



# U.S. Merit Systems Protection Board

CASE REPORT

DATE: June 1, 2007

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## BOARD DECISIONS

### [Gingery v. Department of Defense, 2007 MSPB 138](#)

MSPB Docket No. CH-3443-06-0582-I-1

May 30, 2007

#### **Miscellaneous Topics**

#### **- USERRA/VEOA/Veterans' Rights**

**HOLDING:** The Federal Career Intern Program (FCIP) is a valid exception to the competitive examination requirement set out in 5 U.S.C. § 3304 because it was expressly authorized by an Executive Order promulgated under 5 U.S.C. § 3302 and therefore the use of the FCIP to select 2 applicants other than the preference eligible appellant did not constitute circumvention of the appellant's preference rights.

The Board denied the appellant's petition for review of an initial decision denying his request for relief under the Veterans Employment Opportunities Act of 1998 (VEOA), reopened the appeal on its own motion, and affirmed as modified the initial decision.

The appellant appealed to the Board after he was not selected for an auditor position which was announced by the agency on an internet website which stated that the agency was also accepting resumes for its Federal Career Intern Program (FCIP). The appellant asserted that his rights as a compensably disabled preference eligible were violated when the agency hired two applicants under the FCIP, one applicant from an OPM certificate and one applicant described as eligible for noncompetitive reinstatement. The Administrative Judge (AJ) denied the appellant's request for corrective action.

On review, the Board found no error in the AJ's conclusion that the appellant failed to show a violation of his rights under a statutory or regulatory provision relating

to veteran preference. The Board specifically rejected the appellant's arguments that *Deems v. Department of the Treasury*, 100 M.S.P.R. 161 (2005) and *Dean v. Department of Agriculture*, 99 M.S.P.R.533 (2005), *aff'd on recons.*, 104 M.S.P.R. 1 (2006), and *Olson v. Department of Veterans Affairs*, 100 M.S.P.R. 322 (2005), *aff'd on recons. Sub nom. Dean v. Department of Agriculture*, 104 M.S.P.R. 1 (2006), establish that the agency's hiring under the FCIP constitutes improper circumvention of his preference rights. The Board explained that the cited decisions do not hold that noncompetitive hiring authorities, such as the FCIP, may never be used to hire candidates not entitled to preference when qualified preference-eligible candidates are available. Rather, those decisions hold that, under 5 U.S.C. § 3304, an individual may be appointed in the competitive service only if he has passed an examination or qualified for appointment under a valid noncompetitive appointing authority. Here, the Board found that the FCIP constitutes a valid exception to the competitive examination requirement of 5 U.S.C. § 3304 and that the agency followed correctly OPM's regulations applicable to such excepted appointments.

**[Caracciolo v. Department of the Treasury, 2007 MSPB 139](#)**

MSPB Docket No. NY-3443-05-0222-I-3

May 30, 2007

**Board Procedures**

**- Adjudicatory Error**

**Jurisdiction**

**- Reduction In Pay/Rank/Grade**

The Administrative Judge (AJ) dismissed for lack of jurisdiction the appellant's appeal of the agency's failure to grant her a timely within-grade increase based on a finding that the appellant was covered by a collective bargaining agreement that provides the exclusive remedy for raising claims related to within-grade increases. The Board vacated the initial decision, still dismissing the appeal for lack of jurisdiction, but on other ground.

On petition for review, the Board found, based on the appellant's submission below of an SF-50, that the appellant occupied a supervisory position and therefore was not covered by the collective bargaining agreement. Nevertheless, the Board concluded that the appellant had not raised a nonfrivolous allegation of fact that would establish Board jurisdiction. While the Board noted that the AJ had not provided to the appellant, prior to issuance of the initial decision, the required explicit information of what was needed to establish an appealable jurisdictional issue of a reduction in pay, the initial decision put the appellant on notice that she must show that her pay was actually lowered. Under these circumstances, the Board found no prejudice to the appellant's substantive rights. The Board noted that the appellant, on PFR, acknowledged that she had received payment from the agency but stated that the appellant now appears to be appealing the agency's failure to offer a full accounting of the payment, a matter not within the Board's jurisdiction outside the context of a compliance proceeding. Finally, the Board found no error in the AJ's failure to grant

the appellant's request for recusal, a motion based on the appellant's perception that the AJ was biased based on rulings the AJ had made in the appellant's prior appeal.

