U.S. Merit Systems Protection Board

CASE REPORT

DATE: March 16, 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

***Simone v. Department of the Treasury*, 2007 MSPB 69**
MSPB Docket No. PH-1221-06-0128-W-1
March 12, 2007

Whistleblower Protection Act
- Contributing Factor
- Personnel Action
- Protected "Disclosure"
- Violation of Law

HOLDING: The Board remanded this IRA appeal for a hearing and decision on the merits where the appellant made nonfrivolous allegations that he reasonably believed that he made protected disclosures that evidenced a violation of law, rule, or regulation, and that his disclosures were a contributing factor in the agency's decisions not to convert him to a full-time permanent position and to deny him training.

The appellant petitioned for review of an initial decision that dismissed his individual right of action (IRA) appeal for failure to state a claim upon which relief could be granted. The Board found that the appellant made nonfrivolous allegations that: He reasonably believed that he made protected disclosures that evidenced a violation of law, rule, or regulation when he disclosed to agency managers and an Inspector General that computer billing problems were causing taxpayers to be overcharged on interest and penalties; and his disclosures were a contributing factor in the agency's decisions not to convert him to a full-time permanent position and to deny him training. The Board found that the appellant made a nonfrivolous allegation that there was a

moderate probability that the training would have resulted in some type of personnel action, as required by the Whistleblower Protection Act. Therefore, the Board vacated the initial decision and remanded the appeal for a hearing and a decision on the merits of the appellant's IRA appeal.

***Price v. Department of Veterans Affairs*, 2007 MSPB 70**
MSPB Docket No. AT-0432-06-0899-I-1
March 12, 2007

Timeliness
- Mixed Cases
- Prematurity
- Miscellaneous

The AJ dismissed this mixed-case removal appeal without prejudice to refiling because it was premature. The Board dismissed the appellant's petition for review as untimely filed (2-months late) without good cause shown because her pleading was not responsive to the Clerk's timeliness acknowledgment order. The Board reopened the case and forwarded it to the regional office for adjudication because after the initial decision was issued, the agency apparently issued a final agency decision concerning the appellant's amended equal employment opportunity complaint or 120 days has passed since the appellant filed that complaint.

DISMISSALS-SETTLEMENT/WITHDRAWN

Hammond v. Office of Personnel Management, CH-0845-06-0685-I-1 (3/13/07)

COURT DECISIONS

Toyama v. Merit Systems Protection Board
Fed. Cir. No. 2006-3281, MSPB Docket No. SE-0752-03-0358-I-2
March 13, 2007

Timeliness
- Mixed Cases

HOLDING: Where the agency failed to notify the appellant of her Board appeal rights when it issued the final agency decision (FAD) on her discrimination complaint, as required by 29 C.F.R. § 1614.302(d), she showed good cause for the 20-month delay in refiling her mixed case appeal; the notice requirements of § 1614.302(d) were not satisfied by the notice of Board appeal rights provided by the AJ in the initial decision dismissing the initial appeal without prejudice to refiling.

The appellant filed an equal employment opportunity (EEO) complaint claiming that the agency discriminated against her when, among other actions, it removed her. After the agency issued a final agency decision (FAD) finding no discrimination, the appellant filed a Board appeal of her removal. The administrative judge (AJ) dismissed the appeal without prejudice to refiling so that she could pursue her discrimination claims before the agency and the EEO Commission (EEOC). The dismissal advised the appellant that she could refile her appeal with the Board within 30 days of a FAD on her complaints.

Subsequently, the agency issued a FAD on March 15, 2004 ("2004 FAD"), finding no discrimination. This decision erroneously informed the appellant that she could appeal the FAD to EEOC's Office of Federal Operations ("OFO") or she could file a civil action in a United States district court, and failed to inform her that she could appeal the decision to the Board. After appealing the matter unsuccessfully to EEOC's OFO and a district court, the appellant filed her Board appeal on December 24, 2005, 20 months after the 2004 FAD. The AJ dismissed her appeal as untimely filed and the Board dismissed the appellant's petition for review by Final Order.

