (OPM) failed to withhold from her annuity the correct amount for her life insurance premiums for 9 years. As a result, OPM found that she had been overpaid $5,336.34, and scheduled an installment plan for her to repay that sum. The appellant asked OPM to waive the requirement that she repay the overpayment. OPM found that she was not completely without fault for the overpayment, and thus she did not meet the eligibility requirements for waiver. The appellant filed this appeal with the Board, asking that it find that she qualified for a waiver. OPM moved to dismiss the appeal for lack of Board jurisdiction, arguing that the overpayment arose from an insurance matter, rather than overpayment of an annuity per se. The administrative judge (AJ) dismissed the appeal for lack of jurisdiction.

Because the appellant's petition for review did not address the issue of jurisdiction, the Board denied it. However, the Board reopened the case because the issue of jurisdiction was wrongly decided. In finding that the Board lacks jurisdiction in this appeal, the AJ relied on *Miller v. Office of Personnel Management*, 449 F.3d 1374, 1378-79 (Fed. Cir. 2006), for the proposition that the Board cannot decide appeals when they arise from OPM's collection efforts for insurance matters. He noted that the court in *Miller* had relied upon *Campbell v. Office of Personnel Management*, 90 M.S.P.R. 68 (2001). The Board, however, distinguished this case from *Campbell*, because here, unlike in *Campbell*, the appellant sought review of OPM's refusal to waive recovery of the overpayment, rather than contesting OPM's determination that she had been overpaid.

The Board, instead, relied on *Mitchell v. Office of Personnel Management*, 97 M.S.P.R. 566 (2004), a case in which the annuitant also sought review of OPM's refusal to waive recovery of the overpayment resulting from OPM's failure to deduct from his annuity the correct amount for life insurance premiums. In *Mitchell*, the Board found that it has jurisdiction to review OPM's final decisions on requests that recovery of annuity overpayments be waived, even when it lacks jurisdiction to consider the propriety of the overpayment determination itself. Therefore, the Board found in this case that it has jurisdiction to review the appellant's claim that OPM should waive recovery of the overpayment. Accordingly, the Board vacated the initial decision and remanded the case for adjudication of that matter.

***Davenport v. Department of Justice*,**
MSPB Docket No. AT-3443-06-0489-I-1
January 30, 2007

Miscellaneous Topics – USERRA/VEOA/Veterans' Rights

HOLDING: Where the appellant did not show that she was forced to use annual leave or leave without pay, in lieu of military leave, as a result of the agency's improper administration of military leave, the Board denied her request for corrective action under USERRA.

In this USERRA appeal, the appellant asserted that the agency charged her military leave account from 1992 to 2001 for absences on nonworkdays in violation of *Butterbaugh v. Department of Justice*, 336 F.3d 1332 (Fed. Cir. 2003). She asserted that the improper charging caused her to use annual, sick, or leave without pay to perform military duty. The administrative judge (AJ) found that the appellant showed that the agency had not restored the 4 days of military leave that it charged her on June 19 and 20, 1999, and June 24 and 25, 2000, when she was not scheduled to work in her civilian capacity, and, thus, ordered the agency to correct its records to show that the 4 days were "covered by military leave." The AJ also found that the appellant's submissions were insufficient to show that the agency improperly charged her military leave or required her to use other leave to perform military duty on any other dates. Thus, the AJ apparently dismissed the appellant's argument concerning any days other than June 19 and 20, 1999, and June 24 and 25, 2000, for failure to state a claim upon which relief may be granted.

The Board denied the appellant's petition for review, reopened the case on its own motion, affirmed the initial decision as modified, and denied the appellant's request for corrective action. Because USERRA does not grant the Board the authority to order compliance with the military leave law, the Board found that the AJ erred in ordering the agency to correct its records with regard to the military leave charged to the appellant on June 19 and 20, 1999, and June 24 and 25, 2000. Rather, the appropriate remedy in such a case is to order compensation for any annual leave or leave without pay the appellant was forced to use as a result of the agency's improper administration of military leave. Next, the Board found that the AJ erred to the extent that he dismissed the appellant's claims concerning days other than June 19 and 20, 1999, and June 24 and 25, 2000, for failure to state a claim upon which relief may be granted because, taking as true the allegations in her complaint, it is not beyond doubt that the appellant could not prove a set of facts in support of her claim which would entitle her to relief.

