



# U.S. Merit Systems Protection Board

## CASE REPORT

DATE: February 23, 2007

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## BOARD DECISIONS

### *Jolley v. Department of Homeland Security,*

MSPB Docket No. AT-3443-06-0447-I-1

February 21, 2007

#### Miscellaneous Topics

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

**HOLDING:** The plain language of 5 U.S.C. § 3304(f)(1) entitled any veteran meeting the eligibility requirements therein to compete for any vacancy opened to applicants outside of the announcing agency's workforce. Allowing the agency to limit its application by geographic area or other such factors would eviscerate Section 3304(f)(1) and render it meaningless

The appellant, a preference eligible veteran employed at the Department of Housing & Urban Development (HUD) in Jacksonville, Florida, applied for an announced position that the agency, the Department of Homeland Security (DHS), opened to competitive service employees of the agency and its on-site partner organizations at the Federal Law Enforcement Training Center (FLETC) in Glynco, Georgia. The vacancy notice also stated that the agency would accept applications from certain other categories of applicants, including veterans with VEOA eligibility. The agency declined to consider the appellant's application because he was not within the area of consideration specified in the announcement – he did not currently work at FLETC. The appellant filed a VEOA complaint with the Department of Labor (DOL), which found no merit to his complaint. He then appealed to the Board.

The Board reversed the administrative judge's denial of corrective action, and ordered the agency to reconstruct the selection process and consider the appellant's application. Under 5 U.S.C. § 3304(f)(1), honorably discharged preference eligible veterans, with 3 or more years of active duty service, are entitled to compete for vacant positions that are opened to individuals from outside the announcing agency's workforce. It was undisputed that the appellant was a VEOA eligible veteran. The Board found that the agency's vacancy announcement was opened to individuals outside of its own workforce because it invited applicants from its on-site partner organizations at FLETC, which included components of non-DHS agencies.

The agency argued that the geographic limitation in the announcement, limiting it to applicants already employed at the FLETC location, disqualified the appellant from consideration. Distinguishing the non-precedential decision *O'Brien v. Office of Personnel Management*, 118 F. App'x 484 (Fed. Cir. 2004), and declining to give deference to OPM's *VetGuide*, the Board found that the plain language of 5 U.S.C. § 3304(f)(1) entitled any veteran meeting the eligibility requirements therein to compete for a vacancy opened to outside applicants. Allowing the agency to limit its application by geographic area or other such factor would eviscerate Section 3304(f)(1) and render it meaningless. Therefore, under 5 U.S.C. § 3304(f)(1), the appellant was entitled to compete for the position and the agency was required to reconstruct the selection process.

Vice Chairman Rose dissented, stating that Section 3304(f) permits certain veterans to apply and compete for vacancies, but otherwise receive no special treatment. The Vice Chairman concurred with the Federal Circuit decision in *O'Brien* that an agency may geographically limit a vacancy announcement, so long as the area of consideration is sufficiently broad to ensure the availability of high quality candidates, and would defer to OPM's *VetGuide* in this regard also. Accordingly, the Vice Chairman stated that a geographic limitation should be treated as an eligibility criteria, applying to all potential applicants, from which veterans covered by Section 3304(f) are not exempt.

## COURT DECISIONS

### [Kalil v. Department of Agriculture](#)

Fed. Cir. No. 2006-3098; MSPB Docket No. DC-1221-02-0792-B-2  
February 16, 2007

### **Whistleblower Protection Act - Clear and Convincing Evidence**

**HOLDING: The appellant's ex parte contact with a court regarding on-going litigation was an outrageous offense and a legitimate basis for disciplinary action, regardless of whether the ex parte communication**

**was a protected disclosure. The character of the disclosure itself provided clear and convincing evidence that the agency would have taken the disciplinary action absent any protected disclosure.**

The agency suspended the appellant for contacting the clerk of a federal district court judge and telling the clerk that the agency was attempting a fraud on the court in litigation currently pending before that judge. The appellant sought corrective action from the Office of Special Counsel (OSC) and then filed an individual right of action (IRA) appeal with the Board, characterizing his suspension as retaliation for whistleblowing. The Board found that the agency established by clear and convincing evidence that it would have suspended the appellant absent any whistleblowing.

The appellant sought judicial review and argued that if the appellant's statement to the clerk was a protected disclosure, then the character or nature of that disclosure can never supply support for any disciplinary action. The court disagreed, affirming the Board's decision, finding that the appellant's ex parte contact with a court regarding on-going litigation, even if qualifying as a protected disclosure, was "an outrageous offense, especially for an attorney" and so a legitimate basis for the agency's disciplinary action. Therefore, the agency had provided clear and convincing evidence that it would have taken the disciplinary action, regardless of the whistleblowing contents or nature of the appellant's disclosure.

#### **FEDERAL CIRCUIT AFFIRMANCES/DISMISSALS (NP)**

A petition for rehearing was denied in the following cases:

*Zellars v. Department of the Air Force*, 06-3321, DC-0752-05-0793-I-1 (2/15/07)

*Fernand v. Department of the Treasury*, 06-3082, AT-0432-03-0753-I-1 (2/15/07)

*Roach v. Department of Defense*, 06-3241, AT-0752-05-0285-I-1 (2/15/07)

*Smart v. Merit Systems Protection Board*, 06-3283, DE-1221-05-0505-W-1 (2/15/07)