



# U.S. Merit Systems Protection Board

CASE REPORT

DATE: September 28, 2007

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## BOARD DECISIONS

- ▶ **Appellant: Shed M. Jessup, Jr.**  
**Agency: Department of Homeland Security**  
**Decision Number: [2007 MSPB 225](#)**  
Docket Number: AT-1221-07-0049-W-1  
Issuance Date: September 17, 2007  
Appeal Type: Individual Right of Action (IRA)

### Whistleblower Protection Act

- Abuse of Authority
- Jurisdiction
- Contributing Factor

The appellant petitioned for review of an initial decision that dismissed his IRA appeal for lack of jurisdiction. The appellant alleged that 2 personnel actions were taken against him in retaliation for 3 whistleblowing disclosures. The administrative judge (AJ) found that the appellant failed to make non-frivolous allegations that any of his 3 disclosures were protected under the WPA. The first alleged disclosure involved a statement by an agency official to the appellant that the official would “throw [the appellant’s] ass under a bus,” which the appellant characterized as an abuse of authority. The AJ found that this “threat” was not one that a reasonable person would believe evidenced an abuse of authority and so was not protected under the WPA.

In his petition for review (PFR), the appellant challenged only the AJ’s finding with respect to the first disclosure.

### Holdings:

**1. In spite of the appellant’s “misperception that the threat was solely to his body,” the appellant had alleged before OSC that the official was attempting to intimidate him and others in order to influence their legal determinations. This constitutes a non-frivolous allegation of an abuse of authority, which occurs when there is an**

arbitrary or capricious exercise of power by a federal official that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons.

2. The appellant made a non-frivolous allegation that this disclosure was a contributing factor in 2 personnel actions: placing him in a “Release” status, which is comparable to leave without pay; and the agency’s rescission of a job offer.

The appeal was remanded to the regional office for a hearing and decision on the merits.

- ▶ **Appellant: J. Larry Shope**  
**Agency: Department of the Navy**  
**Decision Number: [2007 MSPB 219](#)**  
Docket Number: PH-1221-07-0152-W-1  
Issuance Date: September 19, 2007  
Appeal Type: Individual Right of Action (IRA)

#### **Whistleblower Protection Act - Jurisdiction**

The appellant petitioned for review of an initial decision that dismissed his IRA appeal for lack of jurisdiction. The “disclosure” at issue was the appellant’s e-mail to his supervisor declining a \$500 bonus the agency had awarded him. Although the AJ denied the agency’s motion to dismiss the appeal for lack of jurisdiction, he concluded, following a hearing, that the appellant did not make a nonfrivolous allegation that his disclosure was protected under the WPA.

**Holding: Although the AJ’s procedural handling of the appeal was flawed, this error was harmless because the AJ correctly concluded that the appellant had not presented a nonfrivolous allegation that his disclosure was protected. The e-mail did not evidence a reasonable belief that the appellant was disclosing information that constituted any of the [5 U.S.C. § 2302\(b\)\(8\)](#) categories. Instead, the statements constitute “an unprotected, generalized, vague rant against the government and agency policy and decision-making.”**

- ▶ **Appellant: Emily K. Hartsock-Shaw**  
**Agency: Office of Personnel Management**  
**Decision Number: [2007 MSPB 222](#)**  
Docket Number: PH-844E-06-0658-I-1  
Issuance Date: September 21, 2007  
Appeal Type: FERS - Employee Filed Disability Retirement

## Retirement

### - Disability Retirement

The appellant petitioned for review of an initial decision that affirmed OPM's reconsideration decision that denied her application for disability retirement benefits. The appellant applied for disability retirement, claiming she was unable to perform her duties because she suffered from major depression. The AJ found that, despite the fact that the appellant had been awarded disability benefits by the Social Security Administration, she failed to show how her depression interferes with the performance of her duties. The AJ found that the *Bruner* presumption—that an employee's removal for physical inability to perform the essential functions of her position constitutes *prima facie* evidence of entitlement to disability retirement—did not apply because there was no PS Form 50 or letter of removal in the record indicating that she had been removed.

