U.S. Merit Systems Protection Board

CASE REPORT DATE: August 31, 2007

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BOARD DECISIONS

► **Appellant: Johnny Williamson**
Agency: United States Postal Service
Decision Number: 2007 MSPB 198
Docket Number: NY-3443-06-0245-I-1
Issuance Date: August 27, 2007

Timeliness
Miscellaneous Topics
- USERRA/VEOA/Veterans' Rights

The appellant, an agency employee, sought corrective action under the Veterans Employment Opportunities Act (VEOA), alleging that the agency violated his rights as a veteran when it failed to select him for several higher-graded positions. He filed his appeal with the Board 18 days after the Department of Labor (DOL) issued its letter notifying the appellant's representative that it could not assist the appellant in resolving his complaint against the agency. The administrative judge (AJ) informed the appellant that a VEOA appeal must be filed no later than 15 days after the date on which written notification is received from DOL that it is unable to resolve the complaint, and ordered the appellant to state when he received DOL's written notification. The AJ also ordered the appellant to state the nature of the agency's alleged violations and the dates on which they occurred. In response, the appellant did not specify the date when he received DOL's letter, asserting only that he timely filed his Board appeal within the 15-day window. Without holding a hearing, the AJ issued an initial decision dismissing the appeal as untimely filed, and for failing to state a claim upon which relief could be granted, stating that veterans' preference rules do not do not apply to promotions and intra-agency transfers.

Holdings:

1. The Board found that the appeal was timely filed. Board precedent and regulations recognize that documents placed in the mail are presumed to be received in 5 days. Accordingly, DOL's May 25, 2006 letter is presumed to have been received by the appellant's representative on May 30, 2006, making the appellant's June 12, 2006 appeal timely filed within the 15-day filing period.

2. The Board denied corrective action on the merits, as the record shows that the appellant applied for multiple positions under announcements limited to internal candidates, and veterans' preference does not apply when an employee seeks a promotion under an announcement limited to internal candidates.

Chairman McPhie issued a concurring opinion in which he agreed that the appellant's claim of a violation of his veterans' preference rights fails on the merits, and that the appeal was timely filed, but his reasoning on the latter issue differed from the majority opinion.

► **Appellant: Paul R.S. Vogel**
Agency: Department of the Navy
Decision Number: 2007 MSPB 200
Docket Number: AT-0752-07-0168-I-1; AT-1221-07-0169-W-1
Issuance Date: August 29, 2007
Appeal Types: Adverse Action by Agency; IRA Appeal
Action Type: Reduction in Grade/Rank/Pay

Settlement
- Authority Under/Effect Of
- Waiver of Rights
Whistleblower Protection Act

The agency removed the appellant from his GS-12 Accountant position, effective January 4, 2004, and he filed an appeal with the Board's regional office. That appeal was resolved pursuant to a settlement agreement in which the agency agreed to cancel the appellant's removal and to accept his request for a GS-07, step 10 Command Evaluation position, and in which the appellant agreed that the agency's actions would constitute a full and complete settlement of the appeal, and that he waived his right to litigate any allegations or charges identified in the appeal, or to institute any other actions with respect to them. An initial decision was issued dismissing the appeal per the settlement agreement, and a petition for review filed by the appellant was dismissed as untimely. *Vogel v. Department of the Navy*, 101 M.S.P.R. 638 (2006).

Following his receipt of a November 2006 letter from the Office of Special Counsel informing him that it was terminating its investigation into his claims of reprisal for making whistleblowing disclosures, the appellant filed another appeal with the Board, which was docketed as both an adverse action (0752) appeal, and as an IRA (1221) appeal. The appellant alleged that he made whistleblowing disclosures on August 22, 2003, and that the agency retaliated against him by attempting to reassign

him in September 2003, and by removing him effective January 4, 2004. The appellant also claimed that he made protected disclosures in May 2001 and that, as a result, he was threatened with termination and referred for counseling. In response to a jurisdictional order issued by the AJ, the appellant argued that the agency fraudulently induced him to enter into the settlement agreement because it had no intention of complying with it, and, in fact, had breached it. The AJ dismissed both appeals for lack of jurisdiction, finding that the appellant could not overcome the waiver of his appeal rights because he breached the agreement by filing a complaint with OSC regarding his reassignment and subsequent 2004 removal, that he did not make a nonfrivolous allegation that the agency breached the agreement; and he did not claim that he did not knowingly and voluntarily enter the agreement.

Holdings:

1. In the adverse action appeal, the appellant is barred by the settlement agreement from appealing the January 4, 2004 removal. To the extent that the appellant argues that the 2004 agreement was fraudulently obtained, that argument is properly raised in a petition for review challenging the initial decision dismissing the appeal as settled; the appellant's previous PFR was dismissed as untimely filed, and the Board declined to reopen that appeal now.

2. The appellant's waiver applies to an IRA appeal, and precludes the Board from exercising jurisdiction over the 2004 removal and any other personnel actions that occurred prior to the date of the settlement agreement.

3. Remand is appropriate for the allegations of whistleblower retaliation that occurred subsequent to the execution of the settlement agreement. The appellant alleged that he was denied promotions subsequent to the date of the settlement agreement.

