



U.S. Merit Systems Protection Board

CASE REPORT

DATE: March 23, 2007

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BOARD DECISIONS

[Gordon-Cureton v. U.S. Postal Service, 2007 MSPB 71](#)

MSPB Docket No. DC-0752-06-0551-I-1

March 15, 2007

Jurisdiction

- Excepted Service

Miscellaneous Topics

- USERRA/VEOA/Veterans' Rights

HOLDING: An individual who, after October 13, 1982, was discharged from active duty prior to completing the shorter of either 24 months of continuous active duty or the full period for which she was called to active duty, is generally not eligible for any benefit of veterans' preference.

The agency removed the appellant for absence without leave (AWOL) and the administrative judge (AJ) dismissed the appeal for lack of jurisdiction because the appellant failed to establish that she was a preference eligible veteran. The appellant was called to active duty on November 21, 1990 and was honorably discharged on January 15, 1991. The record lacked evidence as to whether or not her active duty was for other than training purposes, as required by 38 U.S.C. § 101(21)(A). On PFR, the appellant argues that her deployment was active combat duty, not training, and that appears to be the case. However, under 38 U.S.C. § 5303A(d), an individual who, after October 13, 1982, was discharged from active duty prior to completing the shorter of either 24 months of continuous active duty or the full period for which she was called to active duty, is generally not eligible for any benefit of preference eligibility.

The appellant did not complete 24 months of continuous active service, but the record lacks evidence of whether or not the appellant served the entire period for which she was called to duty. If not, the record also lacks evidence as to whether she qualifies for one of the exemptions, at 38 U.S.C. § 5303A(b)(3), from this minimum active duty requirement. Given this lack of evidence, and given that the appellant was not informed of this jurisdictional issue, the Board vacated the ID and remanded the case to give the appellant the opportunity to address this jurisdictional issue.

Rosenborg v. Department of Transportation, 2007 MSPB 72

MSPB Docket No. AT-0752-06-0043-I-1

March 15, 2007

Adverse Action Charges

- **Theft/Misuse/Misappropriation of Government Property/Funds**
- Penalty**
- **Theft/Misuse/Misappropriation of Government Property/Funds**
- **Prior Record**

HOLDING: It is not wrongdoing for an employee to charge amounts to his government credit card in excess of the amount to which he is entitled reimbursement as long as they are legitimate official travel expenses. It is wrongdoing for an employee to withdraw cash advances on his government issued credit card in excess of the amounts authorized.

The agency suspended the appellant for 30 days for 2 sustained charges of misuse of a government credit card and of obtaining cash advances in excess of the amount authorized. The administrative judge (AJ) affirmed both charges and the 30 day suspension. On review, the Board sustained one charge, reversed the other and mitigated the penalty to a 15 day suspension.

Under the Federal Travel Regulation (FTR), found at title 41 of the Code of Federal Regulations, a government credit card may be used for any legitimate expense related to official travel. Expenditures on a government credit card may exceed the amount to which an employee is entitled to reimbursement, as long as they are legitimate travel expenses; he will simply not receive reimbursement for them. Such activity was the essence of the agency's second charge and so evidenced no wrongdoing as the agency proffered no evidence that the appellant's expenditures were for anything other than legitimate travel expenses. Therefore, the Board reversed the charge of misuse of a government credit card.

Under the FTR, the agency may authorize an employee to withdraw cash advances on his credit card to cover official travel expenses. For the travel at issue, the agency authorized the appellant to withdraw up to a total of \$1,300 in cash advances. The appellant admitted to withdrawing \$1,880 in cash with his government credit card. Even if the cash was used for legitimate

expenses, this amounted to unauthorized withdrawal of cash advances and so the Board sustained this charge.

Having sustained one of the two charges, the Board mitigated the penalty. The agency's deciding official failed to testify at the hearing as to why the penalty of a 30-day suspension was imposed. The Board did not show any deference to the agency's penalty determination and undertook its own analysis of the relevant *Douglas* factors, concluding that the maximum reasonable penalty was a 15-day suspension. On PFR, the appellant objected to the consideration of his prior discipline; however, as he made no such objection below, the Board did not consider this argument and did not need to undertake a *Bolling* review of the prior discipline, limiting its review to only whether the discipline occurred.

Member Sapin dissented, stating that the two charges should be merged into one and that the agency failed to prove this merged charge. Chairman McPhie issued a concurring opinion to rebut aspects of Member Sapin's dissent.

