



U.S. Merit Systems Protection Board

CASE REPORT

DATE: May 11, 2007

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BOARD DECISIONS

[Sredzinski v. United States Postal Service, 2007 MSPB 125](#)

MSPB Docket No. CH-0752-06-0717-I-1

May 3, 2007

Mootness

The administrative judge dismissed the appeal as moot after the agency indicated that it was rescinding the appellant's removal and the appellant did not object, provided the agency returned him to the status quo ante. The Board found that remand was necessary to determine whether the agency has completely rescinded the appellant's removal so as to deprive the Board of jurisdiction where the current record shows that the agency has not completed processing the appellant's back pay, the agency has not expunged references to the removal action from the appellant's personnel file and the agency placed the appellant on administrative leave without showing a sufficient reason for doing so.

[Triplett v. Office of Personnel Management, 2007 MSPB 126](#)

MSPB Docket Nos. CH-844E-05-0089-B-1; CH-844E-03-0754-I-1

May 4, 2007

Timeliness

- Notice of Time Limit/Appealable Matter

Defenses and Miscellaneous Claims

- Collateral Estoppel/Res Judicata/Law of the Case

HOLDING: The appellant did not demonstrate good cause for her untimely PFR where she failed to notify the Board of her change of address and phone number while the appeal was pending. The dismissal of the appellant's first appeal for failure to prosecute was a valid, final

judgment on the merits, and therefore barred the appellant's second appeal under the doctrine of res judicata.

The appellant appealed from two initial decisions (IDs) that dismissed her appeals from the Office of Personnel Management's (OPM's) denials of her disability retirement applications. Her first appeal was dismissed for failure to prosecute after documents sent to her address of record and her forwarding address were returned as undeliverable. Her second appeal was dismissed because OPM rescinded its reconsideration decision based on its determination that the appellant's second disability application was barred by res judicata. The Board construed the appellant's petition for review (PFR) as a PFR of both IDs.

The Board found that the appellant's PFR of the first ID was untimely without good cause shown for the delay. The Board found that she did not act with due diligence and ordinary prudence under the circumstances because she did not provide the regional office with her change of address. With respect to the PFR of the second ID, the Board held that the administrative judge properly dismissed the appeal as barred by res judicata. The Board found that the dismissal of the appellant's first appeal for failure to prosecute was a valid, final judgment on the merits, and therefore barred the appellant's second appeal. Accordingly, the Board dismissed the petition for review of the first ID as untimely and affirmed the second ID.

In dissent, Member Sapin expressed her view that the appellant diligently raised appropriate objections to the dismissal of her original appeal within 2 weeks after she first received notice that the dismissal of her original appeal might preclude Board adjudication of her second appeal. Member Sapin further found that there was no reason for the appellant to renew these objections when the AJ dismissed her second appeal without prejudice to her right to refile her appeal because the ID that dismissed the appeal without prejudice did not put the appellant on notice that the Board might resolve this potentially dispositive issue against the appellant. Therefore, Member Sapin stated that she would reverse both IDs and remand the case for adjudication on the merits.

[Brandt v. Office of Personnel Management, 2007 MSPB 127](#)

MSPB Docket No. AT-844E-07-0242-I-1

May 4, 2007

Retirement

- Disability Retirement

The administrative judge (AJ) dismissed this disability retirement appeal after concluding that the Board no longer had jurisdiction given the Office of Personnel Management's (OPM) rescission of its final decision on the appellant's disability retirement application. The AJ further noted that OPM

would consider the appellant's claim for benefits on the merits. OPM filed a petition for review stating that, contrary to the AJ's comments in the initial decision (ID), OPM did not promise that it would issue a new final decision on the merits, but rather a new reconsideration decision. The appellant did not dispute OPM's contentions. Accordingly, the Board modified the ID to the extent that it indicated that OPM would necessarily issue a new reconsideration decision on the merits. The Board nonetheless affirmed the dismissal of the appellant's appeal for lack of jurisdiction.

[Bobie v. Department of the Army, 2007 MSPB 128](#)

MSPB Docket No. CH-0752-07-0022-I-1

May 4, 2007

Jurisdiction

- Reduction in Pay/Grade/Rank

HOLDING: There is no need to reach the question of whether a constructive demotion occurred where there was an actual reduction in grade. Further, because the appellant was not eligible for grade retention following his reduction in grade, he is not precluded from challenging that action before the Board. On remand, the administrative judge will review the agency's reclassification of the appellant's position only to determine whether the agency acted in accordance with law.

