



U.S. Merit Systems Protection Board

CASE REPORT

DATE: October 5, 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: Betty J. Haskins**
Agency: Department of the Navy
Decision Number: [2007 MSPB 234](#)
Docket Number: AT-3443-06-0730-I-1
Issuance Date: September 28, 2007

Miscellaneous Topics

- USERRA/VEOA/Veterans' Rights

The appellant petitioned for review of an initial decision that denied corrective action with regard to certain actions in this USERRA claim, and dismissed the remaining portion of her appeal as moot. The appellant claimed that the agency improperly charged her military leave on non-workdays while she was performing military service. During the processing of her appeal, she identified 15 non-workdays on which she claimed she was mischarged military leave. The agency conceded that it had improperly charged her with military leave on 11 of these 15 days, and promised to reimburse the appellant for those dates. In his initial decision, the AJ found that the agency's representations that it intended to provide status quo ante relief were sufficient to render the appeal moot as to the 11 dates for which the agency conceded that it had improperly charged the appellant military leave, and that any contentions that the appellant was not provided with status quo ante relief could be addressed in a petition for enforcement. As to the 4 remaining dates, the AJ found that the appellant's affidavit was insufficient to establish that the agency had improperly charged military leave because it was rebutted by agency records showing that she was not charged any form of leave on those dates.

Holdings:

1. The Board overruled *Dombrowski v. Department of Veterans Affairs*, 102 M.S.P.R. 160 (2006), in light of our reviewing court's ruling in [Pucilowski v. Department of Justice](#), No. 2006-3388 (Fed. Cir. Aug. 29, 2007), which held that the

Board has the authority under USERRA to order a remedy for an agency's improper denial of military leave benefits by requiring agencies to correct the employee's leave record to reflect a proper accounting of military leave.

2. The AJ correctly denied corrective action as to the 4 disputed dates. The agency's records show that the agency did not charge her *any* leave on those dates.

3. The AJ erred in dismissing the appeal as moot because: (a) He did not make a determination that the relief that the agency conceded was due to the appellant constituted all the relief she could have received if the appeal had been adjudicated and she had prevailed; and (b) assuming that the relief that the agency intends to provide is sufficient to moot the appeal, he did not require the agency to submit evidence establishing that it has actually afforded such relief. In this regard, the Board overruled several previous decisions: *Hill v. U.S. Postal Service*, 69 M.S.P.R. 453, *aff'd*, 104 F.3d 376 (Fed. Cir. 1996) (Table); *Hatler v. Department of the Air Force*, 3 M.S.P.R. 322 (1980); *Cupp v. U.S. Postal Service*, 66 M.S.P.R. 4 (1994); and *Dellera v. Department of Housing & Urban Development*, 65 M.S.P.R. 636 (1994), *aff'd*, 82 F.3d 434 (Fed. Cir. 1996) (Table).

- **Appellant: Paula M. Shaver**
Agency: Department of the Air Force
Decision Number: [2007 MSPB 229](#)
Docket Number: DC-3443-07-0181-I-1
Issuance Date: September 27, 2007

Miscellaneous Topics

- USERRA/VEOA/Veterans' Rights

The appellant petitioned for review of an initial decision that denied her request for corrective action under the Veterans Employment Opportunities Act. She alleged that the agency's practice of giving military spouses priority over veterans violated her rights as a preference-eligible candidate for positions with the agency. Following a number of procedural pleadings, Board issuances, and a status conference regarding jurisdictional issues and exhaustion of administrative remedies, the AJ issued a decision finding that the appellant established Board jurisdiction, but denied the appellant's request for corrective action on the grounds that the information the appellant supplied as to the positions at issue was so vague as to make it impossible to determine what positions the appellant actually applied for and whether she was found qualified for those positions. The AJ declined to issue an advisory opinion as to whether the military spouse preference abrogated veterans' preference rights.

Holdings:

1. The appellant exhausted her remedy with the Secretary of Labor with respect to one vacancy announcement, but it was unclear whether she did so with respect to other agency actions. The appellant purposely avoided identifying specific agency actions as the subject of her appeal, and instead sought a decision in the nature of an advisory opinion concerning the agency's use of military spouse preference. The Board does not have the authority to issue advisory opinions.

2. On remand, the Board directed the AJ to issue an order requiring the appellant to indicate the specific agency actions that she is attempting to appeal to the Board and, to the extent that she has not already done so, to demonstrate that she has exhausted her remedy with the Secretary of Labor regarding those actions.