**[Pinegar v. Federal Election Commission, 2007 MSPB 140](#)**

MSPB Docket No. CB-7121-07-0001-V-1

May 30, 2007

**Arbitration/Collective Bargaining-Related Issues**

**- Review Authority of MSPB**

**Discrimination**

**- Physical/Mental Disability - Qualified Disabled Employee**

**HOLDING: The scope of the Board's review of an arbitrator's decision is limited. The appellant's disability discrimination claim failed because the evidence did not show that his depression substantially limited his major life activities. The Board will not review arguments other than discrimination claims that have not been raised before the arbitrator. The Board upheld the penalty of removal because it was not incorrect as a matter of civil service law, rule, or regulation.**

The appellant was removed from his GS-12 Attorney position based on charges of Disruptive Behavior (two specifications) and Inappropriate Remarks (seven specifications). He grieved his removal and the arbitrator sustained both charges and found that the penalty of removal was within the bounds of reasonableness. Before the Board, the appellant challenged two specifications under the charge of Inappropriate Remarks, raised claims that he was discriminated against based on gender and disability, and challenged the appropriateness of the penalty.

The Board first rejected the appellant's request to proceed anonymously. The Board applied the principles enunciated in *Ortiz v. Department of Justice*, 103 M.S.P.R. 621 (2006) and found that he had not rebutted the presumption that parties' identities are public information in Board cases.

On the merits, the Board noted that the scope of its review of an arbitrator's decision is limited. The Board found that the appellant did not show that the arbitrator erred in sustaining the charges. The Board found that the appellant made only a bare allegation with respect to his gender discrimination claim, and found that it was unsupported by factual allegations. With respect to disability discrimination, the Board found that the evidence supported the appellant's assertion that he suffered depression. However, the Board found that the evidence did not show that depression substantially limited the appellant's ability to care for himself, perform manual tasks, walk, see, hear, speak, learn, or work. Further, the appellant offered no evidence regarding his own experience living with these conditions upon which the Board could conclude that his depression substantially limited a major life activity. To the extent he asserted that he was disabled due to the side effects of the various medications he took, the Board found that that purported disability can only be considered temporary or transitory because the appellant switched to different medication.

With respect to other affirmative defenses raised by the appellant, the Board noted that it will not review arguments other than discrimination claims that are not raised before the arbitrator. The appellant did not raise his due process and whistleblower claims before the arbitrator. The Board further found that the arbitrator correctly applied the harmful error standard in determining that the appellant failed to show how he was harmed by the agency's procedural errors. Finally, the Board concluded that it could not find that the arbitrator's determination that the penalty of removal was within the bounds of reasonableness was incorrect as a matter of civil service law, rule, or regulation.

## **EEOC DECISIONS**

### ***Parks v. Potter***

Petition No. 0320070049; MSPB Nos. AT-0752-06-0166-I-1, AT-0752-06-0167-I-1  
May 7, 2007

The petitioner filed a complaint with his agency alleging that he was discriminated against on the basis of disability when he was placed on enforced leave and later demoted from a PS-4 to a PS-3 as a result of reassignment from the position of Part-Time Flexible Mail Handler to Custodian. The agency found no discrimination and the petitioner appealed to the Board, which found that the petitioner failed to establish that his diabetes mellitus substantially limited him. On petition for review to the EEOC, the EEOC noted that it has determined that some individuals with diabetes mellitus are individuals with disabilities within the meaning of the Rehabilitation Act while others are not and that much more specific information, pursuant to the principles set forth in *Carr v. United States Postal Service*, EEOC Appeal No. 01A43665 (May 18, 2006), must be collected to shed light on the full extent to which the petitioner's diabetes mellitus impacts his major life activities. Accordingly, the EEOC referred the matter back to the Board for the taking of additional evidence and directed the Board to forward the supplemented record to the Commission for review and a decision on the record.

## COURT DECISIONS

### [Ledbetter v. Goodyear Tire & Rubber Co., Inc., 2007 WL 1528298](#)

Supreme Court Docket No. 05-1074

May 29, 2007

#### **Discrimination**

##### **- Sex Discrimination**

**HOLDING:** The time period for filing a charge with the Equal Employment Opportunity Commission (EEOC) is triggered when a discrete unlawful practice takes place. A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination. Because a pay setting decision is a “discrete act,” the period for filing an EEOC charge commences when a pay setting decision is made. If, however, an employer engages in a series of acts, each of which is intentionally discriminatory, then a fresh violation takes place when each act is committed.

