U.S. Merit Systems Protection Board

CASE REPORT

DATE: February 16, 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

***Wilke v. Department of Homeland Security*, 2007 MSPB 45**
MSPB Docket No. DC-0752-06-0255-I-1
February 8, 2007

Jurisdiction
- Excepted Service
- Miscellaneous
Appointments
- Miscellaneous/General
- Temporary Appointments

HOLDING: The appellant, a TSA employee, was entitled to a jurisdictional hearing because he made nonfrivolous allegations that at the time of his separation pursuant to a RIF, he was an excepted service employee, regardless of whether permanent or temporary, or that he was serving a career TSES appointment; 49 U.S.C. § 40122 does not preclude the TSA or the FAA from modifying the RIF procedures applicable to their excepted and executive service employees.

The appellant submitted an application for employment in response to agency vacancy announcement number "TSA-TSES-54" for a full-time permanent position as an Assistant Administrator for Security Technology/Chief Technology Officer. However, the Transportation Security Administration (TSA) offered, and the appellant accepted, a temporary appointment to the position, not to exceed 3 years, effective March 6, 2005. That same year, TSA separated the appellant as a result of a reorganization-based reduction in force (RIF). The administrative judge (AJ) dismissed the appellant's appeal of his separation for lack of jurisdiction. The AJ found that the appellant had a Senior Executive Service (SES) position, and that TSA's SES personnel do not have

Board appeal rights. Alternatively, she found that the appellant was not a permanent employee and, as such, had no Board appeal rights.

The Board granted the appellant's petition for review, vacated the initial decision, and remanded the appeal for further adjudication. While the Federal Aviation Administration (FAA) and TSA may promulgate personnel management policies, pursuant to 49 U.S.C. § 114(n), they must promulgate such policies subject to the requirements of 49 U.S.C. § 40122, including the requirements that its personnel system is subject to 5 U.S.C. § 7701 and that employees in its personnel system may submit a Board appeal from any action that was appealable to the Board under any law, rule, or regulation as of March 31, 1996. Therefore, regardless of any attempt TSA may have made to eliminate or modify the appeal rights of its non-security screener employees, the jurisdictional issue in this case is whether the action the appellant is attempting to appeal is one that was appealable to the Board under any law, rule, or regulation as of March 31, 1996, given the nature of the appointment held by the appellant at the time of his separation.

As of March 31, 1996, permanent and temporary excepted service employees and career appointees to the SES had the right to file a RIF separation appeal with the Board. Thus, the appellant can establish Board jurisdiction over his appeal of his RIF separation if he can prove that at the time of his separation: (1) He was an excepted service employee, regardless of whether permanent or temporary; or (2) he held a career TSES appointment. The Board found that the appellant made non-frivolous allegations with respect to each of these jurisdictional bases and he was therefore entitled to a jurisdictional hearing.

Nevertheless, 49 U.S.C. § 40122 does not preclude TSA or FAA from modifying the RIF procedures applicable to their excepted and executive service employees. Thus, in the event the AJ finds that the appellant held either a permanent or a temporary excepted service appointment, the AJ must determine if TSA properly promulgated RIF procedures for such employees, and if not, FAA's RIF regulations regarding such appointments govern. In the event, the AJ finds that the appellant was a Career TSES employee, the AJ must determine whether TSA properly promulgated TSES Letter No. 000-1, and if so, determine the RIF procedures to which the appellant was entitled as a Career TSES employee. If the AJ finds that TSES Letter No. 000-1 was not properly promulgated, the RIF procedures that are applicable to the Federal Aviation Executive Service govern.

***Oates v. Department of Labor*, 2007 MSPB 46**
MSPB Docket No. CB-7121-06-0021-V-1
February 12, 2007

Arbitration/Collective Bargaining-Related Issues
- Review Authority of MSPB

- Miscellaneous
Back Pay

HOLDING: An arbitrator may award back pay even though he only mitigated the penalty; because such an award is not covered by the Back Pay Act, the arbitrator did not err in declining to award the appellant interest on any back pay.

The appellant filed a request to review an arbitration decision that mitigated his 25-day suspension to a 13-day suspension and awarded him back pay without interest on that award. Because the appellant alleged that the suspension was discriminatory on the basis of disability, the Board has jurisdiction over his request for review. The Board found that the appellant had not shown that the arbitrator erred as a matter of law in sustaining the charge nor determining the penalty, and that the appellant failed to show that the agency discriminated against him.