The agency reclassified the appellant's new position from GS-14 to GS-13 due to a classification error. The agency placed the appellant at Step 10 of the GS-13 level, and his resulting salary was actually slightly higher than it had been before the change to a lower grade. The appellant filed an appeal challenging the change to a lower grade. The administrative judge (AJ), focusing on the constructive demotion doctrine, dismissed the appeal for lack of jurisdiction without holding the appellant's requested hearing.

On review, the Board found that there was no need to reach the question of whether a constructive reduction in grade occurred because the appellant's grade level was actually changed from GS-14 to GS-13. Such a reduction in grade is generally an appealable adverse action. Furthermore, because the appellant was not eligible for grade retention following his reduction in grade, he is not precluded from challenging that action before the Board. The Board vacated the ID and remanded for a hearing. The Board noted that, under the applicable scope of review, the Board will review the agency's reclassification of the appellant's position only to determine whether the agency acted in accordance with law.

Berry v. Department of Commerce, 2007 MSPB 129

MSPB Docket No. CB-7121-07-0005-V-1

May 4, 2007

Arbitration/Collective Bargaining-Related Issues

- Arbitral v. Appeal Context

Discrimination

- Race Discrimination

HOLDING: The Board will modify or set aside an arbitration decision only where the arbitrator has erred as a matter of law in interpreting civil service law, rule, or regulation. An arbitrator's finding that an appellant did not prove his discrimination and EEO claims is a factual determination entitled to deference, unless the arbitrator erred in his legal analysis. The fact that a proposing official and the appellant are of the same race is of little probative value because a person's race does not preclude the possibility of racial discrimination against a person of the same race.

The agency removed the appellant from his GS-13 Patent Examiner position on the charge of unacceptable performance. After an 8-day hearing, the arbitrator found that the agency failed to prove that it properly removed the appellant for unacceptable performance, and that the appellant failed to prove that the agency engaged in race or color discrimination, or retaliated against him for his prior equal employment opportunity activity. The arbitrator ordered the agency to reinstate the appellant to his former position and award him back pay and benefits. The appellant sought Board review of the arbitrator's decision, asserting that the arbitrator erred by failing to consider his retaliation claim separately from his discrimination claims and by concluding that he did not prove his affirmative defenses.

On review, the Board found that the arbitrator erroneously assumed that a proposing official would not discriminate against the appellant because they were both of the same race and color. A person's race does not preclude the possibility of racial discrimination against a person of the same race. However, the arbitrator properly found that the record contained no evidence of pretext for prohibited discrimination. Because an arbitrator's finding that an appellant did not prove his discrimination claims is a factual determination entitled to deference, unless the arbitrator erred in his legal analysis, the Board found no basis to disturb the arbitrator's findings that the appellant failed to prove his affirmative defenses. Accordingly, the Board sustained the arbitrator's decision.

[Davis v. Department of Defense, 2007 MSPB 130](#)

MSPB Docket No. PH-3443-06-0506-1

May 7, 2007

Miscellaneous Topics

- USERRA/VEOA/Veterans' Rights

Holding: An individual bringing a USERRA appeal has an unconditional right to a hearing on the merits. A finding in a VEOA appeal that a particular position was filled as a merit promotion without a competitive examination is a finding on the merits of the appeal not a jurisdictional finding but the appellant is only entitled to a hearing if he can show that there is a genuine dispute of material fact. Where the appellant was not put on notice of the need to show a genuine dispute of material fact in order to receive a hearing on the merits of his VEOA claim, the appeal must be remanded. Neither USERRA nor VEOA authorize the Board to hear prohibited personnel practice claims, other than claims of retaliation for whistleblowing in violation of 5 U.S.C. § 2302(b)(8).

The appellant, a GS-5 preference-eligible veteran with the agency applied for a competitive service GS-6 position with the agency but the agency selected an internal candidate who was not preference eligible for the GS-6 position. The appellant filed an appeal with the Board alleging a violation of his veterans' preference rights under the Veterans Employment Opportunities Act (VEOA) and also alleging discrimination on the basis of his status as a veteran under the Uniformed Services Employment and Reemployment Rights Act (USERRA). Additionally, the appellant alleged that the agency violated four merit system principles and committed two prohibited personnel practices. The administrative judge (AJ) dismissed the USERRA and VEOA claims without the requested hearing and found no jurisdiction to address the allegations regarding merit system principles and prohibited personnel practices.

