



U.S. Merit Systems Protection Board

CASE REPORT

DATE: December 10, 2007

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BOARD DECISIONS

- ▶ **Appellant: Harry K. Armstrong**
Agency: Department of Justice
Decision Number: [2007 MSPB 280](#)
Docket Number: PH-1221-06-0055-W-2
Issuance Date: November 30, 2007
Appeal Type: Individual Right of Action (IRA)
Action Type: IRA "1221" Non-appealable Action

Whistleblower Protection Act

- **Protected Disclosure**
- **Corrective Action**

Interim Relief

Both parties petitioned for review of an initial decision that found that the agency retaliated against the appellant for protected whistleblowing disclosures. The appellant, a GS-12 Program Analyst with the agency's Office of the Inspector General, answered questions in an investigation involving Polk, his second-level supervisor, who was later disciplined for wrongdoing. Later, the appellant's attempts to be promoted to the GS-13 level were unsuccessful, and he filed a claim with OSC alleging that his non-promotion and the denial of 8 hours of compensatory time, were in reprisal for disclosures made during the Polk investigation. After receiving notice that OSC had completed its investigation, the appellant filed a timely IRA appeal.

In finding that the agency retaliated against the appellant for making protected disclosures, the AJ imposed the sanction of barring the agency from asserting the affirmative defense that it would have taken the 2 personnel actions in question in the absence of the protected disclosures. The AJ ordered interim relief pending the outcome of the case on PFR, but declined to refer the matter to OSC for further investigation.

Holdings:

- 1. The AJ erred in ordering interim relief in this appeal. The purpose of interim relief is not to make the appellant whole at the interim relief stage of the proceedings, but rather to protect the appellant from hardship during the pendency of his appeal if he prevails in the initial decision. By the time the initial decision was issued, the appellant had resigned his position and transferred to another federal agency, and had not alleged that his resignation was involuntary. Under these circumstances, the Board lacks the authority to order the appellant's reinstatement, on either a permanent or interim basis.**
- 2. The appellant met his burden of proof to establish whistleblowing reprisal with respect to the agency's failure to promote him. The Board agreed with the AJ's conclusion that 3 of 9 alleged whistleblowing disclosures were protected; 2 evidenced a reasonable belief of an abuse of authority, and 1 evidenced a reasonable belief of a violation of law, rule, or regulation.**
- 3. The appellant established by preponderant evidence that these disclosures were a contributing factor in the agency's decision not to promote him to the GS-13 level. The Board agreed with the AJ that Polk was aware of the appellant's disclosures, and that the appellant met the knowledge/timing test with respect to the decision not to promote him.**
- 4. The appellant failed to show that his protected disclosures were a contributing factor in the denial of compensatory time in January 2005, as it was too remote in time, and Polk had already left the work unit by this time.**
- 5. The AJ did not abuse his discretion in barring the agency from asserting its affirmative defense as a sanction for its failure to comply with the AJ's discovery orders. Discovery proceedings in this matter were lengthy, and the agency had multiple opportunities to comply. While the sanction imposed by the AJ was unquestionably serious, it was not outcome determinative; the agency still had a fair opportunity to argue that the appellant did not make protected disclosures, or that his disclosures were not a contributing factor in the decision not to promote him. Had the agency been permitted to assert its affirmative defense, its noncompliance with the discovery order would have deprived the appellant of a fair opportunity to rebut the agency's argument.**
- 6. The appellant is entitled to corrective action. Because he left the agency voluntarily, corrective action is limited to retroactive promotion to the GS-13 level, beginning October 1, 2003, and terminating with the date of his departure from the agency. He may also be entitled to consequential damages and an award of attorney fees.**
- 7. Where the Board finds that there is reason to believe that a current employee may have committed a prohibited personnel practice, it is required to refer the matter to OSC for appropriate action. [5 U.S.C. § 1221\(f\)\(3\)](#). The Board has no discretion in this matter, and it was error for the AJ not to make such a referral. The Board referred the case to OSC in accordance with the statute.**

Chairman McPhie issued a dissenting opinion in which he disagreed with the majority's handling of the sanction for noncompliance with the AJ's discovery order. He found the sanction disproportionate to the agency's offense, and would have remanded the case for further adjudication of whether the agency could show by clear and convincing evidence that it would have taken the same action in the absence of the protected disclosures.

