



U.S. Merit Systems Protection Board

CASE REPORT

DATE: May 25, 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

[Brown v. U.S. Postal Service, 2007 MSPB 136](#)

MSPB Docket No. DA-0752-07-0077-I-1

May 22, 2007

Board Procedures/Authorities

- Reopening and Reconsideration

Miscellaneous Topics

- USERRA/VEOA/Veterans' Rights

Timeliness

- Miscellaneous

HOLDING: The filing deadline for an adverse action appeal may be tolled under the Servicemembers Civil Relief Act of 2003 (SCRA). The Board may reopen and reconsider a case on its own motion to consider the effect of the SCRA on the timeliness of an appeal. In a removal appeal, the Board may consider an appellant's USERRA claim as an affirmative defense under 5 U.S.C. § 7701(c)(2)(C) or, if the adverse action is found to be untimely or not within the Board's jurisdiction, the Board may consider the USERRA claim as a separate appeal.

The administrative judge (AJ) dismissed the appellant's removal appeal as untimely filed with no good cause shown based on a finding that the appellant received the Final Agency Decision (FAD) on his discrimination complaint on October 5, 2006, but filed his appeal more than 30 days later and failed to respond to the AJ's order concerning timeliness. The AJ did not address the appellant's Uniformed Services Employment and Reemployment Rights Act (USERRA) claim.

On petition for review, the appellant alleged for the first time, with some supporting evidence, that he did not accept delivery of the FAD on October 5, 2006 because he was serving on military orders with the U.S. Navy Reserve and that his appeal was timely because he filed it within 30 days after his returned home upon

completing military duty. The Board denied the appellant's PFR, reopened the appeal under its own motion, vacated the initial decision, and remanded the appeal for further adjudication, including the appellant's claim under USERRA.

The Board found that the AJ correctly dismissed the appeal as untimely filed without a showing of good cause based on the 9-day delay in filing and the appellant's failure to respond to the AJ's show cause order. Nevertheless, the Board, relying on *Henry v. USPS*, 69 M.S.P.R. 555 (1996), found it appropriate to reopen to consider the effect on the timeliness issue of the Servicemembers Civil Relief Act of 2003 (SCRA), which has a tolling provision that operates to halt the running of the time limitation for filing an appeal until an appellant is released from military service. Because the evidence submitted by the appellant was inconclusive as to whether it constituted military service within the meaning of the SCRA, the Board remanded for a determination on the timeliness issue, with further instructions to the AJ to determine, depending upon the timeliness finding, whether the Board has adverse action jurisdiction over the appellant's removal appeal.

The Board also found it necessary to remand for a determination on the appellant's USERRA claim, which was not addressed by the AJ in either an acknowledgment order or the initial decision. The Board directed the AJ, on remand, to inform the appellant of his jurisdictional burden under USERRA and noted that the appellant's USERRA claim may be considered as an affirmative defense to the removal, or as a separate claim, in which case the Board's authority would not extend beyond the alleged USERRA violations.

[Sutton v. Office of Personnel Management, 2007 MSPB 137](#)

MSPB Docket No. AT-0845-03-0442-I-1

May 23, 2007

Timeliness

-Miscellaneous

The Board dismissed as untimely filed with no good cause shown, the appellant's petition for review (PFR) of an initial decision where the record shows that the PFR was filed three and a half years after issuance of the initial decision and where the appellant's vague allegation of depression was unsupported by any medical evidence that he had such a condition, or that it existed during the relevant time period or that it prevented him from timely filing his appeal.

COURT DECISIONS

Lutz v. U.S. Postal Service

Fed. Cir. No. 06-3154; MSPB Docket No. CH-0752-03-0220-X-1

May 15, 2007

Settlement

- On PFR/PFE

HOLDING: The agency's breach of a settlement agreement provision that required it to cooperate and facilitate the acceptance of the appellant's disability retirement application and not to place negative statements in the supervisor statement was a material one because it discouraged OPM's acceptance of the application.

In this enforcement case, the Federal Circuit held that a supervisor's negative statements discouraged OPM's acceptance of Mr. Lutz's disability retirement application and therefore constituted a material breach of the parties' settlement agreement. The court reversed the Board's decision and remanded for further proceedings.

In the settlement agreement resolving Mr. Lutz's appeal, the agency agreed to cooperate and facilitate the acceptance of Mr. Lutz's disability retirement application and "not to place negative statements in the supervisor statement." OPM denied Mr. Lutz's application and he filed a petition for enforcement (PFE) alleging that the agency breached the settlement agreement by including negative statements in the supervisor's statement. The Board denied the PFE, finding that OPM would have denied the application regardless of any allegedly negative remarks contained in the supervisor's statement.

On review, the court found that OPM explicitly relied on the supervisor's negative statements as one of two factors in denying the request for disability retirement, the other factor being a lack of medical evidence to establish a disabling medical condition. The court acknowledged that it is impossible to know precisely to what extent the supervisor's statements colored OPM's analysis, but found it clear that the statements did discourage OPM's acceptance of the application. The court directed the Board, on remand, to determine the appropriate remedy for the agency's material breach.

