CASE REPORT

DATE: February 9, 2007

Note: These summaries are descriptions prepared by individual MSPB employees. They do not represent official summaries approved by the Board itself, and are not intended to provide legal counsel or to be cited as legal authority. Instead, they are provided only to inform and help the public locate Board precedents.

BOARD DECISIONS

***Muyco v. Office of Personnel Management*,**
MSPB Docket No. SF-0831-06-0492-I-1
February 1, 2007

Jurisdiction
- Miscellaneous
Retirement
- Procedures/Miscellaneous

HOLDING: OPM's written response informing the appellant that it would not revisit its prior, final decision, was not a new appealable decision over which the Board has jurisdiction. OPM did not err or abuse its discretion in refusing to issue a new decision simply because the appellant is dissatisfied with OPM's prior final decision.

The appellant applied to the Office of Personnel Management (OPM) for a Civil Service Retirement System (CSRS) annuity, which OPM denied. The appellant filed a late request for reconsideration, which OPM denied as untimely. The appellant appealed to the Board and OPM's final decision was affirmed by initial decision and his petition for review was denied by the Board. Undeterred, the appellant requested a new decision from OPM, citing new legal argument. OPM refused to issue a new decision and informed the appellant, by letter, that no law or circumstance had changed to make the appellant entitled to an annuity and informed him that OPM would not be issuing a new decision. The appellant filed an appeal with the Board, characterizing this letter as a new final decision by OPM. The administrative judge (AJ) did not recognize the letter as a new decision, treated the appeal as stemming from OPM's earlier final decision, and dismissed the appeal as res judicata. The appellant petitioned for review.

The Board affirmed the AJ's dismissal for res judicata and reopened on its own motion to consider the appellant's argument that OPM's letter constituted a new appealable decision. Treated as such, the Board found that OPM's letter did not constitute a new decision on the merits of the appellant's claim and so dismissed the appeal for lack of jurisdiction. The letter specifically stated that OPM would not issue a new decision because no law or circumstance had changed affecting the appellant's lack of entitlement to an annuity. The appellant submitted no new evidence and was simply making new legal argument, which he should have raised before OPM at the time of his original application. There was no legal error or abuse of discretion in OPM's refusal to issue a new decision simply because the appellant appears dissatisfied with OPM's prior decision.

***Special Counsel v. Phillips and The Jackson County Sheriff Department and Jackson County, Missouri*,**
MSPB Docket No. CB-1216-06-0010-T-1
February 1, 2007

Special Counsel Actions
- Hatch Act

HOLDING: The Board denied the PFR for failure to meet the review criteria. Vice Chairman Rose dissented.

Vice Chairman Rose dissented stating that she disagreed with the holding of the administrative law judge below that the Office of Special Counsel had failed to prove that the respondent agency was within the executive branch of the county.

***Moorer v. Office of Personnel Management*,**
MSPB Docket No. DA-844E-05-0560-I-1
February 2, 2007

Jurisdiction
- Resignation/Retirement/Separation

HOLDING: The AJ's dismissal for lack of jurisdiction was erroneous because it was based upon both parties incorrectly stipulating that OPM had not issued a reconsideration decision; OPM had issued a reconsideration decision at the time. Despite the untimeliness of the appellant's PFR, the proper remedy was for the Board to reopen the appeal and remand it for adjudication.

The appellant filed a "request for reconsideration" with the Board's Dallas Regional Office on August 5, 2005, regarding the denial by the Office of Personnel Management (OPM) and the Social Security Administration of disability benefits. The appellant then stated this was not intended as an

appeal, as he was awaiting OPM's reconsideration decision. OPM moved to dismiss the appeal for lack of jurisdiction because it had not issued a final decision. As both parties agreed that OPM had not yet issued a final decision, the AJ dismissed the appeal on September 6, 2005. On September 5, 2006, the appellant sent another submission to the Board's Dallas office, which was forwarded to the Clerk of the Board as a petition for review (PFR). On PFR, OPM submitted a copy of its April 25, 2005 reconsideration decision denying the appellant's disability retirement application and admitted that it had erroneously stated to the AJ that it had not issued a final decision at the time of the appellant's appeal.

The Board vacated the initial decision dismissing the appeal for lack of jurisdiction because OPM had issued a final decision at the time of the appellant's appeal and remanded the appeal to the AJ for adjudication, including whether the appellant's August 5, 2005 appeal was timely given the date of OPM's April 25, 2005 reconsideration decision.