**Holding:** The appeal must be remanded for a determination of whether the *Bruner* presumption applies. Contrary to the AJ's finding, the record contains a PS Form 50 showing that the appellant was removed effective April 26, 2004. But neither the PS-50 nor other evidence clearly establishes the basis for the removal.

- ▶ **Appellant:** Richard D. Creasy  
**Agency:** Office of Personnel Management  
**Decision Number:** [2007 MSPB 221](#)  
**Docket Number:** DC-831E-07-0074-I-1  
**Issuance Date:** September 21, 2007  
**Appeal Type:** CSRA - Employee Filed Disability Retirement

## Retirement

### - Disability Retirement

The appellant petitioned for review of an initial decision that affirmed OPM's reconsideration decision denying his disability retirement application as untimely filed. The appellant resigned from his position in January 2002, but did not apply for disability retirement until August 2005, more than 2½ years after the 1-year deadline specified by [5 U.S.C. § 8337\(b\)](#). For purposes of determining whether the application was timely filed, the issue under section 8337(b) is whether the appellant was mentally incompetent at the time of his separation or within 1 year thereafter. The AJ determined, after a hearing that included testimony by the appellant's physician, that the appellant had not established by preponderance of the evidence that he was mentally incompetent during this period of time.

**Holding:** The appellant established by preponderant evidence that he was mentally incompetent at the time of his separation or within 1 year thereafter. The AJ failed to give appropriate weight to the physician's testimony, which was supported by statements by friends and family.

Chairman McPhie issued a dissenting opinion.

► **Appellant: Louis A. Lodge**  
**Agency: Department of the Treasury**  
**Decision Number: [2007 MSPB 223](#)**  
Docket Number: AT-0752-01-0116-I-1  
Issuance Date: September 24, 2007

**Miscellaneous Topics**  
**- USERRA/VEOA/Veterans' Rights**

The agency petitioned for review of an initial decision that granted the appellant's request for redress under the Veterans Employment Opportunities Act and ordered the agency to appoint him retroactively to the position for which he had applied. The appellant cross petitioned for review, asserting that the AJ erred when she did not order liquidated damages and interim relief.

The appellant, a veteran with a 30% service-connected compensable disability, applied for the position of Internal Revenue Officer. The agency sought approval from OPM to "pass over" the appellant in order to select a non-preference eligible, but OPM denied that request. The agency filled 83 Internal Revenue Officer positions, but did not select the appellant for this position. On appeal to the Board, the AJ determined that the agency had violated the appellant's rights to veterans' preference, and ordered the agency to retroactively offer the appellant the position for which he would have been selected had he not been erroneously passed over. The AJ further determined that the agency's violation had not been willful, but ordered the agency to compensate the appellant for any loss of wages or compensation because of its violation.

On PFR, the agency did not contest the AJ's finding that it violated the appellant's right to veterans' preference, but argued that the AJ erred in ordering it to retroactively offer the appellant an Internal Revenue Officer position, and in ordering back pay and benefits.

**Holdings:**

**1. Reconstruction of the hiring process is the appropriate remedy in this case, not an order to appoint the appellant retroactively to a particular position. As set out in *Dean v. Department of Agriculture*, [99 M.S.P.R. 533](#) (2005), *aff'd on recons.*, [104 M.S.P.R. 1](#) (2006), and in *Walker v. Department of the Army*, [104 M.S.P.R. 96](#) (2006), reconstruction of the selection process allows the Board to make determinations necessary to award appropriate relief, and is consistent with the principle that requires agencies to give preference eligibles the opportunity to compete for particular positions, but does not guarantee them a position.**

**2. Where appropriate, relief may be retroactive. The Board will not order a retroactive appointment as a remedy, but an individual may be entitled to the retroactive remedies of back pay and compensation for loss of benefits if it is determined that he would have been hired by the agency in the absence of a violation of his rights.**

**3. In light of the above findings, the Board declined to adjudicate the appellant's contentions in his cross-PFR at this time.**

► **Appellant: Henry G. Buckheit, III**  
**Agency: United States Postal Service**

