



U.S. Merit Systems Protection Board

CASE REPORT

DATE: August 7, 2003

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BOARD DECISIONS

Johnson v. Department of the Air Force, 2007 MSPB 182

MSPB Docket No. DA-315H-06-0313-I-1

July 26, 2007

Timeliness

- New Evidence/Argument

The initial decision dismissed the appeal for lack of jurisdiction, concluding that the appellant was serving a probationary period at the time of his termination. The petition for review was filed more than seven months after the deadline specified in the initial decision. The appellant urged the Board to waive the deadline because of what he characterized as new and material evidence showing that the initial decision was incorrectly decided.

Holding: The evidence proffered by the appellant was not new and material justifying the waiver of the deadline for timely filing. To constitute new and material evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence.

Alexis v. Office of Personnel Management, 2007 MSPB 183

MSPB Docket No. AT-0845-06-0594-I-1

July 26, 2007

Mootness

The appellant filed an appeal with the regional office contesting the agency's reconsideration decision that found that he was overpaid \$3,770 in FERS annuity benefits. The administrative judge issued an initial decision dismissing the appeal for failure to prosecute after the appellant failed to comply with several prehearing orders. On petition for review, the appellant filed a motion in which he asserted, inter alia, that

he was unable to competently prosecute his appeal because of illness. The agency thereafter filed a motion to dismiss the appeal as moot, and presented evidence that it had written off the appellant's debt in its entirety.

Holding: An agency's unilateral modification of an appealable action after an appeal has been filed cannot divest the Board of jurisdiction unless the appellant consents to such divestiture or unless the agency completely rescinds the action being appealed. Here, the record shows that the agency has completely rescinded the action being appealed.