The Board next addressed whether the appellant proved that she was forced to use any annual leave or leave without pay because of the agency's improper administration of military leave. First, the Board found that the AJ

sufficiently put the appellant on notice that she was required to show that, as a result of the agency's improper administration of military leave, she was forced to use annual leave or leave without pay to fulfill her military duties. Second, the Board found that the appellant's military reserve point statement, time and attendance information, performance appraisals, and affidavit were insufficient to prove that she is entitled to corrective relief for any of the days she claimed other than June 19 and 20, 1999, and June 24 and 25, 2000. Third, the Board found there is no meaningful relief for the appellant to obtain concerning June 19 and 20, 1999, and June 24 and 25, 2000, because the appellant did not exhaust her military leave in 1999 and 2000. Even if she could have rolled over the 4 days into the following years, it would not have changed her balance because the government stopped charging military leave for nonworkdays in 2000. Further, the evidence does not establish that the appellant was forced to use any other leave as a result of being charged military leave for nonworkdays. Accordingly, the Board denied the appellant's request for corrective action.

***Thompson v. Department of the Air Force*,**
MSPB Docket No. SF-0752-06-0219-I-1
January 25, 2007

Adverse Action Charges - Miscellaneous

HOLDING: The Board deferred to the agency's determination that an Air Traffic Control Specialist (ATCS) certificate was a necessary condition of the appellant's ATCS (Terminal) position.

The agency removed the appellant, an Air Traffic Control Specialist (Terminal), for failure to maintain an Air Traffic Control Specialist (ATCS) certificate. The appellant appealed his removal and raised affirmative defenses of whistleblowing reprisal and harmful error. The administrative judge (AJ) postponed the appellant's requested hearing in order to first determine whether the ATCS certificate was a necessary condition of employment for the appellant's position. The AJ then found that the agency failed to show that the ATCS certificate was a necessary condition of the appellant's position, and, thus, reversed the removal action.

On petition for review, the Board found that the AJ did not order interim relief, and that, in any event, the agency showed compliance with any such order. With regard to the ATCS certificate, absent evidence of bad faith or patent unfairness, the Board defers to the agency's determination as to the requirements that must be fulfilled in order for an individual to qualify for appointment to a particular position, and to retain that position. Here, the Board deferred to the agency's determination that an ATCS certificate was a necessary condition of the appellant's position because: The appellant's position description and the agency's regulations clearly state that an

occupant of the position is required to hold an ATCS certificate; withdrawal of the appellant's ATCS certificate was directly related to his qualifications to perform the duties of his position; and the appellant did not present any evidence of bad faith or patent unfairness. Thus, the agency properly required that the appellant hold an ATCS certificate as a necessary condition of his employment. The Board therefore reversed the initial decision and remanded this case to the regional office for the appellant's requested hearing.

***Manning v. Department of Homeland Security*,**
MSPB Docket No. AT-0432-05-0583-I-2
January 26, 2007

Performance-Based Actions
- Unacceptable Performance - Proof

HOLDING: Where the PIP established the quantity and quality of the appellant's performance required under the critical element as no more than 2 incidents of failure, the agency was required to prove that the appellant committed more than 2 failures within a 90-day period, and the AJ erred in finding that the agency established the appellant's unsatisfactory performance on just 2 incidents of such failure.

The appellant, a Supervisory General Engineer, was placed on a performance improvement plan (PIP) as a consequence of his "fails to meet" rating on the supervisory leadership critical element. The PIP letter set forth the following standard as the acceptable error rate under that critical element during the 90-day PIP period: (1) No more than 2 incidents of failure to meet the requirements of the supervisory leadership critical element that result in a negative impact on meeting project timeliness or project costs; or (2) no more than 4 incidents of failure to meet the requirements of that critical element that do not result in a negative impact on meeting such goals. The agency subsequently removed the appellant for unacceptable performance in the critical element of supervisory leadership, charging that during the PIP period, 5 incidents occurred that met the first category of errors and 3 incidents occurred that met the second category of errors set forth in the appellant's PIP letter. The appellant opted for a discontinued service retirement in lieu of the involuntary action of removal.