The Board found nothing that precludes an arbitrator from awarding back pay, even though he only mitigated the penalty, pursuant to his broad discretion in fashioning a just award that takes account of the parties' mutual interests and conduct. However, the Back Pay Act does not cover this situation because 5 U.S.C. § 5596(b)(1)(A)(i) requires back pay to be awarded where a removal or suspension action is reversed, but does not require a back pay award where the arbitrator only mitigated the penalty. Thus, the arbitrator was not required to award the appellant interest on the back pay award under the Act. Therefore, the Board sustained the arbitrator's decision.

***Williams v. Office of Personnel Management*, 2007 MSPB 50**
MSPB Docket No. DC-0831-06-0490-I-1
February 14, 2007

Retirement – Survivor Annuity
Board Procedures/Authorities
- Remands/Forwards
- Transcripts

HOLDING: If OPM misinformed the appellant concerning his right to elect a survivor annuity upon remarriage, or concerning the steps he was to take in order to make that election, and if its misinformation caused the appellant to fail to elect a survivor annuity in a timely manner, the appellant's election should be considered to have been timely; the Board remanded the case because it was unable to determine either whether the appellant was misinformed or what effect any such misinformation had, especially since the tape-recording of the hearing was largely inaudible.

The appellant retired with a reduced annuity with maximum survivor annuity for his then spouse. After she died, the Office of Personnel Management (OPM), at the appellant's request, restored his full annuity. The appellant remarried in October 2001. In a February 2005 letter, he requested a reduced annuity with survivor benefits for his new wife. OPM denied the appellant's application for a survivor annuity as untimely filed. On appeal, the administrative judge (AJ) affirmed OPM's decision.

The Board granted the appellant's petition for review, vacated the initial decision and remanded the appeal for further adjudication. The appellant's February 2005 election of a reduced annuity with survivor benefits was not filed within 2 years after his remarriage and, thus, was untimely filed. The appellant's allegation that he was unaware of the 2-year deadline was unpersuasive because he did not deny that twice during the 2-year filing period he received OPM's written notices to annuitants that included information about the filing deadline for making a new election following remarriage.

However, the appellant alleged without rebuttal that he contacted OPM in or before November 2002 in order to elect survivor benefits for his new wife, and that an OPM employee informed him that he had to get a social security number for his present wife before he could request benefits for her. In addition, the election notices OPM sent the appellant stated that he could call OPM within the 2-year time limit and state the election he wanted to make, and OPM would then send him detailed information about the effect of the election and an election form to sign and return to OPM. The Board found that the appellant appeared to have followed these instructions, and there was no evidence that OPM sent the appellant the detailed information and election form. If OPM misinformed the appellant concerning his right to elect a survivor annuity, or concerning the steps he was to take in order to make that election, and if its misinformation caused the appellant to fail to elect a survivor annuity in a timely manner, the appellant's election should be considered to have been timely. The Board remanded the case because it was unable to determine either whether the appellant was misinformed or what effect any such misinformation had, especially since the tape-recording of the hearing proceedings was largely inaudible.

***Pupis v. U.S. Postal Service*, 2007 MSPB 47**
MSPB Docket No. PH-0752-06-0450-I-1
February 12, 2007

Back Pay
Mootness

HOLDING: The appellant's sworn statement that he had not yet received any back pay from the agency constituted a nonfrivolous allegation that he had not been restored to the status quo ante requiring a remand

notwithstanding the agency representative's statement that the agency had submitted the appropriate documentation to effect the appellant's back pay payments and that he would receive the payments shortly.

While the appeal of the appellant's indefinite suspension was pending, the agency canceled the suspension retroactive to its effective date, and the administrative judge dismissed the appeal as moot. On review, the appellant stated under penalty of perjury that he has not yet received any back pay from the agency. In response, the agency submitted the unsworn statement of its representative claiming that the agency had submitted all appropriate documentation to secure payment of the appellant's back pay and that he "is due to receive the payment for all due and owing back pay, shortly." The agency did not submit any evidence to support this claim. The Board found that the appellant's sworn statement constituted a nonfrivolous allegation that he had not been restored to the status quo ante. Therefore, the Board remanded the appeal for a determination as to whether the agency has completely rescinded the appellant's suspension and restored him to the status quo ante.

***King v. Department of Veterans Affairs*, 2007 MSPB 48**
MSPB Docket No. AT-1221-06-0462-W-1
February 12, 2007

Whistleblower Protection Act
- Jurisdiction, Generally

HOLDING: The AJ erred in adjudicating the IRA appeal on the merits without first addressing the threshold issue of jurisdiction; where the AJ did not discuss the jurisdictional issues in the prehearing summary and prevented the appellant from eliciting evidence pertaining to the jurisdictional issues at the hearing, the appellant was deprived of a fair opportunity to meet her jurisdictional burden and remand was required even though the agency's submissions contained notice of what the appellant must do to establish jurisdiction.

