



U.S. Merit Systems Protection Board

CASE REPORT

DATE: March 9, 2007

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BOARD DECISIONS

[Bouchard v. Department of Veterans Affairs, 2007 MSPB 63](#)

MSPB Docket No. AT-3443-06-0636-I-1

March 1, 2007

Reduction in Force

- Miscellaneous

Appointments

- Miscellaneous/General

HOLDING: Temporary employees appointed under 38 U.S.C. § 7405(a)(1) are excluded from coverage under civil service laws, rules, and regulations, including title 5 RIF procedures; whereas permanent employees appointed under 38 U.S.C. § 7401 are entitled to title 5 RIF procedures.

The agency terminated the appellant's appointment, under 38 U.S.C. § 7405(a)(1), as a part of "staff adjustments." The administrative judge (AJ) dismissed the case for lack of jurisdiction finding that the appellant was a temporary employee appointed under 38 U.S.C. § 7405(a)(1), and so lacking appeal rights. On petition for review (PFR), the appellant argued that he is entitled to title 5 reduction in force (RIF) procedures under section 7405 and, in the alternative, that his appointment was permanent, rather than temporary, so according him RIF appeal rights under 38 U.S.C § 7401.

The Board found that the first argument fails because the board previously held in *Beckstrom-Parcell v. Department of Veterans Affairs*, 91 M.S.P.R. 656 (2002), that appointees under section 7405(a)(1) are excluded from coverage under civil service laws, rules, and regulations, including title 5 RIF procedures. However, the Board remanded the case for further

consideration of the appellant's second argument because there was conflicting evidence in the record as to whether the appellant's appointment was permanent or temporary. A permanent appointment would be consistent with section 7401 and so confer RIF rights under *James v. Von Zemerensky*, 284 F.3d 1310 (Fed. Cir. 2002); a temporary appointment under section 7405 would not confer RIF rights.

[Jordan v. Office of Personnel Management, 2007 MSPB 64](#)

MSPB Docket No. CH-844E-05-0545-I-2

March 1, 2007

Retirement

- Disability Retirement

The Board denied the appellant's petition for review of the initial decision, which affirmed the decision of the Office of Personnel Management denying the appellant's disability retirement application. Member Sapin dissented, stating that the appellant had provided sufficient medical evidence to establish that she was disabled from performing the duties of her position.

[MacDonald v. Department of Justice, 2007 MSPB 65](#)

MSPB Docket No. AT-1221-06-0532-W-1

March 5, 2007

Whistleblower Protection Act

- Jurisdiction, Generally**
- Exhaustion of Remedy**
- Timeliness**

HOLDING: In an IRA appeal, the AJ must first address the matter of jurisdiction before proceeding to the merits of the appeal. The WPA's requirement of exhaustion before OSC is a mixed question of fact and law and stipulations on such questions are not binding on the Board.

The Board reversed the initial decision and remanded this individual right of action (IRA) appeal for the administrative judge (AJ) to address unresolved jurisdictional issues. In an IRA appeal, the AJ must first address the matter of jurisdiction before proceeding to the merits of the appeal. The AJ failed to notify the appellant of the correct jurisdictional standard for an IRA appeal and also failed to identify and resolve the issue of timeliness of the appeal. Additionally, the AJ erred in finding that the appellant had exhausted his remedies before the Office of Special Counsel (OSC) based upon the agency so stipulating. The Board held that the exhaustion requirement of the Whistleblower Protection Act is a mixed question of fact and law and stipulations on such questions are not binding on the Board.

Masselli v. Department of the Army, 2007 MSPB 67

MSPB Docket No. DC-3443-06-0745-I-1

March 7, 2007

Jurisdiction

- Miscellaneous

HOLDING: Failure to provide an appellant with adequate notice of jurisdictional requirements does not prejudice his substantive rights when the appellant receives the necessary information in an initial decision and he subsequently fails to make sufficient non-frivolous allegations to establish jurisdiction on petition for review.

The appellant e-filed an appeal of his non-selection, claiming entitlement to veterans' preference. The AJ issued an order notifying the appellant of the Board's jurisdictional requirements, specifically including the requirements of the Veterans Employment Opportunities Act (VEOA). The appellant failed to respond and the AJ dismissed the appeal for lack of jurisdiction. The appellant contacted the Clerk of the Board, unaware that his appeal had been dismissed, having received neither the jurisdictional order nor the initial decision (ID) via the e-appeal system. The Clerk provided the appellant with a copy of the ID and the appellant subsequently filed a petition for review (PFR).