Pittman v. Department of Justice

Fed. Cir. No. 2006-3263; MSPB Docket No. NY-3443-05-0113-I-1

May 15, 2007

Miscellaneous Topics

- USERRA/Veterans Rights

HOLDING: The Board lacks jurisdiction over a USERRA claim where the appellant has elected to raise similar matters through the negotiated

grievance procedure. A reemployment claims fails where the employee was placed in his previous position at the agency following his military service.

In this USERRA case, the Federal Circuit held that the Board did not have jurisdiction over Mr. Pittman's claims under 38 U.S.C. §§ 4311(a) & 4316(c) for improper removal because he had elected to raise similar matters by challenging his removal under the negotiated grievance procedure. Because he was barred by 5 U.S.C. § 7121(e) from bringing those claims before the Board, the Board's denial of those claims on the merits was error. The court found that substantial evidence supported the AJ's finding that Mr. Pittman was reemployed in his previous position at the agency following his military service. The court therefore affirmed the Board's denial of Mr. Pittman's reemployment claim under USERRA, but vacated the denial of his improper removal claims and remanded with instructions to dismiss those claims for lack of jurisdiction. In dissent, Judge Mayer expressed his view that the agency failed in its obligation to reemploy Mr. Pittman following his military service.

Rhodes v. Merit Systems Protection Board

Fed. Cir. No. 2006-3340; MSPB Docket No. NY-0752-06-0015-I-1

May 23, 2007

Jurisdiction

- Arbitration/CBA-Related Issues
- Suspensions

HOLDING: For purposes of an election made under 5 U.S.C. § 7121(e), the matter raised by an appeal from the imposition of an indefinite suspension is not the same as the matter raised by an appeal from the continuation of an indefinite suspension and therefore the petitioner's election to grieve the former does not preclude an appeal to the Board of the latter.

The petitioner appealed the agency's failure to restore him to duty after an acquittal of the criminal charges that formed the basis of his indefinite suspension by the agency. The administrative judge (AJ) dismissed the appeal for lack of jurisdiction based on a finding that the petitioner had made a binding election, under 5 U.S.C. § 7121(e), when he challenged the imposition of the indefinite suspension under the collective bargaining agreement. The AJ concluded that an election to grieve the reasons for the indefinite suspension would include any subsequent challenge to the agency's failure to end the indefinite suspension pursuant to the stated condition subsequent.

The Court reversed and remanded. It concluded that, for purposes of section 7121(e), the "matter" raised by an appeal from the imposition of an indefinite suspension is not the same as the matter raised by an appeal from the continuation of an

indefinite suspension. Thus, the Court found that the petitioner's election to grieve the former does not preclude an appeal to the Board of the latter. The Court rejected the Board's argument that *Bonner v. Merit Systems Protection Board*, 781 F.2d 202 (Fed. Cir. 1986), limited the definition of "matter in 7121(e) to the underlying personnel action, of which there is only one in this case, an indefinite suspension. The Court found that an analysis of "matter" in the context of section 7121(e) looks to the underlying agency action that is being appealed.

FEDERAL CIRCUIT AFFIRMANCES/DISMISSALS (NP)

The following appeals were affirmed:

Daniel v. Department of Veterans Affairs, 2006-3291; PH-0432-05-0280-I-2 (05/11/07)

Green v. U.S. Postal Service, 2006-3425; SF-0353-05-0977-I-1 (05/11/07)

Richards v. Merit Systems Protection Board, 2006-3303; CH-0752-05-0883-I-1 (05/11/07)

Shelburne v. Merit Systems Protection Board, 2007-3003; DC-0752-06-0334-I-1 (05/11/07)

Brooks v. Department of the Air Force, 2007-3039; DA-0752-06-0260-I-1 (05/14/07)

Gafford v. Merit Systems Protection Board, 2006-3428; DA-0752-05-0658-I-1 (05/14/07)

Schwab v. Office of Personnel Management, 2007-3061; DC-0846-06-0340-I-1 (05/14/07)

Sweeney v. Department of Homeland Security, 07-3014; DA-0752-05-0534-I-2 (05/14/07)

Rethaber v. Merit Systems Protection Board, 2006-3311; DA-0752-06-0115-I-1 (05/15/07)

FEDERAL REGISTER NOTICES

[72 Fed. Reg. 26533-26535](#) (May 10, 2007)

MSPB issued an interim rule, with the concurrence of the Office of Government Ethics, requiring an MSPB employee to obtain written approval from that employee's supervisor and the concurrence of the agency's Designated Agency Ethics Official (DAEO) or the alternate DAEO before engaging in certain kinds of outside employment. Employment is defined broadly to cover non-Federal employment or business relationships involving the provision of personal services, whether or not for compensation.