***Nakshin v. Department of Justice*,**
MSPB Docket No. NY-0731-03-0145-B-2
February 2, 2007

Miscellaneous Agency Actions
- Suitability

HOLDING: The Board's holding in *Duggan v. Department of the Interior*, 98 M.S.P.R. 666 (2005), is overruled. To establish Board jurisdiction, an appellant need not show that an agency's reasoning in its suitability determination falls within one of the specific categories discussed in 5 C.F.R. § 731.202(b).

The Board denied the agency's petition for review (PFR) but reopened the appeal on its own motion to clarify the Board's suitability case law. In *Duggan v. Department of the Interior*, 98 M.S.P.R. 666 (2005), *aff'd*, 190 F. App'x 963 (2006), the Board stated that to prove jurisdiction, an appellant must show, inter alia, that "his nonselection for the position was based on the agency's determination that he was unsuitable due to one or more of the factors set forth under 5 C.F.R. § 731.202." *Duggan*, 98 M.S.P.R. 666, ¶ 7 (emphasis added). In other words, *Duggan* held that the agency's reasoning for its nonselection must fall within one of the specific categories in 5 C.F.R. § 731.202(b) to be characterized as a constructive suitability determination over which the Board has jurisdiction. This holding was contrary to the Board's prior case law and is overruled.

***Paderes v. Office of Personnel Management*,**
MSPB Docket No. CB-1205-06-0019-U-1
February 5, 2007

Defense and Miscellaneous Claims
- Collateral Estoppel/Res Judicata/Law of the Case
Miscellaneous Topics
- Regulation Review

HOLDING: Petitioner's challenge to an OPM regulation was precluded by res judicata because he could have asserted the argument in his prior appeal of OPM's denial of his CSRS annuity application.

The petitioner, a former long-time temporary employee of the Department of the Navy, was denied a Civil Service Retirement System (CSRS) annuity by the Office of Personnel Management (OPM). The Board and the Federal Circuit Court of Appeals affirmed OPM's denial. The petitioner then requested the Board review OPM's regulation at 5 C.F.R. § 831.201(a)(13), which excludes non-permanent indefinite appointments from CSRS coverage.

The Board denied the request as precluded by res judicata because the appellant was simply seeking to relitigate, in the guise of challenging an OPM regulation, the issue in his prior appeal of his entitlement to an annuity.

***Schaberg v. U.S. Postal Service*,**
MSPB Docket No. SF-0752-06-0367-I-2
February 5, 2007

Board Procedures
- Representation
- Withdrawal of Appeal/PFR

HOLDING: The Board dismissed the PFR as deficient because it was signed only by the appellant's former representative, not the appellant, who had previously revoked his designation of a representative.

The appellant appealed his removal but after a hearing, while the appeal was still pending, the appellant requested to withdraw his appeal and revoked the designation of Mr. J. Byron Holcomb as his representative. The administrative judge (AJ) found the appellant's request voluntary and dismissed the appeal as withdrawn. Mr. Holcomb filed a petition for review (PFR) arguing that the appellant was not competent to either withdraw his appeal or discharge his counsel and requesting that the appeal be reinstated.

The Board dismissed the PFR as deficient because it was signed by neither the appellant nor the appellant's designated representative. Mr. Holcomb, who signed the PFR, was no longer the appellant's designated representative following the appellant's revocation of his designation.

***Vergara v. Office of Personnel Management*,**
MSPB Docket No. CB-1205-06-0022-U-1
February 5, 2007

Miscellaneous Topics
- Regulation Review

HOLDING:

The petitioner requested Board review of the validity of the Office of Personnel Management (OPM) regulation at 5 C.F.R. § 831.201(a)(13), which excludes from Civil Service Retirement System (CSRS) coverage employees serving under excepted, indefinite appointments. The petitioner argued that the regulation is not in accordance with 5 U.S.C. § 8347(g), which authorizes OPM to exclude from CSRS coverage employees whose appointment is temporary or intermittent, and Executive Order 9154.

The Board may invalidate OPM regulations if the implementation of those regulations would result in a prohibited personnel practice; however, the petitioner failed to show how the regulation, on its face or as implemented, would result in a prohibited personnel practice. Despite this, the Board denied review on other, more compelling grounds.

The Board considers four factors in deciding whether to grant regulation review: (1) The likelihood of resolution of the issue through other channels; (2) The availability of other equivalent remedies; (3) the extent of the regulation's application; and (4) the strength of the arguments against its validity. First, the petitioner has an alternate remedy by pursuing his alleged entitlement to a CSRS annuity; this action appeared to be such a claim in the guise of a request for regulation review. Second, the appellant's arguments regarding the validity of the regulation were weak because they have already been addressed and rejected by the Federal Circuit Court of Appeals in *Rosete v. Office of Personnel Management*, 48 F.3d 514 (Fed. Cir. 1995) and the Board in *Tabradillo v. Office of Personnel Management*, 93 M.S.P.R. 257 (2003). Accordingly, the Board rejected the petitioner's request for review.