On appeal, the AJ issued an initial decision affirming the appellant's removal. The AJ found in pertinent part that the agency established 2 out of the 5 alleged incidents of failure of the appellant's supervisory leadership under the first category of errors set forth in his PIP. The AJ did not make findings on any of the 3 remaining incidents which were alleged by the agency as belonging to the first category of errors, noting that, because the agency could prove its charge of unsatisfactory performance based upon 2

failures of supervisory leadership in the first category of errors, he need not address the other 3 incidents. The AJ also made no findings regarding the 3 incidents that the agency alleged in the second category of errors.

The Board granted the appellant's petition for review and vacated the initial decision, finding that the agency was required to prove that the appellant committed more than 2 failures within a 90-day period in order to prove that the appellant failed to perform acceptably under the supervisory leadership critical element. The Board thus determined that the AJ erroneously found that the agency established the appellant's unsatisfactory performance on just 2 incidents of failure to meet the requirements of the supervisory leadership critical element under the first category of errors. Accordingly, the Board remanded the appeal for findings on whether the agency proved any of the 3 remaining incidents alleged by the agency as belonging to the first category of errors.

The Board rejected the agency's suggestion that, upon remand, the AJ, if he finds that these incidents would not have resulted in a negative impact on project timeliness or project cost, can consider the incidents charged under the first category of errors as incidents meeting the lower threshold of the second category of errors because the Board is required to review the agency's decision on an adverse action solely on the grounds invoked by the agency. In addition, because the findings regarding the other 3 incidents charged under the first category of errors may require the AJ to make credibility findings, the Board rejected the agency's invitation to make such findings without remanding this appeal to the regional office.

Pignataro v. Department of Veterans Affairs,
MSPB Docket No. AT-0752-05-0404-I-1
February 1, 2007

Hearings - Waiver
Board Procedures/Authorities
- Pro Se Appellants
- Sanctions

HOLDING: The AJ erred in finding that the appellant waived her right to a hearing where the appellant was pro se, there was no written or other record of a waiver, and the appellant's actions contradicted the AJ's assertion that she waived her right to a hearing and showed that she tried to exercise her right to a hearing; denial of the appellant's requested hearing as a sanction for failing to file a prehearing submission was unwarranted where the Board could not find in her conduct any negligence or abuses that would rise to the level of extraordinary circumstances.

This pro se appellant filed an appeal of her removal. After finding that she had waived her right to a hearing, the administrative judge (AJ) adjudicated her appeal based on the parties' written submissions, affirming the agency's action.

The Board granted the appellant's petition for review and vacated the initial decision, finding that the record did not show that the appellant waived her right to a hearing by either knowingly taking a clear, unequivocal, or decisive action, or by committing an act that would amount to estoppel on her part. There was no written waiver in the record, the AJ did not record the status conference, and the AJ's comments concerning an alleged waiver were too abbreviated. The Board found that, although the appellant did not handle her appeal flawlessly, her actions directly contradicted the AJ's assertion that she waived her right to a hearing and showed that she tried to exercise her right to a hearing. The Board noted the appellant's pro se status and stated that the policy considerations in favor of holding a hearing are not easily defeated.

The Board further found that, to the extent the AJ denied the appellant a hearing as a sanction for failing to file a prehearing submission, such a sanction was not warranted because it could not find in the appellant's conduct any negligence or abuses that would rise to the level of extraordinary circumstances. Although the appellant might have been more diligent in prosecuting her appeal, her hospitalization and the effects of Hurricane Wilma serve to mitigate her deficiencies, and the appellant eventually filed an extensive submission. Under these circumstances, the Board was compelled to resolve any doubts in the appellant's favor and to remand the appeal for a hearing.

***George v. Department of the Army*,**
MSPB Docket No. SF-0752-06-0316-I-1
February 1, 2007

Adverse Action Charges
- Falsification/Fraud
- Miscellaneous/Procedures
Penalty - Miscellaneous

HOLDING: Based on the language of the charge and the narrative description in the proposal letter, the Board found that to prove the charge of Allowing False Time Cards to be Processed Resulting in Over Payment for Unearned Overtime for Yourself and Subordinates, the agency had to show that the time cards were false, not merely incorrect, and that the appellant intentionally allowed the false time cards to be processed; a reduction-in-grade penalty was appropriate and justified for

the sustained charge of Retaliatory Behavior Directed Against a Subordinate for Protected Activity.