On review, the court reversed the Board's decision. The court found that the 2004 FAD provided incorrect appeal rights when it stated that the appellant's options were to file with OFO or in district court, rather than that her options were to file before the Board or in district court, as required by 29 C.F.R. § 1614.302(d). The court also found that the AJ's instructions to refile the Board appeal within 30 days of the FAD, while correct, did not satisfy the agency's obligation, under 29 C.F.R. § 1614.302(d), to notify the appellant of her appeal rights when it issued the 2004 FAD. Finally, the court rejected the agency's argument that, because of the dismissal without prejudice of her initial Board appeal, the Board's regulations controlled the refiling of the appeal. Because the appellant subsequently decided to pursue her case as an EEO complaint, EEOC's regulation governed the proceedings. Accordingly, the court found that the appellant demonstrated good cause for the late filing and remanded the case for adjudication.

Kelly v. Department of Agriculture **(NP)**
Fed. Cir. No. 2007-3012, MSPB Docket No. CH-0752-05-0040-I-1
March 12, 2007

Constitutional Issues/Due Process
- Due Process
Defenses and Miscellaneous Claims
- Harmful Error

HOLDING: The introduction of new and material information by means of an ex parte communication with the deciding official violates the appellant's due process rights and cannot be dismissed as "harmless."

Before the deciding official issued the removal decision, she contacted two managers for an assessment of the appellant. Both of those managers provided negative comments. The appellant was not notified of their comments until receiving the decision letter. On appeal, the administrative judge (AJ) affirmed the removal. The AJ dismissed the ex parte communications as harmless. The Board denied the appellant's petition for review by Final Order.

On review, the court vacated the Board's decision and remanded the case for further proceedings. The court reiterated its holding in *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1377 (Fed. Cir. 1999), that ex parte communications rising to the level of a procedural due process violation cannot be excused as "harmless." Further, such communications to a deciding official render that official's claims of lack of influence unavailing. The court concluded that, when the deciding official received negative comments from the managers, she had a duty to notify the appellant and provide her an opportunity to respond before reaching a decision. The deciding official's failure to do so overrides the agency's contention that the appellant would likely have been removed on the merits of the charge without this procedural defect. The appellant's opportunity to address the managers' negative comments before the Board on appeal does not render the error harmless.

Amend v. Merit Systems Protection Board **(NP)**
Fed. Cir. No. 2006-3420, MSPB Docket No. AT-315H-05-0799-I-1
March 8, 2007

Jurisdiction
- Excepted Service

HOLDING: The Board's interpretation of 5 U.S.C. § 7511(a)(1)(B) in *Greene v. Defense Intelligence Agency*, 100 M.S.P.R. 447, ¶ 12 (2005) (prior service with a different agency can be tacked for purposes of the one year current continuous service requirement) is an "open question" in light of *Illich v. Merit Systems Protection Board*, 104 F. App'x 171 (Fed. Cir. 2004) that need not be reached in this case.

The appellant, a preference eligible in the excepted service, appealed his termination from his Inspector position with the Bureau of Alcohol, Tobacco, Firearms & Explosives (ATF). The administrative judge (AJ) dismissed the appeal for lack jurisdiction because the appellant had not completed 1 year of current continuous service in the same or similar positions with the ATF. The AJ found that the appellant's prior service as an Immigration Inspector could not be tacked because it occurred in a different agency—the Department of Homeland Security. In doing so, the AJ relied upon *Illich v. Merit Systems Protection Board*, 104 F. App'x 171 (Fed. Cir. 2004), a non-precedential decision, that held that prior service with a different agency cannot be tacked for purposes of the one year current continuous service requirement.

After the AJ issued his initial decision, however, the Board issued *Greene v. Defense Intelligence Agency*, 100 M.S.P.R. 447, ¶ 12 (2005), finding that prior service in a different agency may be tacked under section 7511(a)(1)(B). Therefore, on petition for review, the Board found that the appellant's prior service as an Immigration Inspector could be tacked if his Immigration Inspector and ATF Inspector positions were the "same or similar." Finding that they were not, the Board dismissed the appeal for lack of jurisdiction.