***Trachtenberg v. Department of Defense*,**
MSPB Docket No. PH-0351-06-0019-I-1
February 6, 2007

Board Procedures/Authorities
- Reopening and Reconsideration
- Withdrawals of Appeal/PFR
Timeliness
- Miscellaneous

HOLDING: The appellant failed to show good cause for the delay in filing a PFR and the Board declined to reopen her withdrawn appeal

because of the substantial delay in requesting reopening and because there was no error to cure that implicated her basic rights and threatened a manifest injustice.

The appellant withdrew her initial appeal and the administrative judge (AJ) dismissed her appeal as withdrawn in November, 2005. She filed a petition for review (PFR) in October 2006. The Board denied her PFR as untimely filed without good cause for the delay because she failed to show that the delay was due to circumstances beyond her control.

Because the appellant withdrew her appeal the Board also treated her PFR as a request to reopen that appeal. The Board's authority to reopen a case is limited by the requirement that such authority be exercised within a reasonably short period of time, which the delay in this case was not. In addition, given that this case did not involve an error that implicates the appellant's basic rights, threatening a manifest injustice, the Board declined to exercise its authority to reopen the appeal.

***Johnson v. Department of Justice*,**
MSPB Docket No. DC-1221-06-0388-W-1
February 6, 2007

Whistleblower Protection Act
- Jurisdiction, Generally
Board Procedures/Authority
- Discovery

HOLDING: The Board has jurisdiction over an IRA appeal if the appellant has exhausted his remedies before OSC and makes nonfrivolous allegations that he made a protected disclosure that was a contributing factor in the agency's decision to take a personnel action. A motion to compel must state how the information sought is relevant and material and be accompanied by a sworn statement that no response to the discovery request was received. In an IRA appeal, the Board lacks jurisdiction to also adjudicate the merits of the agency's personnel action.

The agency suspended the appellant for 14 days for conducting an unauthorized investigation, misuse of position, and lack of candor. At the same time the agency also reassigned the appellant. The appellant complained to the Office of Special Counsel (OSC) alleging that these actions were in retaliation for several protected disclosures he had made. The AJ dismissed the appellant's individual right of action (IRA) appeal for lack of jurisdiction because the appellant failed to prove, by preponderant evidence, whistleblowing and retaliation.

The Board reversed the initial decision and remanded the appeal for a hearing and adjudication on the merits. The AJ erroneous applied the now-

defunct jurisdictional standard in *Geyer v. Department of Justice*, 63 M.S.P.R. 13 (1994), of proof by preponderant evidence of whistleblowing and retaliation. The correct standard is nonfrivolous allegations, as explicated in *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367 (Fed. Cir. 2001) and *Rusin v. Department of the Treasury*, 92 M.S.P.R. 298 (2002), which overruled *Geyer*. The Board applied the correct standard and found that the appellant had established jurisdiction with respect to only one of his fifteen alleged disclosures. With respect to this one disclosure, the appellant had exhausted his remedies via OSC and had made a nonfrivolous allegation that the disclosure was protected and contributed to the agency's personnel action against him.

The Board also found that the AJ did not err in failing to rule on the appellant's motion to compel because it was not accompanied by a sworn statement that no response was received and did not state how the information sought was relevant and material. Nor did the AJ err in failing to address the appellant's allegations that the agency committed harmful procedural error in the disciplinary actions taken against him because, in an IRA appeal, the Board lacks jurisdiction to also adjudicate the merits of the agency's personnel action.

***Hesse v. Department of the Army*,**
MSPB Docket No. AT-3443-05-0936-I-1
February 6, 2007

Miscellaneous Topics
- USERRA/VEOA/Veterans' Rights
- Statutory/Regulatory/Legal Construction

HOLDING: "Active duty" for purposes of preference eligibility as a "disabled veteran" under 5 U.S.C. § 2108(2) may consist entirely of service for training purposes.

The appellant was tentatively selected for a security guard position that, by statute, may be filled only by preference eligible veterans. Prior to his appointment, however, the agency concluded that the appellant was not preference eligible because, although he served on active military duty, was honorably discharged, and had a service-connected disability, his active duty service was only for training purposes. The appellant filed a complaint with the Department of Labor (DOL), which concurred with the agency, and then an appeal with the Board under the Veterans Employment Opportunities Act of 1998 (VEOA). The administrative judge (AJ) concurred with the agency's determination and denied the appellant's request for relief. On petition for review (PFR) the Board reversed the initial decision (ID), finding that the appellant met the definition of a "disabled veteran" under 5 U.S.C. § 2108(2) and so was preference eligible. Vice Chairman Rose dissented.