4. In light of the appellant's allegation that the agency has not complied with the settlement agreement, specifically that the agency failed to reinstate him to a GS-07 Step 10 position, the AJ shall afford the appellant an opportunity to clarify whether he intended to file a petition for enforcement of the settlement agreement.

► **Appellant: Chris C. Coleman**
Agency: Department of the Army
Decision Number: 2007 MSPB 195
Docket Number: AT-315H-07-0463-I-1
Issuance Date: August 27, 2007
Appeal Type: Termination of Probationer

Jurisdiction
- Probationers

The appellant was a preference-eligible employee in the excepted service who was appointed on February 19, 2006. The agency notified the appellant that he was being removed during his 1-year trial period, effective February 6, 2007. The AJ

notified the appellant that an employee with less than 1 year of current, continuous service in the same or similar position has limited appeal rights the Board, and that such an employee would be granted a hearing only if he makes a nonfrivolous allegation that his termination was based on partisan political reasons or marital status. In response, the appellant asserted that: (1) the agency did not provide him with advance notice of the termination and an opportunity to respond; (2) the agency placed him in a leave without pay (LWOP) status after February 6, 2007, keeping him on the agency's rolls for more than 1 year; and (3) the SF-50 effecting his termination was not approved until March 8, 2007, after the completion of the 1-year trial period. The AJ issued an initial decision dismissing the appeal for lack of jurisdiction, finding inter alia that the date that personnel documents were issued does not establish that the employee was employed on that date.

Holding: The appellant submitted evidence and argument indicating that he was in a leave without pay status after February 6, 2007. This evidence calls into question the effective date of his termination set forth in the termination notice and the SF-50. A remand for a jurisdictional hearing is therefore necessary to determine whether the appellant's employment was terminated before his trial period ended.

► **Appellant: Eugene Mills**
Agency: United States Postal Service
Decision Number: 2007 MSPB 199
Docket Number: DC-3443-07-0463-I-1
Issuance Date: August 28, 2007

Jurisdiction
- Suspensions
Discrimination
- Physical/Mental Disability – Qualified Disabled Employee

The appellant, a preference eligible, is a Mail Handler. The agency notified him that his position was being abolished and that he would be reassigned at his same wage level. The appellant requested reassignment to a manual facility with less noise to accommodate his tinnitus and vertigo. The agency denied his request for accommodation, finding that, because his hearing impairment did not substantially limit him in a major life activity, he was not a qualified individual with a disability within the meaning of the Rehabilitation Act. After advising the parties that the Board may lack jurisdiction over the agency's denial of the appellant's request for reasonable accommodation, and considering the parties' responses, the AJ issued an initial decision dismissing the appeal for lack of jurisdiction. The AJ found that, absent an otherwise appealable action, the Board lacks jurisdiction over an agency's denial of an employee's request for reasonable accommodation of an alleged disability.

Holding: An employee's absence for more than 14 days that results in a loss of pay may be a constructive suspension appealable under 5 U.S.C. §§ 7512(2) and 7513(d). In his appeal, the appellant alleged that the agency "left [him] out of work" for 8 months on leave without pay instead of placing him in a "quieter/less

machinery" facility, and that this action was a denial of reasonable accommodation, and he provided information about his medical conditions and request for accommodation under the Rehabilitation Act. This was sufficient to require the AJ to issue a notice informing the appellant of the elements of a constructive suspension claim. Because neither the AJ's jurisdictional order nor the agency's motion to dismiss the appeal did this, a remand is necessary to afford the appellant an opportunity to submit evidence and argument to show that the Board has jurisdiction.

► **Appellant: Arthur Perkins**
Agency: Department of Veterans Affairs
Decision Number: 2007 MSPB 197
Docket Number: NY-1221-02-0407-X-1
Issuance Date: August 27, 2007
Appeal Type: Individual Right of Action (IRA)

Compliance
- Settlement-Related

This appeal was resolved pursuant to a settlement agreement. In a previous adjudication, the Board found that the agency was in partial noncompliance with its obligations and ordered the agency to take appropriate remedial action. *Perkins v. Department of Veterans Affairs*, 105 M.S.P.R. 289 (2007). The agency submitted evidence that it is now in full compliance with its obligations, but the appellant argued that the agency is not in compliance.

Holding: The Board found that the agency has provided satisfactory evidence of compliance with respect to all 5 disputed issues. It therefore dismissed the petition for enforcement.

► **Appellant: Bruce A. Loomis, John C. Stierle, Richard C. Leavy, Joseph W. Burge**
Agency: Department of the Army
Decision Number: 2007 MSPB 196
Docket Numbers: PH-0752-06-0225-I-1; PH-0752-06-0226-I-1;
PH-0752-06-0228-I-1; PH-0752-06-0237-I-1
Issuance Date: August 27, 2007
Appeal Type: Adverse Action by Agency
Action Type: Reduction in Grade/Rank/Pay

Timeliness

The April 2007 requests to reopen the initial decisions in these appeals were filed about 10 months after the deadline for filing a petition for review specified in the decisions. The appellants asked for reopening in light of an initial decision in another appeal that was issued on January 26, 2007.