[Lydon v. Office of Personnel Management, 2007 MSPB 73](#)

MSPB Docket No. PH-844E-06-0388-I-1

March 15, 2007

Retirement

- Disability Retirement

HOLDING: The medical evidence of the appellant's pulmonary disease and heart disease was unambiguous and without contradiction indicated that she could not perform the duties of her position and therefore fell within the *Mullins-Howard* exception. The appellant's refusal to follow her doctor's orders to stop smoking, diet, and exercise did not disqualify her from receiving disability retirement because this course of action would not improve her condition sufficiently that she would be able to perform her duties.

The Office of Personnel Management (OPM) denied the appellant's disability retirement application because she failed to submit sufficient medical evidence. The administrative judge (AJ) affirmed OPM's denial because the extensive medical documentation the appellant submitted on appeal failed to explain how her medical condition rendered her unable to perform the duties of her Mail Handler position. The Board reversed, finding under *Mullins-Howard v. Office of Personnel Management*, 102 M.S.P.R. 153 (2006), that the medical evidence of her chronic obstructive pulmonary disease and heart disease was unambiguous and without contradiction indicated that she could not perform the duties of her position. Additionally, the appellant's refusal to follow her doctor's orders to stop smoking, diet, and exercise did not disqualify her from receiving disability retirement because

the evidence in the record established that even if she followed this course of action, her conditions would not improve significantly and she would not be able to perform her duties.

Chairman McPhie dissented, stating that the appellant's medical conditions and her job description do not fall within the narrow *Mullins-Howard* exception.

[Daniels v. Department of Veterans Affairs, 2007 MSPB 74](#)

MSPB Docket No. AT-1221-06-0806-W-1

March 16, 2007

Whistleblower Protection Act

- **Jurisdiction, Generally**
- **Contributing Factor**
- **Protected Disclosure**
- **Election of Remedies**

Mootness

HOLDING: The AJ erred in issuing the ID prior to the closing of the record. A reasonable person would believe that the disclosure of computer systems security problems and potential Privacy Act violations evidences wrongdoing under 5 U.S.C. § 2302(b)(8). The knowledge/timing test is just one way to satisfy the contributing factor criterion and the AJ must consider other evidence, such as agency motive. Even though the appellant is no longer a federal employee, her IRA appeal may not be moot because the WPA affords relief that exceeds *status quo ante* relief.

The appellant filed an individual right of action (IRA) appeal alleging that her proposed removal was retaliation for whistleblowing. The administrative judge (AJ) issued a show cause order detailing the appellant's jurisdictional burden and giving her 10 days to file a response. On the 9th day the AJ dismissed the appeal for lack of jurisdiction. The appellant mailed her response to the order on the 10th day. The Board held that the AJ erred in issuing the initial decision (ID) prior to the closing of the record and that the appellant's response was timely filed. The Board considered the appellant's filing, which alleged that personnel actions other than the proposed removal were also retaliation for her whistleblowing.

The Board found that the appellant had failed to exhaust her remedies before the Office of Special Counsel (OSC) with regard to the proposed removal because that personnel action was never a part of her complaint to OSC and in fact occurred after she had filed the OSC complaint. Therefore, the Board lacked jurisdiction over that claim. With regard to two other alleged personnel actions, the removal of duties and the restriction of access/privileges, the appellant had exhausted her remedies before OSC and

these could be considered personnel actions under the Whistleblower Protection Act (WPA).

The appellant also non-frivolously alleged that she made disclosures that were protected under the WPA. A reasonable person in her position would believe that the disclosures of computer systems security problems and potential Privacy Act violations evidenced wrongdoing under 5 U.S.C. § 2302(b)(8). Some of the disclosures were made in the normal course of her duties to her immediate supervisors, and so are not protected; however, some were not in the normal course of her duties and were made to the agency's Office of the Inspector General (OIG) and so were protected.

The appellant also non-frivolously alleged that her disclosure contributed to the alleged personnel actions. While her allegations may not have met the knowledge/timing test, this just one way to satisfy the contributing factor criterion and the AJ must consider other evidence; in this case there were additional allegations and evidence of a motive on the part of the agency. Therefore, the Board found that the appellant carried her burden of non-frivolously alleging that her protected disclosures were a contributing factor.

Finally, the Board found that this appeal may be moot because the appellant has subsequently been removed by the agency and the Board has upheld that removal. However, the WPA affords an individual relief that exceeds *status quo ante* relief, including costs, expenses, and other consequential damages. A prevailing party in an IRA appeal may also request disciplinary action against agency officials. Neither the appellant's initial appeal or petition for review contain any such request; however, on remand the AJ must order the appellant to identify some meaningful relief and then address the issue of mootness before holding a hearing on the merits.