The Board denied the appellant's PFR because the appellant failed to non-frivolously allege facts on PFR that established Board jurisdiction. Having received the ID prior to filing his PFR, the appellant was put on notice by the ID of the jurisdictional pleadings required, such that the earlier lack of notice did not prejudice his substantive rights.

Miller v. U.S. Postal Service, 2007 MSPB 68

MSPB Docket No. PH-3443-06-0392-I-1

March 1, 2007

Miscellaneous Topics

- USERRA/VEOA/Veterans' Rights

HOLDING: A Postal Service employee, although not covered by the military leave provisions of 5 U.S.C. § 6323, was covered by an equivalent Postal Service rule, which the Board has jurisdiction to enforce. Therefore, the appellant did state a USERRA claim upon which relief could be granted.

The appellant filed an appeal under the Uniformed Services Employment and Reemployment Rights Act (USERRA) alleging that his agency improperly charged him military leave for his absences on non-workdays. Without a hearing, the AJ found jurisdiction under USERRA but dismissed

the appeal for failure to state a claim because the appellant was a Postal Service employee and so not covered by the military leave provisions of 5 U.S.C. § 6323.

The Board found that Postal Service employees are excluded from coverage of section 6323; however, the Postal Service had a policy in effect at the relevant time that was the equivalent of section 6323 and the Board has jurisdiction to enforce employee rights derived from agency rules, regulations, and collective bargaining agreements. Accordingly, taking as true the appellant's allegations, he did state a claim upon which relief may be granted. As the appellant was not permitted to engage in discovery prior to dismissal of the claim and that he was seeking relevant evidence from a third party, the Defense Finance and Accounting Service (DFAS), the Board dismissed the appeal without prejudice to refiling, with no deadline, since there is no deadline for filing claims under USERRA.

COURT DECISIONS

Kirkendall v. Department of the Army (en banc)

Fed. Cir. No. 05-3077; MSPB Docket Nos. AT-0330-02-0621-I-1, AT-3443-02-0622-I-1
March 7, 2007

Miscellaneous Topics

- USERRA/VEOA/Veterans' Rights

Timeliness

- Equitable Tolling

Hearings

- Right to a Hearing

HOLDING: The DOL's rejection of a VEOA complaint as untimely filed does not represent a failure to exhaust administrative remedies depriving the Board of jurisdiction. The filing deadlines in VEOA are subject to equitable tolling. An appellant is entitled to a hearing of his USERRA claim as all USERRA claims are "appeals" under 5 U.S.C. § 7701.

The en banc court addressed two issues: (1) Are VEOA's 60-day deadline for filing a claim with the Department of Labor (DOL), and its 15-day deadline for filing an appeal to the Board, subject to equitable tolling? (2) Are all veterans who allege a USERRA violation entitled to a hearing?

First, the Court reaffirmed the holding from its previously vacated *Kirkendall* decision that the rejection, by the Department of Labor (DOL), of the appellant's VEOA complaint as untimely filed does not represent a failure to exhaust administrative remedies depriving the Board and the Court of jurisdiction; otherwise judicial review of DOL's decision of untimeliness would be foreclosed.

Equitable Tolling of VEOA

Under *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), equitable tolling is available in suits against the government when permitted in analogous private litigation. If such an analogy exists, the Court presumes Congress intended to allow equitable tolling. The *Irwin* presumption in favor of equitable tolling can be rebutted if there is good reason that Congress did not want the equitable tolling doctrine to apply. Absent clear and contrary intent of Congress, equitable tolling is presumed to apply. The Court held that claims under VEOA are analogous to private actions under Title VII of the Civil Rights Act, invoking the *Irwin* presumption in favor of equitable tolling.

A majority of the Court held that the language in 5 U.S.C. § 3330a(d)(1) – “in no event may any such appeal be brought” – is not unusually emphatic, is of limited, if any, special importance, and so does not overcome the *Irwin* presumption allowing equitable tolling. Furthermore, VEOA’s purpose makes it abundantly clear that Congress did not intend to override the *Irwin* presumption and, in any event, the canon that veterans’ benefits statutes should be construed in the veteran’s favor would compel the Court to find both deadlines in VEOA subject to equitable tolling. Therefore, VEOA is subject to equitable tolling.