Holding: The Board considers a request to reopen an initial decision as an untimely filed petition for review. The Board dismissed these petitions as untimely filed without good cause shown.

► **Appellant: Ralph T. Vandagriff**
Agency: Department of the Army
Decision Number: 2007 MSPB 201
Docket Number: DA-3443-06-0529-I-1
Issuance Date: August 29, 2007

Timeliness

In an initial decision issued October 19, 2006, the AJ dismissed this VEOA appeal for lack of jurisdiction. The appellant filed a petition for review more than 3 months later, on March 1, 2007.

Holding: The Board dismissed the petition for review as untimely filed without good cause shown for the delay.

COURT DECISIONS

► **Appellant: Jose D. Hernandez**
Agency: Department of the Air Force
Docket Number: 2006-3375
Issuance Date: August 27, 2007

Miscellaneous Topics
- USERRA/VEOA/Veterans' Rights

Hernandez, a retired mechanic for the Department of the Air Force and a former member of the military reserves, filed a *Butterbaugh* claim with the MSPB, alleging that he had been erroneously charged military leave from 1980 to 2001, and that as a result he was improperly forced to use annual leave, sick leave, and leave without pay. In resolving a discovery dispute, the AJ, believing the Board's remedial authority to be limited to events occurring after the enactment of USERRA on October 13, 1994, confined subpoenas to documents after that date. Based on the records obtained in discovery, Hernandez identified 12 days from 1997 to 2000 for which he had been improperly charged military leave. The agency provided relief for those days and moved to dismiss Hernandez's complaint as moot. The AJ issued an initial decision dismissing the appeal as moot. On petition for review, the full Board determined, pursuant to its ruling in *Garcia v. Department of State*, 101 M.S.P.R. 172 (2006), that the Board was authorized to adjudicate USERRA claims arising from prohibited pre-enactment conduct, and that the AJ had improperly limited inquiry to post-enactment

conduct. The Board nevertheless concluded that this error was harmless, reasoning that the appellant was provided with sufficient opportunity to prove his alleged pre-enactment USERRA violations and that the AJ's erroneous ruling had not caused him to abandon his pre-enactment claims. With respect to post-enactment claims, it agreed that the appellant had been afforded complete relief. *Hernandez v. Department of the Air Force*, 102 M.S.P.R. 515 (2006).

Holdings:

1. The *Butterbaugh* rule that it is improper to charge reservists military leave for non-work days applies to violations pre-dating USERRA's enactment. While the substantive provisions of USERRA do not apply retroactively, the result is the same under the predecessor statute, the Vietnam Era Veterans' Readjustment Assistance Act of 1974. The Board has the authority to order relief covering the entire period of Hernandez's alleged *Butterbaugh* violations.

2. The Board erred in not remanding the case for further proceedings with respect to the pre-enactment period. Under a proper understanding of USERRA and the Board's jurisdiction, the AJ's rulings on the scope of subpoenas was arbitrary and capricious because no reasoned basis existed to exclude pre-USERRA records while ordering production of post-USERRA ones. Remand for further proceedings is therefore necessary.

3. The court agreed with the Board that Hernandez's post-USERRA claims were moot because he had already received complete relief under them.

► **Appellant: Alexander F. Pucilowski, Jr.**
Agency: Department of Justice
Docket Number: 2006-3388
Issuance Date: August 29, 2007

Miscellaneous Topics
- USERRA/VEOA/Veterans' Rights

Pucilowski filed a *Butterbaugh* claim with the Board alleging that he had been erroneously charged military leave from 1989 to 2001, and that as a result he was improperly forced to use annual leave, sick leave, and leave without pay (LWOP). Before the Board, he established that he had been improperly charged 22 days of military leave from 1991 to 1998, including 2 days in 1991 and 3 days in 1993, but the only resulting leave that these improper charges forced him to take was LWOP in 1993. Pucilowski took a total of 34 days of LWOP that year, but because he had been improperly denied only 5 days of military leave from 1991 to 1993, the AJ limited his award of back pay to 5 days. The AJ declined to order correction of Pucilowski's civilian and military leave records, reasoning that the Board was without authority to do so under *Dombrowski v. Department of Veterans Affairs*, 102 M.S.P.R. 160 (2006).

Holdings:

1. The Board erred by declining to order correction of Pucilowski's civilian and military leave records to remedy the improper charges of military leave. The Board plainly has the authority under 38 U.S.C. § 4324 to remedy denial of military leave benefits.

2. The court rejected Pucilowski's suggestion that he is entitled to monetary compensation based solely on the 22 days of improperly charged military leave; a veteran is legally entitled to monetary compensation or its equivalent only when he demonstrates actual harm. The court stated, however, that while not legally obligated to do so, agencies may resolve claims by providing more compensation than an individual has been able to prove. This practice is appropriate as a matter of administrative convenience, especially if the records before them are deficient or incomplete, and helps to ensure that veterans are appropriately given the benefit of the doubt in the face of such records and fully enjoy the presumption that veterans' benefits statutes are to be resolved in their favor.