"Disabled veteran" is defined in 5 U.S.C. § 2108(2) as "an individual who has served on active military duty in the armed forces, has been separated therefrom under honorable conditions, and has established the present existence of a service-connected disability …" The parties stipulated that the appellant facially met all these requirements but also that his active duty service was only for training purposes. The agency argued that this does not constitute "active duty" under the statute, referring to the definition of "active duty" at 38 U.S.C. § 101(21), which specifically excludes active duty for training. However, unlike 5 U.S.C. §§ 2108(1)(B)-(D), which define "active duty" by reference to 38 U.S.C. § 101(21), the separate section defining a "disabled veteran," at 5 U.S.C. § 2108(2), includes no such reference to 38 U.S.C. § 101(21). Additionally, nothing in 38 U.S.C.§ 101 makes it generally applicable to Title 5 in general or 5 U.S.C. § 2108 in particular. Rather, 38 U.S.C. § 101 states that its definitions apply for purposes of Title 38. Therefore, the provision limiting the definition of "active duty" in 5 U.S.C. §§ 2108(1)(B)-(D) does not apply to the definition of "disabled veteran" at 5 U.S.C. § 2108(2). Nothing in the statute's legislative history indicates that the omission of this limitation in section 2108(2) by Congress was anything but intentional.

The agency also relied in its argument on *Broussard v. U.S. Postal Service*, 674 F.2d 1103 (5th Cir. 1982), which held that, to qualify as preference eligible, disabled veterans must have served on active duty for purposes other than training, citing to the Federal Personnel Manual (FPM). The Board distinguished *Broussard*, because the 5th Circuit's holding appears to rely on a finding that the appellant lacked a service-connected disability. Regardless, the 5th Circuit decision in *Broussard*, and the underlying decision of the U.S. Civil Service Commission, the board's predecessor, are not binding on the Board.

The agency also cited OPM's regulations at 5 C.F.R. § 211.102, which define active duty as "full-time duty … in the armed forces, except for training …" The Board declined to grant *Chevron* deference to OPM's interpretation of the statute here because it found Congress's intent clear such that OPM's interpretation was inconsistent with the statutory language and legislative history of 5 U.S.C. § 2108(2). Therefore, the Board concluded that "active duty," as that term is used in 5 U.S.C. § 2108(2), may consist entirely of service for training purposes such that the appellant in this case was a "disabled veteran" and preference eligible. The appropriate relief in this case was to reconstruct the selection process because, although the appellant had been tentatively selected, the record did not establish that he would have been appointed.

Vice Chairman Rose dissented, stating that the statute unambiguously limits the term "veteran" to those who have served in active duty for other than training purposes. The Vice Chairman stated that, under the "whole act rule" of statutory construction, failing to read 5 U.S.C. § 2108(2) in light of the subsections around it leads to incoherence. Applying the normal rule of

statutory construction, that identical words in different parts of the same act should be read to have the same meaning, the Vice Chairman would have found that a "disabled veteran" must meet the definition of a "veteran," which requires active duty other than training. Finally, Vice Chairman Rose stated that the statutory language is not unambiguous and that the Board should therefore defer, under *Chevron*, to OPM's interpretation in its regulations at 5 C.F.R. § 211.101.

***Donati v. Office of Personnel Management*,**
MSPB Docket No. PH-0843-05-0336-N-1
February 7, 2007

Board Procedures/Authorities
- Reopening and Reconsideration

HOLDING: The Board granted OPM's request for a stay pending the Board's decision on the merits of OPM's request for reconsideration.

The Office of Personnel Management (OPM) petitioned the Board for reconsideration of its decision on the merits of this case and also requested a stay of the Board's decision pending resolution of OPM's request for reconsideration. The Board considered the four factors that guide it in deciding whether to exercise its discretion to grant a stay.

First, the Board found that OPM presented a serious legal argument on the merits. Second, OPM demonstrated that it would be irreparably harmed by the loss of limited appropriated funds that would be diverted to adjudicating claims similar to the appellant's and potentially then incurring the cost of having to seek recoupment of those funds should the Board's decision be overturned. Third, although a stay will delay the appellant's receipt of benefits, the harm to her would not be substantial because the Board did not foresee a protracted delay before ruling on the merits and the appellant would be exposed to the risk of having to repay any payments received anyway. Fourth and final, the public interest favored granting the stay because public funds should not be spent unnecessarily and requiring OPM to immediately adjudicate similar claims, when the outcome of this case may effect OPM's decisions and payments, could lead to the unnecessary expenditure of more government resources. Therefore, the Board stayed OPM's obligation to comply with its decision in *Donati v. Office of Personnel Management*, 104 M.S.P.R. 30 (2006), pending resolution of OPM's petition for reconsideration.

