



U.S. Merit Systems Protection Board

CASE REPORT

DATE: June 29, 2007

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BOARD DECISIONS

[Smith v. Department of Defense, 2007 MSPB 163](#)

MSPB Docket Nos. CH-315H-07-0102-I-1; DE-315H-07-0077-I-1
June 22, 2007

Jurisdiction

- Probationers/5 U.S.C. § 7511(a)(1)(A)

The Board consolidated appellant's two appeals of his termination during his probationary period. The first appeal was dismissed by an administrative judge (AJ) in the Board's Central Regional Office for lack of jurisdiction because appellant did not present a nonfrivolous allegation that he had completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less, and the second appeal was dismissed by an AJ in the Board's Denver Field Office on the basis of collateral estoppel without considering appellant's jurisdictional response.

The Board reopened the joined appeals, vacated the second initial decision, and affirmed as modified the first initial decision, still dismissing the appeal for lack of jurisdiction. The Board found it appropriate to consider appellant's jurisdictional response, which had not been submitted in the first appeal because of appellant's belief that his case was before a separate office. The Board found that appellant did not show sufficient service to meet the definition of employee in 5 U.S.C. § 7511(a)(1)(a)(i) because the break in service between his current and previous positions was greater than 30 days and his prior service was with another agency. It found that he did not show that he meets the definition of employee in 5 U.S.C. § 7511(a)(1)(A)(ii) because he did not show that he had completed 1 year of current continuous service. In the absence of an appealable action, the Board found that it lacked jurisdiction to consider appellant's claims that the agency's termination action violated Amendments V, VI, and VIII of the Constitution.

[Horton v. Department of Veterans Affairs, 2007 MSPB 164](#)

MSPB Docket No. CH-1221-06-0480-W-1

June 22, 2007

Whistleblower Protection Act

- Exhaustion of Remedies

Board Procedures/Authorities

- Pro Se Appellants

The Board granted appellant's petition for review, reversed the initial decision that dismissed his individual right of action (IRA) appeal for lack of jurisdiction, and remanded for further proceedings. The Board, considering appellant's pro se status, found his descriptions of his disclosures in his OSC complaint and before the Board substantially the same and concluded that he had exhausted his administrative remedies with respect to all 7 of his alleged protected disclosures, rather than the two identified by the administrative judge (AJ). Additionally, the Board found that at least one of appellant's disclosures was protected because he made a nonfrivolous allegation that agency employees violated the law by providing false information on documentation for Medicare and/or Medicaid payments, and the Board found that appellant made a nonfrivolous allegation that his disclosure was a contributing factor in the agency's decision to take at least one personnel action against him.

[Jaramillo v. Department of the Air Force, 2007 MSPB 165](#)

MSPB Docket No. DA-0752-05-0280-I-4

June 25, 2007

Timeliness

- Miscellaneous

The Board, while finding appellant's representative's confusion about the filing date insufficient to establish good cause for the 29-day late filing, nevertheless found that it was in the interest of justice to waive the refiling deadline for appellant's appeal where the appeal had previously been dismissed three times without prejudice to permit completion of criminal proceedings involving events that led to appellant's removal, appellant had timely filed his initial appeal, his intention to refile a Board appeal had been clear throughout the proceedings, he refiled his appeal only 5 days after resolution of the criminal proceedings, the refiling deadline was apparently arbitrary, and the agency did not assert that it would be prejudiced by waiver of the time limit.

DISMISSALS

Davenport v. Department of Veterans Affairs, MSPB Docket No. AT-1221-07-0066-W-1 (June 22, 2007)

Woods v. U.S. Postal Service, MSPB Docket No. AT-0752-07-0160-I-1 (June 25, 2007)

FEDERAL CIRCUIT AFFIRMANCES/DISMISSALS (NP)

Westover v. Department of Agriculture, Fed. Cir. No.2006-3062, MSPB No. DE-3443-05-0035-I-1, June 27, 2007

Swain v. U.S. Postal Service, Fed. Cir. No.2006-3170, MSPB No. DE-0752-06-0539-I-1, June 27, 2007

Vaughn v. USPS, Fed. Cir. No. 2007-3206, MSPB No. PH-0752-01-0214-I-1, June 27, 2007