



U.S. Merit Systems Protection Board

CASE REPORT

DATE: June 15, 2007

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BOARD DECISIONS

[Helmstetter v. Department of Homeland Security, 2007 MSPB 147](#)

MSPB Docket No. PH-0752-04-0067-I-2

June 7, 2007

Timeliness

- Representation

The appellant appealed his removal based on misconduct charges, and the administrative judge sustained the removal. The initial decision became the final decision of the Board on July 26, 2004. The appellant, through a new attorney, filed a petition for review on February 19, 2007, and thereafter a motion to waive the time limit on the ground that his representative failed to file, even though paid to do so. The appellant attached to his motion a damages judgment in his favor against his former attorney and an order disbaring him. The Board found that the appellant failed to show good cause to excuse his delay because, regardless of his belief that his representative would file a petition, he remained personally responsible for prosecution of his appeal. Even if his efforts to diligently prosecute it had been thwarted without his knowledge by his representative's negligence, the Board stated that it would not waive the filing deadline several years after the appellant should have become aware of the negligence.

[Guerrero v. Department of Veterans Affairs, 2007 MSPB 148](#)

MSPB Docket No. AT-0752-06-0144-N-1

June 7, 2007

Miscellaneous Topics

- Stays

HOLDING: The Board denied the agency's request for a stay of its final decision pending OPM's consideration of a petition for reconsideration where the agency failed to make an argument that it had a strong case on the merits and failed to make convincing arguments that it would be irreparably harmed by denial of a stay or that a stay would not harm the appellant and was in the public interest.

The agency requested the Board to stay enforcement of its final decision while it consults with the Office of Personnel Management (OPM) about filing a petition for reconsideration. The appellant opposed the request. The final decision held that the agency failed to prove its charges that the appellant made false statements on application forms and ordered the agency to cancel his removal and restore him to employment. In deciding whether to grant a stay, the Board noted it considers whether the agency has a strong case on the merits, whether it would be irreparably harmed without a stay, whether a stay would substantially harm other parties, and where the public interest lies, and under this test the less the likelihood of success, the more support for the other three criteria is required.

The Board denied the stay. It found that the agency made no argument that it is likely to prevail on the merits and failed to make a convincing argument that the last three criteria were met. The Board noted that the appellant worked for one year in his position and that the agency offered no evidence his performance was unsatisfactory. Although the agency argued that the appellant would not be harmed because he is on paid leave, the Board found some merit to his argument that issuance of a stay would harm his professional credibility. The Board found no public interest in granting a stay.

Dissenting, Chairman McPhie would have granted the stay because he found a high likelihood the agency would succeed on the merits should OPM seek reconsideration. He also found there was a risk of irreparable harm to patients and to the agency as an institution if the appellant were returned to his hospital laboratory position, and he discounted any harm from a stay to his professional reputation, given the findings already made in the Board's final decision. He concluded that the public interest weighs in favor of a stay given the nature of the appellant's alleged misconduct.

[Welch v. Department of Justice, 2007 MSPB 149](#)

MSPB Docket No. CH-0752-06-0015-X-2

June 11, 2007

**Miscellaneous Agency Actions
- Indefinite Suspension**

The appellant filed a petition for enforcement of the final order that upheld his indefinite suspension pending disposition of criminal charges and found that resolution of the charges was the determinable condition that would end the suspension. All criminal charges against the appellant were dismissed on May 10, 2006, and he contended that the agency was not in compliance because it did not reinstate him until August 10, 2006. The administrative judge (AJ) recommended that the Board find noncompliance because the agency had no plan to issue any other disciplinary action against the appellant and that it order the agency to restore him retroactively effective

May 10, 2006. The Board agreed with the AJ's recommendation. Finding that the agency had submitted evidence that it had made the appellant's reinstatement retroactive with back pay to May 10, 2006, the Board dismissed the petition as moot.

