



U.S. Merit Systems Protection Board

CASE REPORT

DATE: August 24, 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

Appellant: Patsy R. Painter

Agency: Office of Personnel Management

Decision Number: [2007 MSPB 189](#)

Docket Number: DA-0831-06-0440-I-1

Issuance Date: August 16, 2007

Appeal Type: CSRA Retirement - Other Than Initial

Action Type: Retirement/Benefit Matter

Retirement

- Former Spouse Survivor Annuity

The appellant and the decedent were married and divorced twice, the second divorce occurring in December 1998. The court order dissolving the second marriage did not award the appellant a former spouse annuity, and Mr. Painter did not take affirmative steps to elect such an annuity before his death. OPM denied the appellant's application for a former spouse survivor annuity and for death benefits under CSRS. On appeal to the Board, the administrative judge (AJ) issued an initial decision affirming OPM's reconsideration decision, finding that the 1998 divorce decree did not award a former spouse survivor annuity to the appellant, that a subsequent September 2006 court order awarding such an annuity was ineffective as it was issued after Mr. Painter's death, and that the appellant failed to prove that Mr. Painter intended to provide a former spouse survivor annuity for the appellant. In her petition for review (PFR), the appellant alleged that OPM failed to offer any evidence that Mr. Painter received the annual notice of his right to elect a former spouse survivor annuity required by law.

Holding: Because OPM provided no evidence to prove that it sent Mr. Painter the annual notice required by 5 U.S.C. § 8339(j), a remand was necessary to determine if this was done. A former spouse may receive survivor annuity benefits without an affirmative election by the annuitant if (1) the annuitant did not receive the

required notice, and (2) there is evidence sufficient to show that the retiree intended to provide a survivor annuity for the former spouse.

Appellant: George M. Cobb

Agency: Department of Defense

Decision Number: [2007 MSPB 188](#)

Docket Number: AT-3443-06-0744-I-1

Issuance Date: August 16, 2007

Appeal Type: Miscellaneous

Miscellaneous Topics

- USERRA/VEOA

The appellant requested corrective action under USERRA, contending that the agency improperly charged his military leave account for his absence on nonworkdays, in violation of *Butterbaugh v. Department of Justice*, 336 F.3d 1332 (Fed. Cir. 2003). In the initial decision, the AJ agreed, finding that the appellant had been improperly forced to use 8 days of annual leave to fulfill his military obligations.

Holding: The agency's evidence rebutted the appellant's assertion that the agency charged him military leave for nonworkdays. Accordingly, the appellant failed to establish that it was more likely than not that the agency improperly charged him military leave, and that as a result he used annual or other leave to account for the remainder of his absences due to military service. The Board therefore reversed the initial decision and denied the appellant's request for corrective action.

Appellant: Roger S. Whitworth

Agency: Department of the Treasury

Decision Number: [2007 MSPB 190](#)

Docket Number: CH-0432-99-0030-I-1

Issuance Date: August 21, 2007

Appeal Type: Performance

Action Type: Removal

Timeliness

The appellant sought review of a 1999 initial decision that was dismissed pursuant to a settlement agreement, contending that the settlement agreement was coerced.

Holding: The Board dismissed the PFR as untimely filed by more than 8 years without good cause shown for the delay in filing.

Appellant: Jane K. Gates
Agency: Department of the Air Force
Decision Number: [2007 MSPB 191](#)
Docket Number: DE-3443-07-0210-I-1
Issuance Date: August 21, 2007

Timeliness

The initial decision dismissed this appeal of the agency's failure to reclassify the appellant's position for lack of jurisdiction. The deadline for filing a timely PFR was April 18, 2007. The appellant filed an untimely petition 14 days later, on May 2, 2007. The appellant did not respond to the Clerk's acknowledgment letter regarding timeliness.

Holding: The Board dismissed the PFR as untimely filed without good cause shown for the delay in filing.

Appellant: Mr. William Smith
Agency: United States Postal Service
Decision Number: [2007 MSPB 192](#)
Docket Number: CH-0752-06-0507-I-1
Issuance Date: August 23, 2007
Appeal Type: Adverse Action by Agency
Action Type: Removal

Timeliness

The December 5, 2006 initial decision dismissed the appeal as withdrawn, and notified the appellant that the decision would become final on January 9, 2007, unless a PFR was filed by that date. The appellant filed a pleading complaining about the decision almost 5 months later, on June 4, 2007. The Clerk advised the appellant that his petition appeared to be untimely and instructed him to submit a motion to accept the filing as timely and/or to waive the time limit for good cause. Although the appellant submitted an additional pleading, he did not address the timeliness of his petition.