- **Appellant: Steven R. Thomas**
Agency: Office of Personnel Management
Decision Number: [2007 MSPB 285](#)
Docket Number: CH-0831-07-0040-I-1
Issuance Date: December 4, 2007
Appeal Type: CSRA Retirement - Other Than Initial
Action Type: Retirement/Benefit Matter

Retirement

- Service Credit
- Post-1956 Military Service

The appellant petitioned for review of an initial decision affirming OPM's reconsideration decision reducing the appellant's CSRS retirement annuity by \$452 per month when he became eligible for Social Security benefits, because he had not made a deposit for his post-1956 military service, as required by [5 U.S.C. § 8332\(j\)\(1\)](#). The issue was whether he should be allowed to make a post-separation deposit on the basis that his failure to make the deposit before his retirement was the result of an "administrative error" committed by OPM or his employing agency (the Department of the Air Force). [5 C.F.R. § 831.2104\(a\)](#). The appellant submitted evidence that, before he retired, he was interested in making a deposit for his post-1956 military service, but had tried unsuccessfully for years to determine how much of a deposit he would need to make in order for this service to be creditable for his civilian retirement annuity, and that the civilian and military personnel offices kept referring him to one another. He further testified that someone in civilian personnel told him in 1988 that his failure to pay the deposit would affect his Social Security payments and not his CSRS annuity. The AJ found that the appellant failed to establish that his decision not to make the deposit was due to administrative error, reasoning that the appellant's own failure to read the forms he executed precluded him from obtaining the information he needed to make an informed decision regarding how to make the deposit and the impact upon his annuity of his failure to make the deposit.

Holdings: A majority of the Board, Member Sapin dissenting, affirmed the initial decision, finding that the appellant was not entitled to make a post-separation deposit to make his post-1956 military service creditable. Although the majority denied the appellant's petition for review, it stated that it was reopening the appeal on its own motion to explain why this case is distinguishable from [McCrary v. Office of Personnel Management](#), 459 F.3d 1344 (Fed. Cir. 2006).

1. The Board has found that the plain language and regulatory history of [5 C.F.R. § 831.2104\(a\)](#) indicate that the administrative error exception should not be given

expansive scope. OPM cited as examples employees who were mistakenly advised by their employing agency that they could make the deposit after retirement and employees who were not able to collect the information they needed to complete the application prior to retirement.

2. The appellant completed and signed the 1990 version of SF-2801, which the Board has found to be reasonably designed to inform an applicant of his opportunity to make a deposit for his post-1956 military service prior to separation, and the consequences of failing to do so. The appellant checked "No" in response to the question on Schedule A asking whether he had paid his military deposit.

3. Where an annuitant receives full and fair notice of the requirement to make a deposit, the government is not required to inform the annuitant about the dollar consequences of electing not to make a deposit. The Board has, however, consistently found administrative error where, in response to an employee's inquiry, the employing agency provides material misinformation concerning the deposit and the consequences of not making the deposit prior to separation.

4. The Board found that the appellant failed to show that his employing agency is responsible for his professed belief that his Social Security benefits, rather than his CSRS annuity, would be reduced at age 62 if he did not make the deposit, noting that the appellant and his wife provided competing explanations as to how he came to have this belief.

5. The appellant's employing agency did commit administrative error when the agency's personnel official, in response to the appellant's direct inquiry, failed to inform him of the amount of his deposit. This administrative error does not justify a waiver of the deadline for making the deposit, however, because the appellant did not show that his failure to make the deposit was "due to" the lack of specific information about the amount of the deposit. The appellant testified that his military pay was less than \$1,200 per year, and he conceded that he knew the deposit would have been a small amount. He also had page 2 of OPM Form 1515, which explicitly informed him that the deposit was 7% of his military basic pay. He further testified that he figured he could work more hours after he retired and make up the difference in his Social Security benefit. Thus, the appellant's own testimony shows that, although he knew that the deposit was only a small amount, he decided not to make the deposit based upon his mistaken belief that he could make up the reduction in his Social Security benefit. The appellant's "mistake" was caused by his failure to read the forms he executed rather than any error by OPM or his employing agency.