**Decision Number: [2007 MSPB 224](#)**

**Docket Numbers: PH-3443-07-0050-I-1; PH-3443-06-0643-I-1; PH-3443-06-0645-I-1**

**Issuance Date: September 25, 2007**

### **Miscellaneous Topics**

#### **- USERRA/VEOA/Veterans' Rights**

The appellant petitioned for review of an initial decision that dismissed his VEOA appeal for lack of jurisdiction, and denied his request for relief under USERRA. The agency notified the appellant that his position (PS-5 mail processing clerk at Linthicum, Maryland) was being abolished, and that he would be reassigned to another position at the same wage level. The appellant bid for and received an appointment to a PS-5 mail processing clerk position at Frederick, Maryland. He filed an appeal, alleging that the agency had conducted a reduction in force (RIF), that the agency had violated his rights as a preference eligible in doing so, and that the agency had discriminated against him based on his prior military service. The AJ dismissed the appellant's VEOA claim as outside the Board's jurisdiction, found that the appellant had not been subjected to an appealable RIF action, and ruled against the appellant on his USERRA claim, finding that the appellant failed to show that the agency treated him less favorably than it treated employees who were not preference eligibles.

### **Holdings:**

- 1. The Board lacks jurisdiction over the action as a RIF, as the appellant was not separated or demoted, but was reassigned from one PS-5 position to another.**
- 2. The appellant established jurisdiction for his VEOA claim, in that he: (1) showed that he exhausted his remedy with the Department of Labor; and (2) made nonfrivolous allegations that he is a preference eligible, the actions at issue took place after VEOA was enacted, and that the agency violated his rights under a statute or regulation relating to veterans' preference. Regarding the last element, because an employee's rights under the RIF regulations (5 C.F.R. Part 351) are based in part on whether the employee is a preference eligible, a violation of those regulations may constitute a violation of a regulatory provision relating to veterans' preference.**
- 3. On the merits of the appellant's VEOA claim, the RIF regulations apply only when an agency releases an employee from his competitive level by "reassignment requiring displacement." Because the undisputed evidence shows that the appellant's reassignment did not require displacement, the appellant has not shown that he was denied any preference-related rights to which he was entitled under Part 351.**

**4. The appellant's argument that the agency violated his assignment rights under collective bargaining agreement provisions is of no avail, as VEOA does not provide jurisdiction over violations of rights under a collective bargaining agreement.**

- ▶ **Petitioner : Special Counsel**  
**Respondent: Paula Acconcia**  
**Decision Number: [2007 MSPB 227](#)**  
Docket Number: CB-1216-06-0007-T-1  
Issuance Date: September 26, 2007  
Appeal Type: Disciplinary Action - Hatch Act

**Special Counsel Actions**  
**- Hatch Act**

The Special Counsel filed a complaint with the Board charging the Respondent with 3 counts of violating the Hatch Act, specifically 5 U.S.C. §§ [7323](#)(a)(1)-(2) and [7324](#)(a)(2). The Special Counsel alleged that the Respondent, an Assistant United States Trustee employed by the Department of Justice, used her official authority or influence to coerce a subordinate employee to make a political contribution for the purpose of affecting the result of a gubernatorial election. After holding a hearing, the ALJ found that the Respondent violated the Hatch Act proscriptions against knowingly soliciting a political contribution from any person, engaging in political activity while on duty in a government office, and using her official authority for the purpose of affecting the result of an election. The ALJ rejected the recommended removal penalty, however, deciding that removal was too severe a penalty for "a single solicitation by an individual who had no relationship with the political campaign involved and who made no attempt to follow up or ascertain whether a contribution was made."

**Holding: Under [5 U.S.C. § 7326](#), removal is presumptively appropriate for a federal employee's violation of the Hatch Act, unless the Board finds by unanimous vote that the violation does not warrant removal. After examining the 5 factors that are considered in Hatch Act penalty reviews, the Board concluded that removal was appropriate in this case.**

- ▶ **Appellant: Robert H. Lary, Jr.**  
**Agency: United States Postal Service**  
**Decision Number: [2007 MSPB 220](#)**  
Docket Number: DE-0752-02-0233-M-1  
Issuance Date: September 20, 2007  
Appeal Type: Adverse Action by Agency  
Action Type: Removal

**Board Procedures/Authorities**  
**- Remands/Forwards**

The case was before the Board pursuant to decision by the Board's reviewing court in [Lary v. U.S. Postal Service](#), 472 F.3d 1363 (Fed. Cir. 2006), in which the court

ordered the Board to provide the appellant with specific performance to remedy a material breach of a settlement agreement.