[Thorne v. Office of Personnel Management, 2007 MSPB 75](#)

MSPB Docket No. AT-844E-06-0227-I-1

March 19, 2007

Retirement

- Disability Retirement

OPM denied the appellant's disability retirement application and the administrative judge affirmed, finding the appellant had not proved disability because his psychological symptoms were limited to the workplace. The Board reversed, finding that the undisputed evidence established that the appellant was angry, severely depressed, anxious, suffered from post traumatic stress disorder, suicidal ideation, psychosis, was obsessed with the Postal Service, and posed a threat to his colleagues. Therefore, the record demonstrated that the appellant's psychiatric condition was precipitated and exacerbated by job-related stress to the point it became disabling such that disability was proved by preponderant evidence.

Cook v. Department of the Army, 2007 MSPB 76

MSPB Docket No. CH-0752-05-0830-I-1

March 19, 2007

New Evidence

Evidence

- Credibility

Interim Relief

HOLDING: With regard to interim relief, the Board's review of an agency's undue disruption determination is limited to whether the determination has been made and does not extend to the merits of the determination. Affidavit of an agency official was not new evidence because it could have been discovered by the agency with due diligence and the official's failure to come forward earlier with his testimony can be imputed to the agency.

The agency removed the appellant for conduct unbecoming. The administrative judge (AJ) reversed, finding the agency failed to prove its charge and that the appellant proved his affirmative defenses of harmful procedural error, retaliation for EEO activities, and retaliation for whistleblowing. The agency petitioned for review, offering new evidence, and the appellant cross-petitioned, arguing that the agency had failed to grant him the interim relief the AJ ordered.

With regard to interim relief, the Board found that the agency had made an undue disruption determination, the merits of which the Board has no authority to review, and that there was no evidence that the appellant was not receiving the appropriate pay and benefits. Therefore, there was no basis for finding that the agency had not complied with the interim relief order.

The Board affirmed the AJ's finding that the agency failed to prove its lone charge, deferring to the AJ's credibility determinations. The new evidence offered by the agency was not new despite its due diligence because the knowledge of one of the agency's own officials could have been obtained via diligent discovery and, because this was a high ranking official, an EEO Officer, who was aware of the proceedings against the appellant, his decision not to come forward earlier can be imputed to the agency.

The Board vacated the AJ's finding of harmful procedural error because the appellant could not receive any further relief, the Board having reversed the agency's action on the merits.

The Board reversed the AJ's findings regarding the appellant's affirmative defenses, finding that the appellant failed to prove that his disclosures were protected, that they were contributing factors, or that the agency's action was retaliatory.

Hunt v. Office of Personnel Management, 2007 MSPB 77

MSPB Docket No. AT-844E-06-0001-I-1

March 19, 2007

Reirement

- **Disability Retirement**

Board Procedures/Authority

- **Adjudicatory Error**

HOLDING: In a disability retirement appeal, it was error for the AJ to not consider a DVA decision finding that the appellant was entitled to “individual unemployability.” However, DVA’s decision is not dispositive and, because it did not relate the appellant’s medical conditions to his specific job duties, it was outweighed by the evidence in the record. Therefore, the AJ’s error in failing to consider it did not prejudice the appellant’s substantive rights and did not warrant a different outcome.

OPM denied the appellant’s disability retirement application. The AJ affirmed OPM’s decision, finding that the appellant failed to show that his various medical conditions prevented him from performing useful and efficient service in his position. The Board affirmed the AJ’s decision, finding that the medical evidence did not demonstrate that the appellant was disabled from performing his job duties.

The Board did find that the AJ erred in failing to consider a decision of the Department of Veterans Affairs (DVA) that concluded that the appellant was entitled to “individual unemployability.” However, DVA’s decision is not dispositive and, because it did not relate the appellant’s medical conditions to his specific job duties, it was outweighed by the evidence in the record. Therefore, the AJ’s error in failing to consider it did not prejudice the appellant’s substantive rights and did not warrant a different outcome.