EEOC DECISIONS

The Equal Employment Opportunity Commission (EEOC) concurred with the Board's final decision in the following mixed appeals:

Dedrick v. Office of Personnel Management, EEOC No. 0320070033 (1/25/07)
MSPB Docket No. PH-831E-06-0483-I-1
Moncrieffe v. Department of Health & Human Services, EEOC No. 0320070030 (1/30/07)
MSPB Docket No. DC-0752-06-0552-I-1
Hester v. Department of the Interior (Commission of Fine Arts), EEOC No. 0320070038 (1/31/07)
MSPB Docket No. DC-0752-06-0443-I-1

COURT DECISIONS

Parrish v. Merit Systems Protection Board
Fed. Cir. No. 2006-3054; MSPB Docket No. DE-0351-05-0293-I-1
February 7, 2007

Retirement
- Service Credit – Firefighter/Law Enforcement Provision

HOLDING: The Board has the authority and the obligation to determine its own jurisdiction and a full and careful analysis of an agency's implementation of an independent personnel system that purportedly strips the Board of its jurisdiction is a necessary and appropriate part of the Board's determination of its own jurisdiction.

The appellant, an employee of Southwestern Indian Polytechnic Institute (SIPI), appealed his removal by reduction in force (RIF). The Department of the Interior (DOI), SIPI's parent agency, moved to dismiss the appeal for lack of jurisdiction because SIPI, under a statutory authorized demonstration project, had implemented an independent personnel system that had removed Board jurisdiction over RIFs, replacing it with a negotiated-grievance procedure. The appellant argued that SIPI had failed properly implement its personnel system under the authorizing statute such that the Board retained jurisdiction. The administrative judge (AJ) found that SIPI had failed to publish its plan in the Federal Register, as required by the statute, such that it was ineffective and the appellant retained his Board appeal rights. On interlocutory appeal, the Board reversed and dismissed the appeal finding that the Board lacked jurisdiction and lacked authority to enforce the procedural requirements of SIPI's authorizing statute.

The Court vacated the Board's decision, finding that the Board has the authority and the obligation to determine its own jurisdiction over a particular appeal and that it failed to do so here. The Board's jurisdiction in this case turns on whether SIPI followed the required statutory procedure to eliminate Board jurisdiction, as DOI contends, or whether it failed to do so, as the appellant contends. The Board did not resolve this issue. A full and careful analysis of SIPI's actions is a necessary and appropriate part of the Board's determination of its own jurisdiction, not an unwarranted attempt to enforce

SIPI's authorizing statute. On remand, the Board should determine if SIPI satisfied the statutory requirements for effecting its personnel system and, if not, determine whether such non-compliance vitiated SIPI's supersession of the Board's jurisdiction.

FEDERAL CIRCUIT AFFIRMANCES/DISMISSALS (NP)

The following appeals were affirmed:
Bagbee v. U.S. Postal Service, 06-3405, SF-0752-06-0336-I-1 (2/6/07)
Abadia v. Office of Personnel Management, 06-3297, DC-0831-03-0453-I-1 (2/6/07)
Chambers v. Department of the Interior, 06-3414, AT-0831-05-0395-I-2 (2/6/07)

The following appeals were dismissed:
Cuellar v. Department of Homeland Security, 07-3074, DA-0752-06-0283-I-1 (2/1/07)
Sheppard v. Department of the Air Force, 07-3078, AT-3443-06-0791-I-1 (2/5/07)
Matos v. U.S. Postal Service, 07-3082, PH-0353-06-0498-I-1 (2/5/07)

A petition for rehearing was denied in the following cases:
Casimier v. Office of Personnel Management, 06-3143, DA-831E-04-0459-I-1 (2/2/07)

FEDERAL REGISTER NOTICES

72 Fed. Reg. 5151 (Feb. 5, 2007)

OPM issued final regulations to rewrite certain sections of the Federal regulations in plain language. These final regulations require Federal agencies to provide employees entering LWOP status, or whose pay is insufficient to cover their Federal Employees Health Benefits (FEHB) premium payments, written notice of their opportunity to continue their FEHB coverage. Employees who want to continue their enrollment must sign a form agreeing to pay their premiums directly to their agency on a current basis, or to incur a debt to be withheld from their future salary.