The Board vacated the AJ's findings and conclusions on the merits of the appellant's USERRA claim and remanded for a hearing as the AJ had issued his decision prior to the Federal Circuit's decision in *Kirkendall v. Department of the Army*, 479 F.3d 830 (2007), which held that an individual bringing a USERRA appeal has an unconditional right to a hearing on the merits.

The Board also vacated and remanded the AJ's decision with respect to the appellant's VEOA appeal. The Board found that to the extent the AJ had dismissed the appellant's VEOA appeal for lack of jurisdiction, that finding was incorrect because the AJ reached the merits of the appeal when he found that the position at issue was filled as a merit promotion without a competitive examination. The Board also found that to the extent the AJ dismissed the appellant's VEOA claim for failure to state a claim, that

disposition was incorrect because the AJ did not, as required for such a disposition, accept as true the appellant's claim that the selection of a non-veteran for the GS-6 position was not a merit promotion. The Board noted the dispute between the parties as to whether or not the agency used merit promotion procedures to appoint the non-preference eligible but also noted that in VEOA appeals, unlike USERRA appeals, there is no absolute right to a hearing. A hearing is only required if there is a genuine dispute of material fact and here it appears from the agency's documentary evidence that the appointment was made pursuant to merit promotion procedures. Nevertheless, because the appellant was not put on notice of what was needed to show a genuine dispute of material fact, the Board remanded the appeal to give the appellant the opportunity to demonstrate a genuine dispute.

The Board found no jurisdiction to hear the appellant's allegations of violations of merits system principles. It also found no jurisdiction to hear the appellant's allegations of prohibited personnel practices other than retaliation for whistleblowing, citing cases holding that VEOA does not grant the Board authority to consider claims for violations of laws other than veterans preference rules and that USERRA does not grant the Board authority to consider violations of laws other than USERRA. The Board found that the appellant had abandoned the whistleblower retaliation claim he raised below.

[Moore-Meares v. Office of Personnel Management, 2007 MSPB 131](#)

MSPB Docket No. DA-0831-06-0565-I-1

May 8, 2007

Retirement

- Survivor Annuity

Miscellaneous Topics

- New Evidence

Holding: In a survivor annuity case where the paramount concern is whether the appellant is entitled to the benefits she seeks and where the appellant's new argument and evidence presented for the first time on petition for review (PFR) raise the real possibility that the appellant is entitled to a survivor annuity, the Board may exercise its discretion to reopen and reconsider the decision below despite the fact that the evidence submitted on PFR was not unknown or unavailable to the appellant prior to the close of the record below.

The administrative judge affirmed the Office of Personnel Management's (OPM) decision denying the appellant a survivor annuity because she did not meet the statutory definition of "widow," because she was not married to the Civil Service Retirement System (CSRS) annuitant for 9 months or more prior to his death as required for entitlement to a CSRS survivor annuity. On petition for review, the appellant argued for the first time that she met the

definition of “widow” because she and the annuitant had entered into a common law marriage under Texas law approximately 15 months before the annuitant’s death and she submitted affidavits in support of her claim. OPM replied that it was unaware of this information and would not oppose a remand of the appellant’s survivor annuity application.

The Board majority found that the affidavits submitted by the appellant do not meet the criteria for new evidence because they do not contain facts that were unknown or unavailable to the appellant prior to the close of the record below. Rather, the appellant’s affidavit indicates that neither she nor her non-attorney representative were aware that Texas law recognizes common law marriage. The Board, however, declined to apply the usual rule that an appellant is responsible for the errors of her chosen representative, noting that it might be inequitable to do so in this annuity appeal where the paramount concern is whether the appellant is entitled to benefits and where the appellant’s new argument and evidence presented for the first time on PFR raise the possibility that she is entitled to a survivor annuity under CSRS. Accordingly, the Board reopened the appeal, vacated the initial decision and remanded the case to OPM for issuance of a new reconsideration decision.

The Chairman concurred in the result, based on OPM’s statement that it would have no objection if the Board remanded the matter to it. In the Chairman’s view, the evidence submitted for the first time on PFR was not so strong on its face as to justify departure from the general rule that the Board will not consider argument and evidence submitted for the first time on review unless it was unavailable for below.

[Guerrero v. Department of Veterans Affairs, 2007 MSPB 132](#)

MSPB Docket No. AT-0752-06-0144-I-2

May 8, 2007

Adverse Actions Charges

- **Falsification/Fraud**

Board Procedures

- **Adjudicatory Error**

The agency removed the appellant based on three charges: false statements on Optional Form 306; false statements on Optional Form 612; and misrepresentation of qualifications. After a hearing, the administrative judge (AJ) found that the agency had failed to establish any of its charges and reversed the removal.