- ▶ **Appellant: Lester R. Mitchell**
Agency: Department of Commerce
Decision Number: [2007 MSPB 235](#)
Docket Number: AT-3443-07-0244-I-1
Issuance Date: September 28, 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. The appellant claimed that the agency failed to consider his veterans' preference status when it selected another employee for a temporary position in January 2005. The AJ dismissed the appeal for lack of jurisdiction on the basis that the appellant failed to submit a complaint with the Department of Labor within 60 days of his nonselection, as required by [5 U.S.C. § 3330a\(a\)\(2\)\(A\)](#). In his petition for review (PFR), the appellant argues that his repeated attempts to file a VEOA complaint were unsuccessful because his multiple telephone calls were redirected among various state and federal agencies.

Holding: The record shows that the appellant did not initiate his attempts to file a complaint until August 2006, 19 months after the agency effected the appointment of another employee to the vacancy in question. Although our reviewing court has found that the doctrine of equitable tolling may apply to VEOA appeals, [Kirkendall v. Department of the Army](#), 479 F.3d 830 (Fed. Cir. 2007) (en banc), this doctrine generally applies where the claimant actively pursued his remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. Here, the appellant's failure to file a timely complaint with DoL resulted from his failure to exercise due diligence in preserving his legal rights.

- ▶ **Appellant: Clarence R. Dunbar**
Agency: Office of Personnel Management
Decision Number: [2007 MSPB 230](#)
Docket Number: DA-844E-06-0524-I-1
Issuance Date: September 27, 2007
Appeal Type: FERS - Employee Filed Disability Retirement

Retirement

- Disability Retirement

OPM petitioned for review of an initial decision that reversed its determination that the appellant was not entitled to disability retirement benefits. The appellant, who had resigned from his position as a WG-2 Housekeeping Aid, applied for disability retirement on the basis of degenerative disc disease, radiculopathy, numbness in the

lower extremities, hypertension, and kidney disease. OPM denied the application, determining that the appellant's medical documentation did not establish that he was unable to perform the duties of his position because of a disabling medical condition. On appeal to the Board's regional office, the AJ found, after a hearing, that the appellant is entitled to disability retirement benefits. In its PFR, OPM argued that the AJ erred by relying almost exclusively on the appellant's subjective evidence to the exclusion of the objective medical evidence.

Holding: Although an employee's own evidence concerning his medical condition is entitled to weight when it is supported by competent medical evidence, the medical evidence did not support the appellant's assertions in this case, and he has not established that he is unable to render useful and efficient service in his position.

- ▶ **Appellant: Lawson A. Rose**
Agency: United States Postal Service
Decision Number: [2007 MSPB 231](#)
Docket Number: CH-0752-07-0121-I-1
Issuance Date: September 27, 2007
Appeal Type: Adverse Action by Agency
Action Type: Suspension - Indefinite

Board Procedures/Authorities
- Withdrawal of Appeal/PFR

The appellant petitioned for review of an initial decision that dismissed his appeal of an indefinite suspension as withdrawn. The agency placed the appellant in an off-duty status without pay and instructed him not to return to duty until notified. After an appeal was filed with the Board's regional office, the agency issued the appellant a Notice of Proposed Removal, and agreed to pay the appellant back pay from November 6, 2006, the effective date of his suspension, through December 27, 2006. The agency paid the appellant a portion of this amount and notified him that he would receive the remainder on January 26, 2007. According to the AJ's summary of a telephonic conference that occurred on January 29, 2007, the appellant stated that he had received the payment and wished to withdraw his appeal, and the AJ issued an initial decision dismissing the appeal.

In his PFR, the appellant asserts that the withdrawal of his appeal was conditional on two acts that did not occur: his receipt of compensation for the entire period of his suspension, which did not end until the close of business on January 31, 2007; and reimbursement for the annual leave he used during his suspension.

Holding: Ordinarily, an appellant's withdrawal of an appeal is an act of finality, but a relinquishment of appeal rights to the Board must be by clear, unequivocal, and decisive action, and the Board may relieve an appellant of the consequences of his decision when the decision was based on misleading or incorrect information provided by the Board or the agency. Here, the record indicates that the appellant's agreement to withdraw his appeal was based on certain conditions that

do not appear to have been satisfied, and the Board concluded that the record did not establish that the appellant relinquished his right to appeal by clear, unequivocal, and decisive action.

The initial decision was vacated and the appeal remanded to the regional office for adjudication.

► **Appellant: Danny R. Jinks**

Agency: Department of Veterans Affairs

Decision Number: [2007 MSPB 232](#)

Docket Number: AT-0752-06-1053-I-1

Issuance Date: September 28, 2007

Appeal Type: Adverse Action by Agency

Action Type: Removal

Defenses and Miscellaneous Claims

- Harmful Error

Penalty

- Insubordination/Failure to Follow Instructions

The appellant petitioned for review of an initial decision that sustained his removal from a supervisory position based on charges of failure to follow instructions and insubordination. Following a hearing, the AJ sustained the charges, found that the appellant failed to prove his affirmative defenses of race discrimination, reprisal for EEO activity, and harmful procedural error, and found that the removal penalty was within the bounds of reasonableness.