Janini v. Department of Labor, 2007 MSPB 150

MSPB Docket No.DC-0432-06-0171-I-1

June 11, 2007

Timeliness

- Miscellaneous

Board Procedures/Authorities

- Reopening and Reconsideration

The appellant filed an appeal of his removal on December 19, 2005, but his union representative withdrew the appeal on December 21, 2005, to pursue arbitration. The administrative judge dismissed the appeal as withdrawn. On March 14, 2007, the appellant filed a motion to reopen his Board appeal and was informed that his filing would be treated as a petition for review (PFR) of the initial decision dismissing his appeal. The appellant filed a motion to waive the time limit and to reopen the appeal.

The Board first considered the PFR as a petition for appeal filed 16 months after the effective date of his removal. The only explanation that the appellant offered for his delay was that he was pursuing relief under the collective bargaining agreement, and the Board held that pursuing relief in another forum is not good cause for a delay in filing. Considering the PFR as a request to reopen, the Board noted that a withdrawal is an act of finality removing its jurisdiction and that it will not reopen and reinstate an appeal absent unusual circumstances. The Board declined to reopen the appeal on the ground that the arbitrator had held that the earlier Board appeal prevented him from reaching the merits of the appellant's removal.

Stempihar v. U.S. Postal Service, 2007 MSPB 151

MSPB Docket No. SF-0752-06-0635-I-1

June 12, 2007

Mootness

HOLDING: It was error to dismiss the appeal as moot based on the agency's assurances that the appellant would be restored to the status quo ante instead of evidence that he had been restored to it.

The appellant appealed his removal, and while the appeal was pending, the agency indicated that it was rescinding the removal. Over the appellant's objection, the administrative judge (AJ) dismissed the appeal as moot based on the agency's implicit representation it would restore the appellant to the status quo ante. The decision said that any dispute about such restoration could be raised in a petition for enforcement and that the deadline for filing a petition for review was August 23, 2006. On October 25, 2006, the appellant filed a complaint that he was not provided lost overtime pay, and

the pleading was docketed as an untimely petition for review, with notice to appellant to show good cause for his delay.

The Board found that the appellant showed good cause for his untimely filing because he acted reasonably in the face of a confusing initial decision. No date was specified for filing a petition for enforcement (PFE), and the appellant filed what he intended as a PFE within 30 days of a perceived impasse in the parties' negotiations over his claim for lost overtime. The Board also found the decision was misleading because a decision dismissing an appeal as moot is not enforceable since it is not a decision on the merits. The Board also noted that an agency's unilateral modification of its action after an appeal has been filed does not divest the Board of jurisdiction unless the appellant consents or the agency completely rescinds the action. The Board found that the AJ erred by dismissing the appeal as moot on the agency's assurances, and it remanded for the dispute concerning the appellant's overtime back pay to be resolved.

[Seward v. Department of Veterans Affairs, 2007 MSPB 152](#)

MSPB Docket No. DA-3443-06-0679-R-1

June 11, 2007

Timeliness

- Equitable Tolling

Miscellaneous Topics

- USERRA/VEOA/Veterans' Rights

The Department of Labor (DOL) dismissed the appellant's claim under the Veterans Employment Opportunities Act (VEOA) as untimely filed. On appeal, the Board found that because DOL dismissed her complaint as untimely without adjudicating its merits, she failed to exhaust her DOL remedy and the Board lacked jurisdiction over her appeal. One week later the Federal Circuit issued *Kirkendall v. Department of the Army*, 479 F.3d 830 (Fed. Cir. 2007) (en banc), holding that the Board has authority to review, and should apply the doctrine of equitable tolling to, claims brought under VEOA that DOL has dismissed as untimely. The Board therefore reopened the appeal and remanded to the regional office with instructions to notify the appellant of her burden under *Kirkendall* and to decide whether the time limit should be equitably tolled.