**Holding: The Board ordered the agency to provide the relief specified by the court.**

Chairman McPhie issued a concurring opinion observing that the appellant's death forecloses the possibility that his estate will receive any benefit from the specific performance ordered by the court, but that "the Board is constrained to comply with the direction of the court, made with knowledge of the appellant's death, to order the agency to now reinstate and then remove a deceased employee."

- ▶ **Appellant: Julio G. Pimentel**  
**Agency: Department of the Treasury**  
**Decision Number: [2007 MSPB 228](#)**  
Docket Number: CH-0752-06-0239-I-1  
Issuance Date: September 26, 2007  
Appeal Type: Adverse Action by Agency  
Action Type: Removal

#### **Timeliness**

This removal action was resolved by a settlement agreement, which was approved by the AJ in an initial decision issued May 26, 2006. That decision advised the parties that it would become the Board's final decision unless a PFR was filed by June 26, 2006, or the Board reopened the case on its own motion. The appellant filed a PFR more than 10 months later, on May 18, 2007.

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

- ▶ **Appellant: Karen N. Mitchell**  
**Agency: Broadcasting Board of Governors**  
**Decision Number: [2007 MSPB 226](#)**  
Docket Number: DC-315H-07-0208-I-1  
Issuance Date: September 17, 2007  
Appeal Type: Termination of Probationers  
Action Type: Probationary Termination

#### **Timeliness**

The appellant's petition for review was filed about 2 months after the deadline specified in the initial decision. The appellant did not respond to the Clerk's notice that advised her that her petition might be dismissed as untimely filed unless she showed that it was timely filed or that good cause justified the delay in filing.

**Holding: The petition for review was dismissed as untimely filed without good cause shown.**

## COURT DECISIONS

- **Appellant:** [Craig J. Jacobsen](#)  
**Agency:** Department of Justice  
Docket Number: 2007-3006  
Issuance Date: September 20, 2007

**Attorney Fees**  
**- USERRA**

The appellant petitioned the court for review of the Board's decision in *Jacobsen v. Department of Justice*, [103 M.S.P.R. 439](#) (2006), which denied the appellant's motion for attorney fees. On the merits of the USERRA claim, the Board found that the agency improperly charged the appellant with two days of military leave for days he was not scheduled to work. In its motion for attorney fees under [38 U.S.C. § 4324\(c\)\(4\)](#), the appellant sought \$8,700 for 29 hours of legal work performed by his attorney. The Board denied the motion, relying on 2 factors. First, citing *Farrar v. Hobby*, 506 U.S. 103 (1992), the Board considered the degree of overall success, and found that the appellant's success was "nominal," in that Jacobsen's claim for relief covered unspecified days over a 7-year period, and the agency was eventually ordered to restore only 2 days of leave. Second, the Board relied on the fact that the appellant failed to avail himself of the agency's administrative process for making retroactive military leave adjustments. Had he utilized the agency's internal procedure in the first place, the Board rationalized, the appellant would have obtained the same result before the agency without filing an appeal before the Board.

**Holdings:**

- 1. Unlike other attorney fees-permitting provisions administered by the Board, section 4324(c)(4) does not require that the petitioner be a "prevailing party" who may only be awarded attorney fees in the "interest of justice"; it provides that "the Board may, in its discretion, award such person reasonable attorney fees . . . ." In such circumstances, the court would accord broad deference to the Board's decision to deny fees.**
- 2. The Board's reliance on *Farrar v. Hobby* was appropriate, and the court agreed that the appellant's success was minimal. His claim could reasonably be construed as alleging that the agency improperly charged him military leave for each of the 7 years he was obligated to serve. But the evidence established that the agency only once improperly charged him with military leave in violation of USERRA.**
- 3. It was error for the Board to rely on the fact that the appellant could have achieved the same result through the administrative process as he did before the Board. USERRA contains no requirements that a petitioner pursue, much less exhaust, his or her administrative remedies prior to bringing an appeal before the Board. The Board's improper reliance on this factor was harmless, however.**