After exhausting her Office of Special Counsel (OSC) remedies, the appellant filed an individual right of action (IRA) appeal, claiming that she had received a letter of reprimand for alleged whistleblowing. The administrative judge (AJ) disallowed documents attached to the appellant's appeal form except for the Letter of Reprimand, the Proposed Reprimand, the OSC complaint, and OSC's closure letter. After affording the appellant her requested hearing, the AJ, without first addressing the issue of jurisdiction, found that the agency had proved by clear and convincing evidence that it would have reprimanded the appellant absent any protected activity.

On review, the Board found that the AJ erred in adjudicating the appeal on the merits without first addressing the threshold issue of jurisdiction and, thus,

reopened the appeal to address this issue. However, the Board found that the portions of the appeal that the AJ retained in the record were insufficient to determine whether the appellant had made nonfrivolous allegations that she had a reasonable belief that her disclosures were protected, and that any protected disclosure was a contributing factor to the reprimand. In addition, although the agency's response to the appeal contained notice of what the appellant must do to establish jurisdiction, the AJ did not discuss the jurisdictional issues in the prehearing summary and prevented the appellant from eliciting evidence pertaining to the jurisdictional issues at the hearing. The Board found that the AJ's mishandling of the threshold question of jurisdiction likely misled the appellant into believing that she was not required to establish that the Board has jurisdiction over her appeal. The Board therefore found that the appellant was deprived of a fair opportunity to meet her jurisdictional burden and remanded the case to afford her the opportunity to establish jurisdiction over her appeal.

***Timmers v. Office of Personnel Management*, 2007 MSPB 49**
MSPB Docket No. CH-0831-03-0715-B-1
February 12, 2007

Board Procedures/Authorities
- Remands/Forwards
- Reopening and Reconsideration
Retirement
- Court/Domestic Relations Orders
- Survivor Annuity
Defenses and Miscellaneous Claims
- Collateral Estoppel/Res Judicata/ Law of the Case

HOLDING: Neither the original 1983 divorce decree nor the 1985 amended judgment entitled the appellant to a former spouse survivor annuity where her 1983 divorce occurred prior to the effective date of the Spouse Equity Act of 1984; the law of the case doctrine precluded the AJ from finding that the appellant failed to establish grounds for reopening the appeal and in dismissing the appeal as untimely where the Board previously reopened the appeal despite the untimeliness.

The appellant and Vernon Rausch were divorced in 1983. In October 1985, a state court issued an amended judgment and decree of dissolution that awarded "death benefits" to the appellant based on a portion of Mr. Rausch's federal service. After Mr. Rausch's death, the appellant applied for survivor annuity benefits. The Office of Personnel Management (OPM) denied the appellant's application because the amended judgment did not expressly provide for an award of survivor annuity benefits. The appellant's appeal of that decision was dismissed as untimely filed. The Board denied the appellant's petition for review. The court affirmed the Board's denial of the petition for review, but remanded the appeal to the Board to determine whether the Board should reopen

the appeal to consider the merits of OPM's decision in light of the fact that OPM was wrong in finding that the amended judgment did not expressly provide for an award of survivor annuity benefits. *Timmers v. Merit Systems Protection Board*, 126 F. App'x 482 (Fed. Cir. 2005) (nonprecedential).

On remand, OPM informed the Board that Mr. Rausch had married Susan Rausch in 1989 and that Ms. Rausch was receiving a survivor annuity pursuant to Mr. Rausch's election of survivor benefits for her. The Board then granted Ms. Rausch's request to intervene; reopened the appeal despite its untimeliness because there were genuine questions of fact and law as to how the survivor annuity should be awarded; and remanded the appeal for further development of the record and consideration of the merits of the appeal. *Timmers v. Office of Personnel Management*, 101 M.S.P.R. 305 (2006). On remand, the administrative judge (AJ) found that the appellant was not entitled to a former spouse survivor annuity. However, the AJ apparently dismissed the appeal as untimely filed.

On review, the Board agreed with the AJ that neither the original divorce decree nor the October 1985 amended judgment provided the appellant with an enforceable entitlement to a survivor annuity because her divorce occurred prior to the effective date of the Spouse Equity Act of 1984, and prior to that date, a former spouse had no right to survivor benefits under the Civil Service Retirement System. However, the Board found that the AJ erred in stating that the appellant failed to establish grounds for reopening the appeal and in dismissing the appeal, apparently as untimely, because the Board's determination that it was appropriate to reopen the appeal was binding on the AJ pursuant to the law of the case doctrine. Nevertheless, because the AJ correctly determined that the appellant is not entitled to a former spouse annuity, the Board affirmed the initial decision as modified.