The Board majority denied the agency’s petition for review, reopened on its own motion, and affirmed as modified the initial decision. With respect to the charge of false statements on Optional Form 306, the majority found that neither the proposal notice nor the decision letter identified any specific information on the form that it believed was inaccurate or false and therefore

the majority found in agreement with the AJ that the charge could not be sustained. With respect to the charges of false statements on Optional Form 612 and misrepresentation of qualifications, the Board found it appropriate to merge the charges into a single charge because charges of falsification and misrepresentation require the same elements of proof and because the charges here are based on the same factual specifications. The Board majority found that the agency failed to establish the necessary element of intent to mislead.

The Board majority rejected all the agency's claims of adjudicatory error. Specifically, the majority found no error in the AJ's refusal to permit the proposing official to testify on a particular topic where the agency provided no explanation regarding how the testimony would have altered the outcome of the proceeding. Contrary to the agency's argument that the AJ erroneously relied on a decision of the Georgia Department of Labor awarding the appellant benefits based on its finding that the appellant had not falsified his employment application, the majority found no indication of such reliance. The majority also considered exhibits that the agency alleged the AJ had improperly excluded as irrelevant and found that the information contained was not of sufficient weight to change the outcome of the appeal. Finally, the majority rejected the agency's arguments that the AJ failed to resolve certain credibility issues.

The Chairman dissented, noting that evidence of an individual's "reckless disregard" for the truth is sufficient to infer that an individual intended to make a false statement. In the Chairman's view, the agency met its burden of proof to show intent and he would not disturb the agency's decision to remove the appellant.

[Bennett v. Department of Transportation 2007 MSPB 133](#)

MSPB Docket No. DC-0752-06-0139-I-1

May 9, 2007

Miscellaneous Topics

- **Statutory/Regulatory/Legal Construction**
- **Remedies**

HOLDING: The Board has jurisdiction over the FAA's placement of an air traffic controller on enforced leave for three months, despite the absence of a specific reference to chapter 75 provisions in the legislation providing FAA employees with appeal rights to the Board. The Board lacks authority to award back pay to a FAA employee placed on enforced leave. The Board also lacks authority to award specific or equitable relief to an FAA employee who was placed on enforced leave. Where the appellant withdrew his discrimination and reprisal claims under circumstances in which he had reason to believe that the Board had authority to award him back pay, remand is appropriate to permit the appellant to pursue those claims.

The appellant, an air traffic controller with the Federal Aviation Administration (FAA) who was assigned to administrative duties for about two months following a restriction of his medical clearance, was directed to take leave after the agency informed him that administrative work was no longer available. The appellant successfully challenged his placement on leave as a constructive suspension. As relief, the administrative judge (AJ) ordered the agency to provide back pay and to restore the paid leave the appellant used during the enforced leave period.

On review, the Board denied the agency's petition for review, reopened the appeal on its own motion, affirmed the AJ's findings on the merits of the appeal, vacated the initial decision with respect to the remedies of back pay and restoration of leave and remanded for further consideration.

The Board rejected the agency's argument that the Board lacks authority to issue orders in adverse actions taken against FAA employees because the 2000 Wendell H. Ford Aviation Investment and Reform Act for the Twenty-First Century (Ford Act), which reestablished the Board's jurisdiction over such actions does not specifically identify chapter 75 provisions.

As to remedies, the Board found that, consistent with its recent decision in *Ivery v. Department of Transportation*, 102 M.S.P.R. 356 (2006), issued after the AJ had issued the initial decision, it lacked authority to order back pay to an FAA employee because the Back Pay Act does not apply to the FAA and the back pay provisions of the FAA Personnel Management System do not apply to Board appeals. The Board also found that sovereign immunity is a bar to providing an equitable remedy, in this case restoration of leave improperly charged to the appellant. While the Board recognized that Congress amended 5 U.S.C. § 702 with the purpose of granting a waiver of sovereign immunity where equitable relief is sought, the Board found that the specific language of section 702, which refers to "[a]n action in a court of the United States...." precludes its application to remedies available in administrative proceedings before the Board. The Board distinguished *West v. Gibson*, 527 U.S. 212 (1999), which interpreted language somewhat similar to that in section 702 as waiving sovereign immunity against compensatory damages in proceedings before the Equal Employment Opportunity Commission. Finally, the Board examined the statutory provisions made applicable by the Ford Act to FAA employee, 5 U.S.C. §§ 1204, 1221, and 7701, but found that none of them authorize the Board to order either damages or equitable relief.