In her dissent, Member Sapin agreed that the appellant's employing agency committed administrative error by failing to respond to his request for an exact calculation of the amount of money he needed to contribute to his retirement account for his post-1956 military service. She disagreed with the majority opinion's conclusion that, even without that exact calculation, the appellant made an informed choice not to make the deposit. She stated her belief that, consistent with *McCrary*, without that specific calculation and a reasonably accurate estimate of the annuity

adjustment likely to result from a decision not to make a deposit, the appellant was unable to make an informed choice about whether to make the deposit.

► **Appellant: John Doe**

Agency: Department of Justice

Decision Number: [2007 MSPB 282](#)

Docket Number: CH-0752-04-0620-B-1

Issuance Date: December 4, 2007

Appeal Type: Adverse Action by Agency

Action Type: Removal

Penalty

Defenses and Miscellaneous Claims

- Law of the Case

Both parties petitioned for review of a remand initial decision that mitigated the agency's removal penalty to a 120-day suspension and a directed reassignment at the agency's option. In the original initial decision, the AJ did not sustain the removal on the basis that the agency failed to establish a nexus between the charged conduct—"Unprofessional Conduct – Videotaping Sexual Encounters With Women Without Their Consent—and the efficiency of the service. In its previous Opinion and Order, the Board reversed that initial decision and remanded the appeal to the regional office for further adjudication. *Doe v. Department of Justice*, 103 M.S.P.R. 135 (2006). On remand, the agency filed a motion requesting that the record be reopened to allow for the submission of evidence and a supplemental hearing on the issue of whether the Board's finding that the appellant's conduct was "clearly dishonest" impairs the appellant's ability to testify or act as an affiant in criminal cases under the agency's "Giglio Policy," promulgated pursuant to *Giglio v. United States*, 405 U.S. 150 (1972). The AJ denied the motion, but granted the parties' request that they be permitted to submit legal argument concerning this issue. The agency asked the AJ to certify the issue presented in its motion to the Board as an interlocutory appeal, but the AJ did not act on that request.

In mitigating the penalty, the AJ found that, despite the appellant's status as a law enforcement officer (FBI Special Agent) and his failure to maintain the high standards expected of him in that position, the penalty of removal was beyond the tolerable limits of reasonableness due to a number of mitigating factors.

Holdings:

- 1. The Board denied the appellant's cross-PFR, which asked the Board to reconsider its previous ruling on the nexus issue, relying on the law of the case doctrine.**
- 2. The agency has not shown that the AJ's implicit denial of its motion for certification of an interlocutory appeal was an abuse of discretion. An interlocutory appeal is only appropriate if the record shows that the ruling involves an important question of law or policy about which there is substantial ground for difference of opinion, that an immediate ruling will materially advance the completion of the proceeding, or that the denial of an immediate ruling will**

cause undue harm to a party or the public. [5 C.F.R. § 1201.92](#). Those criteria were not met here.

3. The Board modified the initial decision to find that the removal penalty did not exceed the bounds of reasonableness.

- a. Where the Board sustains the charge and underlying specifications, it will defer to an agency's penalty decision unless the penalty exceeds the range of allowable punishment specified by statute or regulation, or the penalty is "so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion."
- b. The appellant has not alleged, and the record does not suggest, that the agency failed to weigh any relevant factors; thus, mitigation is appropriate only if the agency's judgment clearly exceeded the limits of reasonableness.
- c. The intentional, egregious, and "clearly dishonest" nature of the appellant's misconduct—the surreptitious videotaping of sexual encounters with various female acquaintances, two of whom were agency employees assigned to the same division as the appellant—is clear from the record. Such misconduct stands at odds with the high standards of conduct expected of an FBI Special Agent.
- d. The AJ found that any disruption of office functions resulting from the existence of the videotapes was caused more by office discussions initiated by one of the women videotaped than by the actions of the appellant. The Board found that such intervening acts do not absolve the appellant of culpability for his clearly dishonest actions in the matter.
- e. Although the appellant had served with the agency for 7 years, with no disciplinary record and a history of positive performance, those factors were insufficient to warrant mitigation of the penalty.