Navarro v. Office of Personnel Management, 2007 MSPB 78

MSPB Docket No. CB-1205-07-0003-U-1

March 19, 2007

Miscellaneous Topics

- **Regulation Review**

The petitioner requests the Board to review OPM regulation 5 C.F.R. § 831.201(a)(13), which excludes non-permanent employees serving under indefinite appointments from retirement coverage under CSRS. The Board denied the request under the doctrine of *res judicata* because the appellant could have raised this argument before the Board in the several prior proceedings that she and her late husband, for whom she stands in, had previously brought with regard to their claims for a retirement annuity and survivor annuity under CSRS.

Will v. Department of the Treasury, 2007 MSPB 79

MSPB Docket No. DC-3443-06-0853-I-1

March 21, 2007

Miscellaneous Topics

- USERRA/VEOA/Veterans' Rights

HOLDING: The appellant did not fail to state a claim upon which relief can be granted because he could obtain relief if his allegations were accepted as true.

The AJ denied the appellant's request for a hearing and dismissed this *Butterbaugh* appeal for failure to state a claim upon which relief can be granted because the appellant failed to respond to the AJ's order to identify specific dates that he was required to use military leave on non-work days and subsequent specific dates that he was required to use annual leave, sick leave, or LWOP to participate in military duty.

The Board vacated the initial decision because the AJ erred in dismissing the appeal for failure to state a claim. Failure to state a claim requires a finding that the appellant cannot obtain relief even if his allegations are accepted as true. That is not the case here, as the appellant's allegations, if true, would warrant a remedy from the Board. Despite the fact that the appellant failed to respond to the AJ's order and provide sufficient evidence to prevail, in the interest of justice the Board dismissed the appeal without prejudice to refiling. If the appellant refiles and requests a hearing, the AJ must hold a hearing in accordance with *Kirkendall v. Department of the Army*, No. 05-3077, 2007 WL 675744 (Fed. Cir., Mar. 7, 2007) (en banc).

Perkins v. Department of Veterans Affairs, 2007 MSPB 80

MSPB Docket No. NY-1221-02-0407-X-1

March 21, 2007

Compliance

- Settlement-Related

Settlement

- On PFR/PFE

The appellant filed a petition for enforcement (PFE) of the settlement agreement, arguing that the agency had failed to initiate the process of amending his position description and failed to pay the appellant the required pay and benefits. The Board found the agency to be in partial non-compliance for its failure to accurately account for the cost-of-living allowance to which the appellant was entitled and for failing to undertake the position description review as required.

[Fiacco v. Office of Personnel Management, 2007 MSPB 81](#)

MSPB Docket No. AT-831M-06-0467-I-1

March 21, 2007

Retirement

- Procedures/Miscellaneous
- Court/Domestic Relations Orders

HOLDING: Court orders affecting the apportionment of retirement annuities may be modified after the employee's retirement or death and OPM will honor such court orders, applying them prospectively only.

In assessing a modified court order regarding the apportionment of the retirement annuity between the appellant and her former spouse, the retiree, the Office of Personnel Management (OPM) determined that it had overpaid the appellant and underpaid the retiree. The appellant sought board review and the administrative judge (AJ) found that OPM failed to prove any overpayment. The AJ also determined that the modified court order was inapplicable. OPM petitioned for review.

While OPM may not honor a modification to a court order *providing* a former spouse annuity if the modification is made after the employee's retirement or death, court orders affecting the *apportionment* of retirement annuities may be modified after the employee's retirement or death and OPM will honor such court orders, applying them prospectively only. 5 U.S.C. § 8345(j); 5 C.F.R. § 838.225(a). Therefore, the AJ should honor the Court order modifying the apportionment of the annuity, but only giving it effect prospectively, beginning the first day of the second month after OPM received it.

The Board remanded the appeal because the AJ should have notified the retiree of the appeal and given him the opportunity to intervene because the outcome of the case could directly affect his rights, in that his annuity could be reduced. The Board also ordered the AJ to consider argument on the interpretation of the court order, the resolution of which would affect the apportionment of the annuity and on whether the appeal should be remanded to OPM so that the appellant can obtain clarification of the court order's language from the state court.

COURT DECISIONS

[Tully v. Department of Justice](#)

Fed. Cir. No. 2007-3004

March 21, 2007

Miscellaneous Topics

- USERRA/VEOA/Veterans' Rights

HOLDING: USERRA requires the rights and benefits of employees absent for military service to be equal to, not more favorable than, those of an employee on a *comparable* leave of absence. To determine whether two types of leave are comparable, the duration of the leave may be the most significant factor to compare.