[Melendez v. Department of Veterans Affairs, 2007 MSPB 153](#)

MSPB Docket No. DA-0752-07-0040-I-1

June 11, 2007

Timeliness

- Miscellaneous

After the appellant appealed his removal, the agency and he entered into a Last Chance Agreement (LCA) under which the agency agreed to restore him to employment and hold his removal in abeyance for 2 years, while the appellant agreed to waive his right to appeal any removal during that period. The agency removed the appellant for violating the LCA effective August 21, 2006. The appellant filed an appeal on October

23, 2006, and the administrative judge (AJ) ordered him to show that his appeal was timely or that good cause existed for his delay. The appellant responded that his motion for compensatory damages filed electronically under the first appeal's docket number on September 8, 2006, was intended to appeal his second removal and was timely. The AJ dismissed the appeal as untimely.

On petition for review, however, the Board found that the pro se appellant's reasons for filing his appeal as a motion for compensatory damages were credible. It was reasonable for him to assume that his appeal of his August 21, 2006 removal was a continuation of his earlier removal appeal. Since there was no basis for awarding compensatory damages at the time when the appellant filed his motion, the Board construed it as an appeal of his removal, found the appeal timely, and remanded for further adjudication.

[Williamson v. Office of Personnel Management, 2007 MSPB 154](#)

MSPB Docket No. DA-0841-06-0636-I-1

June 12, 2007

**Miscellaneous Topics
- Pay and Benefits**

The appellant sought death benefits under the Federal Employees' Retirement System (FERS) based on the service of his late wife, contending that he met the statutory requirement of a marriage of at least 9 months prior to his wife's death because a common law marriage of 3 months duration immediately preceded their formal marriage of over 6 months. The Office of Personnel Management (OPM) denied benefits on the ground that the appellant failed to submit evidence establishing the common law marriage. On appeal, the administrative judge reversed, finding that the appellant's state, Oklahoma, recognized common law marriage, that the common law and licensed marriages could be combined to meet the 9-month requirement, and that the appellant submitted evidence establishing the common law marriage.

On petition for review, OPM contended that 1998 amendments to Oklahoma marriage law requiring certain formal acts had rendered common law marriages invalid in Oklahoma. The Board rejected this argument, finding that the amendments applied only to licensed marriages and that the Oklahoma Supreme Court had repeatedly affirmed the validity of common law marriage. The Board ordered OPM to provide the appellant the survivor benefits to which he was entitled.

[Schroeder v. Office of Personnel Management, 2007 MSPB 155](#)

MSPB Docket No. PH-0845-06-0600-I-1

June 12, 2007

**Timeliness
-Miscellaneous**

The appellant appealed a reconsideration decision of the Office of Personnel Management (OPM), and the administrative judge affirmed OPM's decision and notified the appellant that a petition for review must be filed on or before January 2, 2007.

After the appellant filed a petition for review on January 19, 2007, he was informed by the Clerk of the Board that his petition was untimely and that he must submit a motion to waive the time limit, accompanied by a sworn statement showing good cause for the late filing. The appellant did not respond to the Clerk's notice. The Board found that the appellant's petition was untimely filed and dismissed it because the appellant was informed of the time limit and failed to show any circumstances that reasonably prevented him from timely filing.

Hay v. U.S. Postal Service, 2007 MSPB 156

MSPB Docket No. AT-0752-05-0775-B-1

June 13, 2007

Timeliness

-Mixed Cases

HOLDING: In determining whether an EEO complaint concerning a proposed removal encompasses the removal, the Board must look to the complaint, the agency's treatment and processing of the claim, and the surrounding circumstances. Where an appellant filed a timely EEO complaint with the agency prior to appealing to the Board, the right to appeal does not vest until the agency issues a final decision on the complaint or 120 days have elapsed from the date the complaint is filed.

On May 5, 2004, the appellant appealed his removal effective March 13, 2004. The administrative judge (AJ) dismissed for lack of jurisdiction because the appellant failed to show that he was a preference eligible. On July 20, 2005, the appellant again appealed with evidence showing that he was preference eligible. The AJ dismissed based on the collateral estoppel effect of his previous decision, but on petition for review the Board reversed, finding that in the prior appeal the appellant may not have had a fair opportunity to litigate the issue where the agency possessed information on his status that it failed to reveal. Finding jurisdiction, the Board remanded for a determination as to the appeal's timeliness.