On review, the court stated that the Board's interpretation of the one year current continuous service requirement in *Greene* is an "open question" in light of *Illich*. However, the court did not reach this issue because it agreed with the Board that the Immigration Inspector and ATF Inspector positions were not the "same or similar." Thus, the court affirmed the Board's decision dismissing the appeal for lack of jurisdiction.

Coleman v. U.S. Postal Service **(NP)**
Fed. Cir. No. 2006-3251, MSPB Docket No. DC-3443-04-0656-I-1
March 14, 2007

USERRA/VEOA/VETERANS' Rights

HOLDING: Pursuant to *Kirkendall v. Department of the Army*, Fed. Cir. No. 05-3077 (3/7/07), the court remanded this USERRA case to the Board for a hearing on the USERRA claim.

The appellant, a preference eligible, filed a removal appeal in which he claimed that the agency violated the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified at 38 U.S.C. §§ 4301-4333) (USERRA) by discriminating against him on the basis of his past military service. The administrative judge (AJ) dismissed the removal claim for lack of Board jurisdiction because the appellant did not meet the one year current continuous service requirement. The AJ denied the appellant's request for a hearing on his USERRA claim and denied the claim, finding that the agency would have removed him for valid reasons despite his prior military service. The Board denied the appellant's petition for review by Final Order. On review, the court affirmed the jurisdictional determination but remanded the appeal for a hearing on his USERRA claim pursuant to *Kirkendall v. Department of the Army*, Fed. Cir. No. 05-3077 (3/7/07) (3/9/07 MSPB Case Report) (veterans have a right to a hearing on a USERRA claim).

FEDERAL CIRCUIT AFFIRMANCES/DISMISSALS (NP)

The following appeals were affirmed:
Amend v. Merit Systems Protection Board, 06-3420, AT-315H-05-0799-I-1 (3/8/07)
Adamo v. Merit Systems Protection Board, 06-3184, DC-0752-05-0337-I-1 (3/8/07)
Cebula v. Department of Veterans Affairs, 06-3312, PH-0752-05-0531-I-1 (3/8/07)

Aguilar v. Merit Systems Protection Board, 06-3327, DA-0752-05-0706-B-1 (3/8/07)
Omelis v. Office of Personnel Management, 06-3421, SF-0831-06-0305-I-1 (3/8/07)
Brown v. Merit Systems Protection Board, 07-3025, DE-1221-06-0157-W-1 (3/8/07)
Velez v. Department of Homeland Security, 06-3305, DE-0752-04-0407-I-1 (3/12/07)
Gordon v. Merit Systems Protection Board, 06-3329, DE-0752-05-0759-I-1 (3/12/07)
King v. Department of Veterans Affairs, 07-3034, AT-1221-05-0790-W-1 (3/12/07)
Harris-Coleman v. Office of Personnel Management, 07-3047, AT-0831-06-0616-I-1 (3/12/07)
Wormely v. Department of the Treasury, 06-3413, PH-0752-06-0004-I-2 (3/12/07)
Zgonc v. Department of Defense, 07-3039, DC-1221-06-0306-W-1 (3/12/07)

The following appeals were dismissed:
Daniel v. Office of Personnel Management, 07-3118, DA-0841-06-0623-I-1 (3/12/07)
Bloom v. Department of the Army, 07-3102, DC-1221-05-0024-B-1 (3/12/07)
Bloom v. Department of the Army, 07-3102, DC-1221-05-0024-B-1 (3/14/07)

The court recalled the mandate and reinstated the appeal:
Gaghan v. Office of Personnel Management, 06-3286, DC-0432-05-0740-I-1 (3/12/07)

FEDERAL REGISTER NOTICES

72 Fed. Reg. 11380 (3/13/07)

The Board forwarded an Information Collection Request to OMB, requesting approval to conduct surveys over the next 3 years to obtain insight into employees' current perspectives. The surveys will ask employees to share their perceptions of the implementation of the merit system in the workplace, including topics such as merit systems principles, prohibited personnel practices, job satisfaction, performance management, training and development, and leadership.