The agency reduced the appellant in grade from a GS-8 Supervisory Firefighter to a GS-7 Firefighter based on the following charges: (1) Allowing False Time Cards to be Processed Resulting in Over Payment for Unearned Overtime for Yourself and Subordinates; (2) Falsification of the Official Fire Department Incident Report, dated October 13, 2004; and (3) Retaliatory Behavior Directed Against a Subordinate for Protected Activity. The administrative judge (AJ) issued an initial decision, finding that the agency proved only the first and third charges. The AJ affirmed the agency's action based on those 2 charges.

The Board granted the appellant's petition for review, agreeing with the appellant that the AJ misconstrued the first charge. The AJ found that the first charge only required proof that the appellant was negligent. Based on the language of the charge and the narrative description in the proposal letter, the Board found that to prove the first charge, the agency had to show that the time cards were false, not merely incorrect, and that the appellant intentionally allowed the false time cards to be processed.

Although the AJ incorrectly interpreted the first charge, the Board found that it did not need to remand this case for a new determination on the merits of that charge because the appellant did not show that the AJ erred in sustaining the third charge, "Retaliatory Behavior Directed Against a Subordinate for Protected Activity," and the reduction-in-grade penalty was appropriate and justified based on that sustained charge. Because individuals who bring to light waste, fraud, or abuse are serving an important public purpose, they must not be subjected to retaliatory behavior by anyone, especially a supervisor.

***Marshall v. Department of Health & Human Services*,**
MSPB Docket No. AT-3443-06-0811-I-1
February 1, 2007

Board Procedures/Authorities - Miscellaneous
Miscellaneous Topics – USERRA/VEOA/Veterans' Rights

HOLDING: The appellant showed that he had exhausted the DOL complaint process by e-filing the DOL closure letter with the Board even though this e-filing was not entered into the appeal file; the VEOA appeal was remanded so that the AJ could fully advise the appellant of the jurisdictional requirements for a VEOA claim and afford him the opportunity to establish jurisdiction.

On June 25, 2006, the appellant filed this appeal alleging that the agency violated his veterans' preference rights when it failed to offer him the

position of GS-13 Budget Analyst in 2004, due to a purported "hiring freeze," but approximately two years later, offered him the job after he had already accepted other employment. The administrative judge (AJ) issued an acknowledgment order on July 24, 2006, informing the appellant that the Board lacks jurisdiction over his VEOA claim absent proof that he exhausted his Department of Labor (DOL) remedy and ordering the appellant to submit such proof. Receiving no response from the appellant, the AJ issued an initial decision dismissing the appeal for lack of jurisdiction since the appellant has not exhausted his DOL remedy.

The Board granted the appellant's petition for review. Exhaustion of the DOL complaint process is a jurisdictional prerequisite to pursuit of a Board appeal under the VEOA. The Board's electronic filing record reflects that on July 24, 2006, the appellant e-filed a copy of a June 22, 2006 letter in which DOL informed the appellant that his claim was without merit and advised him that he may file a Board appeal within 15 days from his receipt of the letter. Through no fault of the appellant, this e-filing containing DOL's letter was not entered into the appeal file in accordance with the Board's regulations, 5 C.F.R. § 1201.14, Electronic filing procedures. The Board thus found that the appellant exhausted his administrative remedy before DOL and timely filed his Board appeal.

However, the Board found that the record was not sufficiently developed for the Board to determine whether the appellant raised a nonfrivolous allegation that the agency violated his veterans' preference rights, and, thus, remanded this appeal so that the AJ could fully advise the appellant of the requirements for establishing the Board's jurisdiction over a VEOA claim and afford the appellant an opportunity to do so.

***Bullock v. Department of Homeland Security*,**
MSPB Docket No. DA-0752-06-0043-I-1
January 31, 2007

Penalty
- Theft/Misuse/Misappropriation of Government Property/Funds

The Board issued a Final Order denying the agency's petition for review of the initial decision that mitigated the appellant's removal for misuse of a government credit card to a demotion to a non-supervisory position. Chairman McPhee issued a dissenting opinion, stating that he would have upheld the removal in light of the appellant's status as a supervisory law enforcement officer and her knowing and repeated unauthorized charges to her government card totaling over $4000.

***Johnston v. Department of the Treasury*,**
MSPB Docket No. NY-1221-00-0220-A-2
January 25, 2007

Attorney Fees - Reasonableness

HOLDING: The appellant was entitled to an additional award of attorney fees for fees and costs incurred in preparing a response to the agency's PFR of the addendum initial decision.