Petitioner Ledbetter was an employee of Goodyear from 1979 until 1998, at which time she brought a discrimination action under Title VII of the Civil Rights Act of 1964 alleging that several supervisors had, in the past, given her poor evaluations because of her sex. Petitioner had not filed a timely charge of discrimination following each instance of any such past discriminatory act. Rather, she claimed that the past acts of discrimination were “carried forward” within the employer's performance-based pay system by causing her, over the passage of time, to earn significantly less than her male colleagues. The Supreme Court granted certiorari to determine whether, and under what circumstances, a plaintiff may bring an action under Title VII alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period.

Citing to precedent such as *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101 (2002), the Court held, in a 5-4 decision, that the EEOC charging period is triggered when a discrete unlawful practice takes place. A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination. Because a pay setting decision is a “discrete act,” it follows that the period for filing an EEOC charge commences when a pay setting decision is made. If, however, an employer engages in a series of acts, each of which is intentionally discriminatory, then a fresh violation takes place when each act is committed. Under the facts presented, the Court found that Ledbetter had not proven that a discriminatory act had occurred during the applicable time limit for a private sector complaint (180 days prior to the filing of the EEOC charge).

The Court also rejected Ledbetter's argument that her case, to the extent that relates to discriminatory pay setting decisions, should be governed by the Court's holding in *Bazemore v. Friday*, 478 U.S. 385 (1986) (*per curiam*), and therefore treated differently. The Court held that *Bazemore* does not support Ledbetter's claim of discrimination but, rather, stands for the proposition that an employer violates Title VII and triggers a new EEOC charging period whenever the employer issues paychecks using a facially discriminatory pay structure. However, a new Title VII violation does not occur, and a new charging period is not triggered, when an employer issues paychecks pursuant to a system that is facially nondiscriminatory and neutrally applied. The Court held that Ledbetter had not established that Goodyear adopted its performance-based pay system in order to discriminate on the basis of sex and, therefore, *Bazemore* was not applicable.

**[Davis v. Department of Homeland Security](#) NP**

Fed. Cir. No. 2006-3061, MSPB Docket No. SF-0752-04-0760-I-1  
May 30, 2007

**Jurisdiction**  
**-Miscellaneous**

The Federal Circuit vacated and remanded the Board's decision which had found that the petitioner voluntarily resigned from her position as a Customs and Border Patrol Officer for the Department of Homeland Security.

The petitioner filed a complaint of sexual harassment with the Equal Employment Opportunity Commission (EEOC). Before her complaint was resolved, she filed a claim of constructive discharge with the Board and alleged that her resignation was coerced based on sexual harassment, and retaliation for filing an EEO complaint and whistleblowing. The administrative judge (AJ) found that while the petitioner may have been subject to sexual harassment the agency took appropriate measures to curtail the conduct and that the appellant had voluntarily resigned. After the initial decision had been issued and after the record on petition for review (PFR) had closed, the petitioner submitted to the Board a copy of the transcript of the EEOC proceeding and the EEOC's decision finding that the petitioner was subject to sexual harassment. The short form Order stated that the Board did not consider the late-filed submissions.

On judicial review, the Court rejected the petitioner's claims that the AJ violated her due process rights during the processing of the appeal and that the Board's decision did not state with sufficient specificity the reasons for denying review. The Court also found that the petitioner's allegations of coercion, other than her claim of sexual harassment, do not establish coercion and that the AJ correctly found no jurisdiction over the petitioner's whistleblowing claim. The Court, however, found that the Board should have considered the EEOC's decision, which was issued after the record on PFR had closed, given that the EEOC's decision was inconsistent with the determination made by the AJ in the initial decision. The Court remanded with instructions to consider the conclusions reached by the EEOC and the AJ with respect to sexual

harassment and to resolve the inconsistencies, noting that the Board might still reach the same result if, for instance, the sexual harassment was too far removed in time from the petitioner's resignation to have rendered it involuntary or if other factors, unrelated to the harassment, caused the petitioner to resign voluntarily.