On September 28, 2006 the AJ ordered the appellant to show within 7 days that his May 5, 2004 appeal from his March 13, 2004 removal was timely or that there was good cause for the delay. The appellant responded on October 11, 2006 that he received the order on October 6, 2006, and that his appeal was timely under mixed case procedures, i.e., because he appealed the agency's June 21, 2005 final agency decision on his complaint on July 20, 2005. The AJ declined to consider the appellant's untimely response to his order and dismissed the appeal as 23 days late under 5 C.F.R. § 1201.22(b). The appellant filed a petition for review arguing that the AJ erred in not applying mixed case procedures.

The Board held that sanctions for a late-filed response to an order should be imposed only when a party has failed to exercise due diligence in complying and that the opposing party is not entitled to sanctions, absent a showing of prejudice. It found that the agency was not prejudiced by the appellant's 6-day delay, particularly where the appeal was delayed for over 2 years by the agency's failure to promptly come forward

with evidence of the appellant's preference eligible status. Therefore, the Board considered the appellant's late submission.

The Board held that, when an appellant has filed a mixed case complaint with the agency, an appeal to the Board must be filed within 30 days after he receives the agency resolution or final decision. Whether a complaint regarding a proposed removal includes the removal action depends on whether the parties clearly intended that it should, the Board said. It found that coverage was intended in this case, citing the appellant's complaint, filed after the final notice of removal but before the effective date, and the agency's treatment of the complaint. Noting that where a complaint precedes an appeal to the Board, the right to appeal does not vest until there is a final agency decision or 120 days have elapsed, the Board found that the AJ should have dismissed the May 5, 2004 appeal without prejudice because at the time of his decision 120 days had not elapsed since the complaint was filed. With respect to the appellant's July 20, 2005 appeal, the Board held that it was timely filed because it was filed within 30 days of the agency's June 21, 2005 decision on his complaint. Thus the Board remanded the case for further adjudication.

[Hayes v. Department of the Army, 2007 MSPB 157](#)

MSPB Docket No. AT-0330-06-0198-R-1

June 13, 2007

Board Procedures/Authorities

- Reopening and Reconsideration

HOLDING: Reopening and reconsideration may be appropriate where there is clear and material legal error and a conflict between the decision and a controlling precedent, either because of oversight or a change in the controlling law since the decision issued.

The appellant filed a complaint under the Veterans Employment Opportunities Act (VEOA) concerning his nonselection that the Department of Labor (DOL) dismissed as untimely without addressing the merits of his claim. He then appealed to the Board. The administrative judge dismissed his appeal because the Board's jurisdiction was precluded by the appellant's failure to exhaust the DOL remedy by a timely complaint and because the Board lacked authority to review the DOL's failure to excuse his lateness. The appellant's petition for review of the dismissal was denied, and he did not seek judicial review. Eight months later, the Federal Circuit issued its decision in *Kirkendall v. Department of the Army*, 479 F.3d 830 (Fed.Cir. 2007) (en banc), holding that the Board has authority to review, and should apply the doctrine of equitable tolling to, claims brought under VEOA that DOL has dismissed as untimely. Nine days after *Kirkendall* issued, the appellant filed a request for reconsideration.

In its decision, the Board noted that reopening and reconsideration may be appropriate where there is clear and material legal error and a conflict between the decision and a controlling precedent, either because of oversight or a change in the controlling law since the decision issued. While noting that it generally exercises this authority within a shorter time period than eight months, the Board determined that, in

light of the appellant's diligence in seeking reconsideration only nine days after the *Kirkendall* decision, the desirability of finality was outweighed by the public's interest in reaching what appears to be the right result. It found that the appellant had no basis for seeking further review in court earlier because, prior to *Kirkendall*, equitable tolling of the DOL filing deadline was not available. It also found that it was not a foregone conclusion that the appellant could not prevail on the merits of his claim because there was a dispute concerning the basis of the selection of the individual who received the position that the appellant sought.

