U.S. Merit Systems Protection Board

CASE REPORT DATE: October 26, 2007

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## BOARD DECISIONS

► **Appellant: Kenneth M. Pedeleose**
**Agency: Department of Defense**
**Decision Number: 2007 MSPB 248**
Docket Number: AT-0752-06-0350-I-1
Issuance Date: October 24, 2007
Appeal Type: Adverse Action by Agency
Action Type: Suspension - More than 14 Days

**Adverse Action Charges**
**- Insubordination/Failure to Follow Instructions**
**Whistleblower Protection Act**
**- Protected Disclosure**
**- Abuse of Authority**
**- Contributing Factor**
**- Clear and Convincing Evidence**

The appellant petitioned for review of an initial decision that affirmed the agency's 30-day suspension for charges of refusing to cooperate in an agency investigation, insubordination, and failure to follow instructions.

The appellant was an Industrial Engineer who, with other employees, developed and submitted a May 16, 2005 report to the agency's Inspector General (IG) and Senator Grassley, that detailed safety problems and waste in connection with the C-130J program (the C-130J is a tactical cargo and personnel transport aircraft). A month later, the appellant helped Susan VanDerbeck, an engineer and probationary employee, file a complaint with the IG regarding safety issues she had observed in her work in the C-130J program. The appellant e-mailed a copy of VanDerbeck's complaint to the IG, with a copy to his supervisor, Colonel Nicole Plourde. On June 15, 2005, the appellant received information that, in a meeting, Plourde discussed the safety issues that VanDerbeck was raising and that Plourde was quoted as saying that "since Susan VanDerbeck is a probationary employee all they have to do is fire her." The appellant

e-mailed this information to the IG. The agency terminated VanDerbeck the following day. On June 16, 2005, a former employee sent the appellant an e-mail message stating that she had learned that VanDerbeck and two other employees were targeted by Plourde for termination. Two days later, when it was known that VanDerbeck had been fired, the appellant phoned one of these employees (Sawyer) at home and told her that he had heard that she was "targeted to be fired." Sawyer became very upset and decided to retire to avoid removal, and she submitted paperwork for her retirement when she returned to work on Monday. Supervisors met with Sawyer and told her the rumor was false. Plourde asked Sawyer to reveal the name of the person who had told her she was going to be fired, but Sawyer declined to do so.

Plourde decided to conduct an investigation into the source of the information that Sawyer was about to be fired, and appointed Stacy Scantlebury to conduct the investigation. Despite a number of directives, the appellant refused to cooperate with Ms. Scantlebury's investigation, stating his belief that the Scantlebury investigation would interfere with the investigation of the same matters he believed would be investigated by the IG.

In an appeal decided on the written record, the administrative judge (AJ) sustained the three charges, and found that the appellant failed to prove his affirmative defenses, which included retaliation for whistleblowing. The AJ found the penalty to be within the bounds of reasonableness.

**Holdings:**

**1. Although the general rule is that an employee must first comply with an order he believes to be improper and register his complaint or grievance later, there are exceptions to this rule. Two considerations underlie the "obey now, grieve later" rule: (1) the agency and its mission may be harmed by the employee's failure to act; and (2) the employee may be mistaken in his belief." Accordingly, cases where employees are disciplined for breaking the rule usually involve investigations of potential crimes and serious misconduct. None of these consideration are present in this case. In addition, the appellant raised legitimate concerns about the investigation, and sought the advice of the IG and did not get a definitive answer about whether the investigation was lawful. He also supplied the information that Plourde sought to the IG and informed Plourde and Scantlebury that he had done so. Moreover, neither Plourde nor Scantlebury informed the appellant that they had come to an accommodation with the IG that would ensure that the two investigations did not conflict with one another. Under all these circumstances, a majority of the Board found that the agency failed to prove its charges of misconduct.**

**2. One of the appellant's allegations of protected disclosures lies at the heart of this appeal: that threatening to fire VanDerbeck, who had also made protected disclosures regarding the safety of the C-130J program, was a violation of the WPA and an abuse of authority. The Board stated in this regard that a supervisor's "use of his or her influence to denigrate other staff members in an abusive manner and to threaten the careers of staff members with whom he or she disagrees constitutes**

**abuse of authority." The Board found that Plourde know of VanDerbeck's safety disclosures and that VanDerbeck was a competent employee with knowledge of the C-130J, and that the appellant had a reasonable belief that Plourde had been correctly quoted regarding firing VanDerbeck and that Plourde's statement exhibited a violation of the WPA and an abuse of authority.**