The Board noted the appellant's claims of discrimination based on gender and race and a claim of reprisal for prior EEO activity and his withdrawal of these claims under circumstances in which he had reason to believe that the Board could award him back pay. The Board found it appropriate to remand the appeal for a hearing on these discrimination claims, noting that if he were to prevail, the administrative judge, the Board or the

EEOC might conclude that he is entitled to relief to which he would not otherwise be entitled.

Member Sapin dissented from that portion of the majority's decision that found that the Board lacks authority to award specific or equitable relief under the circumstances of this appeal. She would find that the waiver of sovereign immunity in 5 U.S.C. § 702 extends to administrative proceedings, noting the Supreme Court's observation in *West v. Gibson* that declining to apply in administrative proceedings a waiver that is applied in judicial proceedings would undermine the remedial scheme under which an individual is to seek administrative relief prior to seeking court action.

[Johnson v. U.S. Postal Service, 2007 MSPB 134](#)

MSPB Docket No. AT-0752-06-0968-I-1

May 9, 2007

Settlement

- Waiver of Rights

HOLDING: Where an appellant raises a nonfrivolous factual issue of compliance with a settlement agreement, the Board must resolve that issue before addressing the scope and applicability of a waiver of appeal rights in the agreement. Here, the appellant's general denial of the agency's allegations, along with interview summaries from the agency's investigation, constitute a nonfrivolous allegation that he did not violate the settlement agreement. Thus, he is entitled to a hearing to determine whether he, in fact, complied with the settlement agreement. If the appellant fails to show compliance with the settlement agreement, then the Board must determine the scope and applicability of the agreement's waiver provision.

The appellant and the agency entered into a settlement agreement whereby the agency agreed to change the appellant's proposed reduction in grade and pay to "a letter of warning in lieu of a 30-day suspension." In exchange, the appellant agreed not to engage in certain improper conduct. The appellant also agreed that "any further similar incidents of improper conduct . . . [would] result in [his] immediate reduction in grade and pay to a Level 05/O PTF clerk position, without avenue of appeal." Subsequently, the agency proposed reduction of the appellant's grade and pay based on a single charge of "improper conduct – violation of resolution of proposed adverse action." The administrative judge (AJ) dismissed the appellant's appeal for lack of jurisdiction finding that, under the settlement agreement, the appellant waived his right to appeal the demotion if he violated the settlement agreement within three years of its execution.

On review, the Board found that the appellant's general denial of the agency's allegations, along with the interview summaries from the agency's

investigation, constitute a nonfrivolous allegation that he did not violate the settlement agreement. Thus, he is entitled to a hearing to determine whether he, in fact, complied with the settlement agreement. If the appellant fails to show compliance with the settlement agreement, then the Board must determine the scope and applicability of the agreement's waiver provision. The Board remanded the case for further adjudication. The Board also directed the AJ to examine extrinsic evidence of the parties' intent as to the expiration of the agreement.

[Johnson v. U.S. Postal Service, 2007 MSPB 135](#)

MSPB Docket No. CH-0752-06-0177-I-1

May 9, 2007

Timeliness

The administrative judge (AJ) dismissed the appeal on the basis that it was untimely filed and that the appellant failed to show any good cause for his delay in filing his appeal after he had learned about his appeal rights. The AJ also found that the Board lacked jurisdiction over the appellant's VEOA claim because he did not show that he had exhausted his claim before the Department of Labor. On review, the Board did not find sufficient evidence in the record that the appellant received information on where, when, and how to file a Board appeal. However, the Board found that the AJ did not alert the parties to the significance of a November 24, 1998 notice that may have informed the appellant of his appeal rights. The Board remanded the appeal so that the AJ may order the parties to submit evidence and argument before deciding anew whether the appellant had sufficient information to file a timely appeal when he learned of his appeal rights in September 2005. If he did not have sufficient information, the AJ must determine whether the appellant showed good cause for the delay in filing his appeal.

FEDERAL CIRCUIT AFFIRMANCES/DISMISSALS (NP)

The following appeals were affirmed:

Gershfield v. Merit Systems Protection Board, 2006-3347, DC-3443-06-0447-I-1 (05/04/07)

Mullins v. Department of Commerce, 06-3284, CH-0752-05-0686-I-1 (05/04/07)

The court denied petitions for rehearing in these cases:

Trobovic v. General Services Administration and Merit Systems Protection Board, 06-3341, NY-0752-05-0347-I-1 (05/04/07)