EEOC DECISIONS

Heffernan v. Department of Health & Human Services
EEOC Pet. No. 0320060079, 2007 WL 313336
MSPB Docket No. DC-0752-04-0756-I-1
January 24, 2007

Discrimination
- Disparate Impact/Treatment
- Religious Discrimination
Defenses and Miscellaneous Claims - Reprisal

HOLDING: The appellant proved religious discrimination and retaliation for EEO activity; a comparator for purposes of disparate treatment discrimination need not be charged with the same offenses as the appellant or subjected to disciplinary action at all.

The appellant is a Roman Catholic priest who was employed as a Chaplain in a National Institutes of Health clinic. The appellant's supervisor, a Methodist minister, proposed his removal for, among other things, failure to comply with training requirements. After the appellant was removed, he filed an appeal, contesting the charges and claiming, in pertinent part, that the removal action constituted discrimination based on his religion and reprisal for equal employment opportunity (EEO) activity. The appellant claimed that a rabbi who also served as a Chaplain under the Methodist minister was treated more favorably with regard to the same training requirements.

The administrative judge (AJ) affirmed the appellant's removal and found that the appellant did not establish a prima facie case of religious discrimination because he did not identify any similarly situated comparison employees. In light of this finding, the AJ stated that she did not consider the appellant's proffered evidence of pretext. The AJ further found that the appellant did not prove his claim of retaliation for EEO activity because he did not establish a nexus between the protected activity and the removal action. The Board denied the appellant's petition for review by Final Order.

Upon review of the Board's decision, the Equal Employment Opportunity Commission (EEOC) found that, contrary to the initial decision, the rabbi could be a comparator even though the rabbi was not subjected to disciplinary action at all and was not charged with the exact same three charges as the appellant. The EEOC then found that the appellant made a prima facie case of religious discrimination and EEO retaliation; the agency articulated legitimate, nondiscriminatory reasons for the removal action; and the AJ, thus, erred in precluding the appellant from presenting evidence of pretext. *Heffernan v. Leavitt*, EEOC Petition No. 03A60015, 2006 WL 522323 (Feb. 21, 2006). Therefore, EEOC referred the case to the Board to take additional evidence on pretext and directed the Board to forward the supplemental record to EEOC.

Upon receipt of the Board's supplemental record, EEOC found again that the agency articulated legitimate, nondiscriminatory reasons for its removal decision. However, EEOC also found that the appellant showed that the agency's proffered reasons for his removal were pretext for discrimination on the bases of religion and reprisal for EEO activity. EEOC relied heavily on the testimony of the rabbi and a Greek Orthodox Chaplain that the appellant's supervisor told them that he was trying to get rid of the appellant in order to hire a Maronite priest and that he did not like Roman Catholics. EEOC thus found that the appellant proved his claims of religious discrimination and reprisal for EEO activity. EEOC therefore returned this case to the Board for action.

FEDERAL CIRCUIT AFFIRMANCES/DISMISSALS (NP)

The following appeals were affirmed:

Simmons v. Small Business Administration, 06-3415, DC-0752-06-0356-I-1 (2/8/07)

Moody v. Merit Systems Protection Board, 06-3432, DC-0752-06-0280-I-1 (2/8/07)

Baney v. Department of Justice, 07-3008, DA-3443-06-0016-I-1 (2/8/07)

Curry v. Department of Agriculture, 06-3328, DE-0752-05-0294-I-1 (2/9/07)

Jones v. U.S. Postal Service, 06-3361, CH-0752-05-0926-I-1 (2/9/07)

Gibson-Michaels v. Federal Deposit Insurance Corporation, 06-3409, DC-1221-06-0413-W-1 (2/9/07)

Hunter v. Department of Veterans Affairs, 06-3338, DC-0752-05-0322-C-2 (2/12/07)

McFadden v. Department of the Treasury, 06-3349, DC-0752-06-0006-I-1 (2/12/07)

Devera v. Smithsonian Institution, 06-3354, DC-1221-05-0021-B-1 (2/12/07)

Stoyanov v. Merit Systems Protection Board, 06-3358, DC-1221-06-0160-W-1 (2/12/07)

Schultz v. Department of Veterans Affairs, 06-3313, PJ-0752-05-0609-I-1 (2/13/07

The following appeal was dismissed:

Sweeney v. Department of Homeland Security, 07-3091, DA-0752-06-0305-I-1 (2/12/07)

A petition for rehearing was denied in the following case:

Teacher v. Department of Homeland Security, 06-3333, SF-3443-06-0278-I-1 (2/8/07)