Holding: The Board dismissed the PFR as untimely filed without good cause shown for the delay in filing.

Appellant: Lois Scali**Agency: Office of Personnel Management****Decision Number: [2007 MSPB 194](#)**

Docket Number: SF-0831-06-0027-I-1

Issuance Date: August 24, 2007

Appeal Type: CSRA Retirement - Other Than Initial

Action Type: Retirement/Benefit Matter

Timeliness

The appellant, the trustee for the deceased spouse of a former federal employee, applied for death benefits under the CSRS. OPM issued a reconsideration decision denying the requested benefits because neither the deceased spouse nor her conservator or guardian applied for survivor benefits before her death as required by law. On appeal, the AJ issued an initial decision dismissing the appeal for lack of jurisdiction. The initial decision informed the parties that it would become the Board's final decision on February 21, 2006, unless a PFR was filed by that date. The appellant filed a PFR almost a year later, on February 8, 2007. She asked that the time limit be waived because the case concerned an allegedly important, complex, and obscure legal issue that took a significant period of time to discover. OPM filed a cross-PFR, contending that the AJ erred in dismissing the appeal for lack of jurisdiction, and asking that the appeal be remanded for a decision on the merits.

Holding: The Board dismissed the PFR as untimely filed without good cause shown for the delay in filing. Because there is no timely PFR at issue, the Board lacks any basis to consider OPM's cross-PFR. OPM assumed the risk of having its cross-PFR dismissed by not filing its own timely PFR. Chairman McPhie concurred in the result only.

Appellant: Ross Milligan**Agency: United States Postal Service****Decision Number: [2007 MSPB 193](#)**

Docket Number: NY-0752-06-0016-I-1

Issuance Date: August 24, 2007

Appeal Type: Adverse Action by Agency

Action Type: Removal

Arbitration/Collective Bargaining Issues**Defenses and Miscellaneous Claims****- Collateral Estoppel/Res Judicata/Law of the Case**

The agency removed the appellant, a preference-eligible Mail Processing Clerk, for improper conduct. The appellant's union filed a grievance on his behalf, and the arbitrator issued an award that sustained the charge but mitigated the penalty to a time-served suspension with reassignment. The appellant also filed a formal discrimination complaint alleging religious and gender discrimination and retaliation for prior EEO activity. The agency issued a final agency decision finding no discrimination or

retaliation. On appeal to the Board, the AJ issued an initial decision affirming the agency's action after conducting a hearing. The AJ accorded collateral estoppel effect to the arbitrator's finding sustaining the charge, and thus found that the agency proved the charged misconduct. The AJ secondly found that the appellant failed to prove his affirmative defenses. Finally, the AJ found that the arbitrator-imposed penalty was reasonable. The appellant filed a timely PFR.

In an Opinion and Order, a majority of the Board denied the PFR, but reopened on the Board's own motion to affirm the initial decision with respect to the merits of the charge and the appellant's affirmative defenses, but remanded the appeal to the regional office for adjudication of the reasonableness of the removal penalty.

Holdings:

1. The AJ's discussion of the penalty was flawed because it relied on case law related to the standard of Board review of arbitrator's decisions under 5 U.S.C. § 7121(d). That section does not apply to Postal Service cases; a preference-eligible Postal employee can file both a grievance under a collective bargaining agreement and a Board appeal under 5 U.S.C. § 7513. The latter is a de novo proceeding, and does not include review of an arbitrator's findings under a deferential or any other standard.

2. Although the requirements for collateral estoppel were met in this case as to the arbitrator's penalty selection, it was inappropriate to apply that doctrine here. Under *Montalvo v. U.S. Postal Service*, 50 M.S.P.R. 48 (1991) and *Fulks v. Department of Defense*, 100 M.S.P.R. 228 (2005), the Board has held that collateral estoppel effect cannot be given to an arbitrator's decision if the arbitrator mitigated a removal to a time-served suspension without pay, because such a penalty is arbitrary on its face.

3. Ordinarily, the Board would do its own penalty determination analyzing the *Douglas* factors. Because the case was not litigated as a de novo appeal of the removal action, however, and because the appellant was not aware of the possibility that the removal action could be upheld, fairness dictates that the case be remanded for the parties to litigate the propriety of the agency's removal penalty.

In a dissenting opinion, Chairman McPhie argued that that the appeal should have been barred by *res judicata*.

COURT DECISIONS

The U.S. Court of Appeals for the Federal Circuit has not issued any precedential decisions involving MSPB decisions since the last Case Report. The court has, however, issued some nonprecedential decisions involving MSPB decisions, which can be accessed at the court's website: <http://www.fedcir.gov/dailylog.html>