The agency petitioned for review of the addendum initial decision that awarded the appellant attorney fees. The Board summarily denied the petition for review (PFR) and granted the appellant's unopposed request for additional attorney fees for fees and costs incurred in preparing a response to the agency's PFR of the addendum initial decision.

***Gowdy v. Department of Justice*,**
MSPB Docket No. SF-0752-05-0340-I-1
February 1, 2007

Timeliness – Miscellaneous

The Board dismissed the appellant's petition for review as untimely filed (17–months late) without good cause shown because his alleged misunderstanding of the appeal process and arguments concerning the underlying merits of his petition for review do not constitute good cause. The Board also denied the appellant's request to reopen the appeal.

***Griffin v. Office of Personnel Management*,**
MSPB Docket No. SF-0731-03-0528-I-3
January 31, 2007

Timeliness – Miscellaneous

The Board dismissed this pro se appellant's petition for review as untimely filed (20-months late) without good cause shown because she failed to respond to the Clerk's timeliness acknowledgment letter, and her claimed misunderstanding of, and dissatisfaction with, the terms of the settlement agreement do not constitute good cause. The Board also denied the appellant's request to reopen the appeal.

***McPherson v. Department of the Treasury*,**
MSPB Docket No. DA-0752-05-0043-I-1
January 31, 2007

Timeliness
– Miscellaneous
- New Evidence/Argument

The Board dismissed this pro se appellant's petition for review as untimely filed (19-months late) without good cause shown because he failed to respond to the Clerk's timeliness acknowledgment letter and did not establish good cause based on alleged agency misconduct, his dissatisfaction with the terms of the settlement agreement, or alleged new and material evidence.

COURT DECISIONS

Stoyanov v. Department of the Navy
Fed. Cir. No. 2006-3363, MSPB Docket No. DC-1221-06-0266-W-1
January 26, 2007

Whistleblower Protection Act
- Jurisdiction Generally
- Personnel Actions

HOLDING: Where the appellant did not raise an allegation to OSC involving a personnel practice taken against him, as opposed to his brother, the Board properly dismissed his IRA appeal for lack of jurisdiction; the Board's IRA jurisdiction only covers personnel actions taken or proposed against the IRA appellant himself.

The appellant filed a whistleblower complaint with the Office of Special Counsel (OSC), alleging that the agency took or proposed to take various personnel actions against his brother in reprisal for whistleblowing disclosures of both brothers. After exhausting his OSC remedy, the appellant filed an individual right of action (IRA) appeal with the Board. The AJ dismissed the appeal for lack of jurisdiction because the Board's IRA jurisdiction only covers personnel actions taken or proposed with respect to the IRA appellant himself. The Board denied the appellant's petition for review by Final Order.

The court affirmed the Board's decision. The court agreed with the Board that 5 U.S.C. § 1221(a), on its face, requires that the allegedly improper personnel practice must be taken or proposed to be taken against the person bringing the IRA appeal. The court distinguished a case involving the National Labor Relations Act (NLRA) in which the U.S. Court of Appeals for the Seventh Circuit held that retaliatory acts against a family member are akin to taking the acts against a person himself. The court concluded that the NLRA's language is broader than the language of § 1221(a), which

provides relief for complaints by employees with respect to any personnel action taken, or proposed to be taken, "against such employee." The court further found that, because an IRA appellant must exhaust his remedies for whistleblower allegations with the OSC, and because, in this case, the Board correctly held that the appellant did not raise an allegation to the OSC involving a personnel practice taken against him, the Board properly dismissed his appeal for lack of jurisdiction.

FEDERAL CIRCUIT AFFIRMANCES/DISMISSALS (NP)

The following appeals were affirmed:
Dobruck v. Department of Veterans Affairs, 06-3411, AT-0432-05-0734-I-1 (1/25/07)
Stanley v. Office of Personnel Management, 06-3334, DE-844E-06-0065-I-1 (1/30/07)

A petition for rehearing was denied in the following case:
Thompson v. Office of Personnel Management, 06-3262, SF-844E-05-0638-I-1 (1/29/07)

The mandate was recalled and the appeal reinstated in the following case:
Baird v. Department of the Army, 07-3046, CH-0752-06-0377-I-1 (1/26/07)