The court upheld the Board's decision that the appellant was not entitled to pay for the 27 holidays that occurred while he was on leave without pay to serve on active duty in the Army. Under USERRA, an employee absent for military service is deemed to be on furlough or leave of absence and is entitled to the rights and benefits generally provided to employees on furlough or leave of absence. The appellant sought to rely on *Waltermyer v. Aluminum Co. of America*, 804 F.2d 821 (3d Cir. 1986), which found a short absence for military training comparable to employees' absences for non-military purposes, such as jury duty, for which employees received holiday pay. The case at hand was distinguished from *Waltermyer* because the appellant's 2½ year absence on active military service was significantly longer as to not be comparable to a short absence such as jury duty. USERRA requires the rights and benefits to be equal, not more favorable than, those of an employee on a *comparable* leave of absence. To determine whether two types of leave are comparable, the duration of the leave may be the most significant factor to compare. In contrast, payment of salary during the absence is a benefit, not a characteristic during the absence to be compared.

[Perez v. Department of Justice](#)

Fed. Cir. No. 06-3144

March 16, 2007

**Adverse Action Charges
- Miscellaneous/Procedures**

HOLDING: If an agency gives the employee 30 days written notice of its proposed action, it need not show that it has reasonable cause to believe he has committed a crime.

The petitioner challenged the arbitrator's rejection of his argument that, in addition to 30 days written notice of the proposed suspension, the agency also had to determine that there was reasonable cause that he committed the crime that was the basis of the suspension. Under 5 U.S.C. § 7513(b)(1), an employee is entitled to 30 days advance written notice of a proposed agency action, *unless* the agency has reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed. The court held that if an agency gives the employee 30 days written notice, it need not show that it has reasonable cause to believe he has committed a crime. The Court affirmed the arbitrator's decision.

Judge Dyk dissented, stating that prior Federal Circuit opinions required a reasonable cause determination by the agency in all cases and that an action taken without reasonable cause is plainly arbitrary.

FEDERAL CIRCUIT AFFIRMANCES/DISMISSALS (NP)

The following appeals were affirmed:

Chambers v. Office of Personnel Management, 06-3310, SF-831M-05-0504-I-1 (3/16/07)

Boechler v. Department of the Interior, 05-3252, DE-1221-02-0389-W-3 (3/19/07)

Gaddy v. Department of the Navy, 07-3001, DC-0752-04-0660-I-2 (3/19/07)

The following appeals were dismissed:

Shokooh v. Department of Veterans Affairs, 06-3149, CH-1221-03-0714-A-1 (3/16/07)

A petition for rehearing was denied in the following cases:

Fisher v. Office of Personnel Management, 06-3324, DE-0845-05-0500-I-1 (3/16/07)

Dobruck v. Department of Veterans Affairs, 06-3411, AT-0432-05-0734-I-1 (3/16/07)

Hunter v. Department of Veterans Affairs, 06-3338, DC-0752-05-0322-I-1 (3/19/07)

The court recalled the mandate and reinstated the appeal:

Maibie v. Merit Systems Protection Board, 06-3275, DA-0752-06-0206-I-1 (3/16/07)

Baxter v. Department of Veterans Affairs, 07-3103, AT-1221-06-0158-W-1 (3/19/07)

FEDERAL REGISTER NOTICES

72 Fed. Reg. 12032-12037 (March 15, 2007)

OPM issued final regulations to amend a number of rules on pay and leave administration, including employment in the SES, use of paid leave during uniformed service, time limits for using compensatory time off earned in lieu of overtime pay, and other miscellaneous changes.

72 Fed. Reg. 12031-12032 (March 15, 2007)

OPM adopted as a final rule, without changes, an interim rule that implemented amendments to veterans' preference as contained in the National Defense Authorization Act of FY 2006. These amendments expanded the definition of a veteran and clarified veterans' preference eligibility for individuals discharged or released from active duty under honorable conditions.

72 Fed. Reg. 12122-12125 (March 15, 2007)

OPM issued proposed regulations clarifying representative rate as used in OPM's retention regulations. These regulations clarify: how an agency determines employees' retention rights when the agency has positions in one or more pay bands; the order in which an

agency releases employees from a competitive level; and how an agency determines employees' retention rights when a competitive area includes more than one local commuting area.

72 Fed. Reg. 12947-12958 (March 20, 2007)

OPM issued final regulations to revise the ALJ Program. The revisions remove procedures that appear in other parts of 5 C.F.R. parts. 337 and 930, update outdated information and remove the internal examining processes from the regulations and describe OPM and agency responsibilities concerning the ALJ Program.