Holding: The Board affirmed the AJ's findings. With regard to the assertion of harmful procedural error, there is nothing in the record indicating that, before the hearing, the AJ apprised the appellant of the burden and elements of proof for such a claim, but this was corrected during the hearing, and the appellant has not identified any evidence that would show that the agency committed a procedural error that likely had a harmful effect upon the outcome of his case before the agency. With regard to the reasonableness of the penalty, the agency and the AJ erred to the extent that they considered disciplinary actions that were not listed in the proposal notice. Nevertheless, the Board found that removal was warranted without consideration of those disciplinary actions.

- **Appellant: Elizabeth A. Johnson**
Agency: Department of the Army
Decision Number: [2007 MSPB 233](#)
Docket Number: DC-0752-07-0338-I-1
Issuance Date: September 28, 2007
Appeal Type: Adverse Action by Agency
Action Type: Removal

Jurisdiction

The appellant petitioned for review of an initial decision that dismissed her appeal of a removal action for lack of jurisdiction. The issue was whether the appellant fell within [5 U.S.C. § 7511\(b\)\(8\)](#), which excludes from chapter 75 coverage an employee “whose position is within . . . an intelligence component of the Department of Defense (as defined in [section 1614](#) of title 10), or an intelligence activity of a military department covered under subchapter I of chapter 83 of title 10” The AJ found that the appellant, who was employed in the Indications and Warnings Branch, Intelligence Operations Division, Directorate of Intelligence, Headquarters Joint Special Operations Command, was employed in an intelligence component of the Department of Defense, viz., an organization covered by [10 U.S.C. § 1614\(2\)\(D\)](#).

Holdings:

- 1. The appellant was not employed in an intelligence component of the Department of Defense.**
- 2. The appellant was employed in an intelligence activity of a military department covered under subchapter I of chapter 83 of title 10. She is therefore excluded under [5 U.S.C. § 7511\(b\)\(8\)](#) from coverage under the provisions of 5 U.S.C. chapter 75 that generally provide employees with the right to appeal their removals.**

- **Appellant: McTrena Davis**
Agency: Department of Veterans Affairs
Decision Number: [2007 MSPB 236](#)
Docket Number: CH-0752-06-0724-I-1
Issuance Date: October 2, 2007
Appeal Type: Adverse Action by Agency
Action Type: Removal

Board Procedures/Authorities

- **Adjudicatory Error**

Discrimination

- **Physical/Mental Disability**

Settlement

The appellant petitioned for review of an initial decision that affirmed her removal on various misconduct charges.

Holdings:

- 1. The appellant's challenges to the AJ's procedural rulings, findings of fact, and conclusions of law constitute mere disagreement with the explained findings of the initial decision, which are supported by the record.**
- 2. The AJ erred by failing to address the appellant's affirmative defense of disability discrimination, but remand is not necessary. The appellant failed to establish that she was a disabled individual. The evidence indicates that she suffered "work-related stress," and that she attributed a significant portion of this stress to her alleged harassment and mistreatment by her immediate supervisor, but an appellant's inability to work with a particular supervisor is not enough to show that she is substantially limited in the major life activity of working.**
- 3. The appellant's assertion that the AJ erred by failing to "discuss the settlement" in the initial decision is without merit. At the conclusion of the hearing, the agency prepared a written settlement agreement for the appellant's signature, but instead of signing it, the appellant submitted a counter settlement offer, which the agency did not accept. Accordingly, a binding settlement agreement was not reached.**

COURT DECISIONS

The court has not issued any precedential decisions reviewing MSPB decisions since the issuance of the last Case Report. It has issued some nonprecedential decisions reviewing MSPB decisions, which can be found at the [court's website](#).

FEDERAL REGISTER NOTICE

[72 Fed. Reg. 56883](#). On October 5, 2007, the Merit Systems Protection Board issued an Interim Rule, to be effective November 5, 2007, revising its regulations to clarify the procedures applicable to MSPB processing and adjudication of cases arising under the Department of Homeland Security's new human resources management system established pursuant to the Homeland Security Act of 2002. As discussed in the notice, these regulations are necessary to reconcile the Board's regulations and procedures with final regulations published by the Department of Homeland Security and the Office of Personnel Management on February 1, 2005, at 70 Fed. Reg. 5272.