Chairman McPhie dissented because he found there was no indication that the result would change after reopening and because the appellant could have sought judicial review. Noting the appellant made no argument that he would receive relief if his failure to meet the filing deadline is excused, the Chairman found that the agency lawfully filled the position that the appellant sought under merit promotion procedures and that veterans' preference rules do not apply to such actions. He also cited the appellant's failure to seek judicial review as *Kirkendall* did and the absence of a persuasive reason why his appeal should receive the same treatment as *Kirkendall's*.

COURT DECISIONS

[Lynch v. Department of the Army, \(NP\)](#)

Fed. Cir. No. 2007-3114, MSPB Docket No. DE-3443-06-0256-I-1
June 12, 2007

Miscellaneous Topics

- USERRA/VEOA/Veterans' Rights

The appellant, a ten point 30% disabled preference eligible veteran, applied for a position at the Naval Station, Guantanamo Bay. The position required medical clearance since all residents of the Guantanamo base were required to be medically fit, given the limited medical care available there. The agency made the appellant a tentative job offer, but after medical screening revealed that he suffered from hematuria and hypertension, the agency withdrew the offer, finding him medically unsuitable. The appellant filed a complaint with the Department of Labor (DOL) under the Veterans Employment Opportunities Act (VEOA), claiming the Army violated his veterans' preference rights. After the DOL denied his claim, he appealed to the Board. The Board denied corrective action, finding that no veterans' preference statute or regulation precluded withdrawing a job offer because the applicant is not medically cleared for work overseas.

On appeal, the court addressed the appellant's argument that the agency violated his rights under 5 U.S.C. §§ 3312(a) and (b). Section 3312(a) provides that, in determining a preference eligible's qualifications for a competitive service position, an examining agency shall waive physical requirements if it determines that the preference eligible is

physically able to efficiently perform the duties. Section 3312(b) provides that, if an agency determines that a preference eligible with a service-connected disability of 30% or more is unable to fulfill the physical requirements of the position, the agency shall notify the Office of Personnel Management (OPM), which shall make the final determination.

The court noted that it was undisputed that the agency did not comply with subsection (b). The agency argued that its error was harmless since it determined only that the appellant was unable to fulfill the physical requirements of the duty location and that the position itself had no physical requirements. However, the court found nothing in the wording of the statute, the regulations or the legislative history that supported this limiting interpretation of "requirements of the position" and found there was no basis for distinguishing requirements inherent in the job from requirements that result from the job's location. Concluding that the agency violated the appellant's rights when it withdrew the job offer without notifying OPM, the court reversed the Board's decision and remanded for proceedings consistent with its opinion.

FEDERAL CIRCUIT AFFIRMANCES/DISMISSALS (NP)

The following appeals affirmed the Board's decision.

Mueller v. Merit Systems Protection Board, 2007-3086, SF-0752-06-0777-I-1 (6/7/07)

Chambers v. Office of Personnel Management, 2007-3090, SF-0831-06-0848-I-1

Reyman v. Office of Personnel Management, 2007-3110, SF-0831-06-0491-I-1 (6/7/07)

Eisinger v. Merit Systems Protection Board, 2006-3426, CB-1216-05-0011-T-1 (6/8/07)

Ravago v. Merit Systems Protection Board, 2007-3079, SF-0831-06-0494-I-1 (6/8/07)

Jones v. U.S. Postal Service, 2007-3054, AT-0752-06-0027-I-1 (6/11/07)

Pangilian v. Office of Personnel Management, 2007-3060, SF-0831-06-0315-I-1
(6/11/07)

Bloom v. Department of the Army, 2007-3102, DC-1221-05-0024-B-1 (6/11/07)

Jwanouskos v. Department of the Treasury, 2007-3123, DC-0752-00-0091-I-1

Anderson v. Office of Personnel Management, 2007-3127, CH-844E-06-0550-I-1
(6/11/07)

Shelton v. Merit Systems Protection Board, 2007-3048, SF-0752-04-0040-B-1 (6/12/07)

The following appeals were dismissed.

Foronda v. Office of Personnel Management, 2007-3120, SF-0831-06-0677-I-1 (6/8/07)

Ivery v. Department of Transportation, 2006-3360, DA-0752-02-0424-C-1 (6/12/07)