**3. The appellant established by preponderant evidence that his protected discloure was a contributing factor in his suspension, and the agency failed to show by clear and convincing evidence that it would have taken the same action in the absence of the disclosure. The Board ordered the agency to take corrective action.**

Chairman McPhie issued a dissenting opinion. He would have found that the agency proved its misconduct charges. He stated that he would not make an exception to the obey-now-grieve-later principle, which the Board has recognized only in unusual cases, e.g., when an employee would be required to obey an unlawful instruction, when obeying the order would place him in danger of serious harm, or when obeying the order would result in his surrender of a constitutionally-protected right. He found that the present case is unlike any of the extreme situations. The Chairman did not agree that the appellant made a protected disclosure under the Whistleblower Protection Act. He characterized the appellant's disclosure as consisting of "fourth-hand information about what was said in a meeting that the appellant did not attend."

► **Appellant: Henry Heffernan**
**Agency: Department of Health and Human Services**
**Decision Number: 2007 MSPB 246**
Docket Number: DC-0752-04-0756-P-1
Issuance Date: October 19, 2007
Appeal Type: Adverse Action by Agency
Action Type: Compensatory Damages

**Miscellaneous Topics**
**- Compensatory Damages**

The appellant petitioned for review of an addendum initial decision that awarded him $3,000 in compensatory damages. In the merits appeal, the Board concurred in and adopted the finding of the EEOC that the appellant had proved his claims of religious discrimination and retaliation for protected EEO activity in connection with his removal appeal. *Heffernan v. Department of Health & Human Services*, 105 M.S.P.R. 41 (2007). In this addendum decision, the AJ determined that the appellant was entitled to $3,000 in compensatory damages.

**Holding: Based on awards made by the EEOC in similar circumstances, the Board determined that $25,000 was the appropriate amount of compensatory damages for the appellant's non-pecuniary losses, which include emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to character and reputation, and loss of health. Based on the appellant's own affidavit and that of his sister, the appellant established that he suffered mental pain and anguish as a result of the agency's actions, and that his professional standing as a Jesuit priest**

**was severely damaged. The Board noted that the appellant had not presented medical evidence in support of his compensatory damages claim, but observed that such evidence is not required.**

► **Appellant: Joyce Branch Williams**
**Agency: Department of Veterans Affairs**
**Decision Number: 2007 MSPB 247**
Docket Number: PH-0752-06-0522-M-1
Issuance Date: October 23, 2007
Appeal Type: Adverse Action by Agency
Action Type: Removal

**Jurisdiction**

This case was before the Board pursuant to a decision of our reviewing court, which held that the Board lacked subject matter jurisdiction over this removal appeal because the appellant had elected to pursue relief for the same claims in the United States District Court for the District of Maryland, and that court had addressed the same issues presented in the Board appeal. *Williams v. Department of Veterans Affairs*, No. 2007-3140 (Fed. Cir. July 13, 2007) (NP).

**Holding: Pursuant to the Federal Circuit's decision, the Board dismissed the appeal for lack of subject matter jurisdiction.**

## COURT DECISIONS

► **Appellant: David L. Gutkowski**
**Agency: United States Postal Service**
Docket Number: 2007-3022
Issuance Date: October 23, 2007

**Compliance**

At issue in this enforcement proceeding was the agency's compliance with a final Board order that mitigated a removal action to a 90-day suspension and a demotion to the "next-highest non-supervisory position." Initially, the agency assigned Gutkowski to a Part-Time Flexible PS-5 Distribution Clerk position. The agency later appointed him to the non-supervisory, EAS-11 position of Postmaster, Shawanese, Pennsylvania. In response to Gutkowski's contention that he should have been considered for a number of identified vacancies, the agency averred that offering him any of these positions would have violated the applicable collective bargaining agreement. In the initial decision that became the Board's final decision, the AJ ruled that it would not have been "reasonable to require the agency to violate the National Agreement in seeking to place" Gutkowski following the final Board order.

**Holding: The court agreed that an agency is not required, pursuant to the terms of a Board order, to assign an employee to a particular position when that assignment would violate the applicable collective bargaining agreement. The court stated that it need not decide, however, whether the Board has the authority to order an assignment that would violate the CBA because an agency's interpretation of its own orders is entitled to significant deference, and the Board reasonably construed the term "next highest non-supervisory position" as excluding positions that were unavailable under the CBA.**

Non-Precedential Decisions

Additional, non-precedential decisions issued by the Court of Appeals for the Federal Circuit that reviewed MSPB decisions can be found at the court's website.