The dissenting judges stated that the plain language of VEOA precludes equitable tolling.

Hearing Rights Under USERRA

A majority of the Court held that the Board, through its regulations and decisions, has defined and treated a USERRA claim as an “appeal” to the Board from an “action which is appealable” such that 5 U.S.C. § 7701(a) confers on the appellant a right to hearing. Therefore, an appellant has a right to a hearing under section 7701 on a USERRA claim.

A plurality of 5 judges held that the plain language of USERRA, at 38 U.S.C. § 4324(c)(1), requires the Board not only to adjudicate any complaint brought under the statute but also to hold a hearing, should one be requested. Therefore, the plurality held that veterans have a right to a hearing under USERRA and the Board may not deny any request for a hearing.

The dissenting judges stated that neither does the plain language of USERRA provide an automatic right to a hearing nor do the Board’s regulations provide a right to a hearing under 5 U.S.C. § 7701.

Cheney v. Department of Justice

Fed. Cir. No. 06-3124; MSPB Docket No. CH-0752-05-0326-I-1

March 2, 2007

Constitutional Issues/Due Process

- Due Process

Adverse Action Charges

- Security Clearance Determinations

HOLDING: Although the Board and the Court may not review the underlying merits of an agency's security clearance decision, the Board or the Court may determine whether the procedures for notice and an opportunity to respond, as set forth in 5 U.S.C. § 7513, were followed. Under 7513, an employee must be given enough information to enable him or her to make a meaningful response to the agency's proposed suspension of the security clearance. The Court held that the DEA failed to provide adequate notice to the appellant because its allegations were vague and non-specific

The Drug Enforcement Administration (DEA) suspended the appellant's security clearance due to a pending investigation based on allegations of "derogatory personal conduct." The DEA then proposed the appellant's indefinite suspension because of the loss of his security clearance. The appellant requested additional information as to the reasons for the suspension of his security clearance and the agency replied that its basis was "allegations that you inappropriately queried ... Law Enforcement Data Bases and abused the Administrative Subpoena process. Additionally it is believed that you are in violation of the confidentiality agreement you entered into..."

The appellant appealed his suspension to the Board, arguing that he did not receive sufficient notice to enable him to respond. The administrative judge (AJ) upheld the suspension, holding that the appellant received sufficient information to respond, and the Board denied his petition for review.

The Court reversed the Board's decision, reaffirming that, although the Board and the Court may not review the underlying merits of an agency's security clearance decision, the Board or the Court may determine whether the procedures for notice and an opportunity to respond, as set forth in 5 U.S.C. § 7513, were followed. Under 7513, "the employee must be given enough information to enable him or her to make a meaningful response to the agency's proposed suspension of the security clearance." The Court held that the DEA failed to provide adequate notice to the appellant because the allegations were vague and non-specific, particularly in view of the fact that querying the Law Enforcement Data Bases and utilizing the Administrative Subpoena process were actions that the appellant regularly and repeatedly undertook as part of his duties. Accordingly, the Court held the indefinite

suspension to be improper, reversed it, and remanded the case to the Board to determine appropriate back pay.

Chief Judge McKinney dissented, stating that he believed the appellant was sufficiently informed to formulate a meaningful response to the suspension of his security clearance.

FEDERAL CIRCUIT AFFIRMANCES/DISMISSALS (NP)

The following appeals were affirmed:

Roberts v. Department of Commerce, 06-3356, SF-0752-05-0605-I-1 (3/5/07)

Ian-Benet v. Department of Defense, 06-3416, DC-0752-05-0513-I-1 (3/6/07)

Wiley v. U.S. Postal Service, 06-3407, DA-0752-05-0539-I-1 (3/7/07)

The following appeals were dismissed:

Bennett v. Merit Systems Protection Board, 07-3044, AT-0351-06-0612-I-1 (3/1/07)

A petition for rehearing was denied in the following cases:

Simmons v. Small Business Administration, 06-3415, DC-0752-06-0356-I-1 (3/2/07)

Hoover v. Department of Labor, 06-3066, DA-0752-04-0561-I-1 (3/2/07)