► **Appellant: Rita D. Knox**

Agency: Office of Personnel Management

Decision Number: [2007 MSPB 284](#)

Docket Number: DC-831M-07-0648-I-1

Issuance Date: December 4, 2007

Appeal Type: CSRA - Overpayment of Annuity

Action Type: Retirement/Benefit Matter

Retirement

- Annuity Overpayment

The appellant petitioned for review of an initial decision that affirmed in part a reconsideration decision by OPM that found that the appellant had received an overpayment, and that the appellant was not entitled to a waiver of recovery of the overpayment. The existence and amount (\$6,904.92) of the overpayment, which were the result of interim payments during a period in which the appellant was not entitled to an annuity, were not in dispute. The AJ found that the appellant was not without fault in the creation of the overpayment, and that recovery of the debt would not cause

financial hardship. Nevertheless, he ordered OPM to adjust the repayment schedule from \$92 a month to \$73 a month.

Holdings: The Board found that the appellant was not entitled to waiver of the overpayment, but that the repayment schedule should be reduced to \$5 per month, for the following reasons:

1. Contrary to the AJ's finding, the Board found that the appellant was without fault in the creation of the overpayment. The appellant testified without contradiction that she made several telephonic inquiries to OPM within a week of receiving the overpayment, and informed OPM that she believed it to be in error, but that she was told that it was her money and that she could spend it.

2. A waiver may be granted when the annuitant is without fault and recovery would be against equity and good conscience. [5 U.S.C. § 8470\(b\)](#). As to the latter inquiry, OPM's Policy Guidelines, § I.C.4, provide that individuals who know or suspect that they are receiving overpayments are expected to set aside the amount overpaid pending recoupment, and in the absence of exceptional circumstances, which do not include financial hardship, recovery in these cases is not against equity and good conscience. Here, the appellant concedes that she was aware of the overpayment but did not set aside the amount overpaid, due to unforeseen circumstances (she was the victim of vandalism on 2 occasions and wrecked her car). These hardships do not constitute exceptional circumstances of the sort that would warrant an exception to the set-aside rule.

3. In calculating the adjustment to the appellant's repayment schedule, the AJ made several significant error, leading the Board to conclude that a reduction in OPM's repayment schedule to \$5 per month was appropriate:

- a. It was inappropriate to consider the value of the appellant's home and automobile.
- b. The AJ did not take into account that the appellant is entitled to \$50 per month in emergency expenses. Adjusting the figures in the appellant's Financial Resources Questionnaire, her monthly expenses exceed her monthly income by \$12.51.
- c. The AJ erred in finding that the \$7,956 in the appellant's checking accounts "would easily pay off the overpayment." OPM policy provides that the first \$5,000 in liquid assets are generally considered unavailable for debt repayment.

- **Appellant: Richard A. Becker**
Agency: Department of Veterans Affairs
Decision Number: [2007 MSPB 281](#)
Docket Number: NY-3443-07-0242-I-1
Issuance Date: December 3, 2007

Miscellaneous Topics

- **USERRA/VEOA/Veterans' Rights**
- **Whistleblower Protection Act**
- **Jurisdiction**
- **Exhaustion of Remedy**

The appellant petitioned for review of an initial decision that dismissed his VEOA, USERRA, and IRA appeals for lack of jurisdiction. The appellant, a GS-5 Nursing Assistant, alleged that his non-selection for a GS-5/6 position was in retaliation for past Board appeals and at least one workforce complaint, and failed to properly account for his veteran's status. The appellant also alleged that he had contacted the Department of Labor (DoL) and OSC regarding this matter, but had not received a reply. The AJ dismissed the appeal for lack of jurisdiction on the basis that the appellant failed to show that he had exhausted his administrative remedies with DoL and OSC.

Holdings:

1. An appellant raising an IRA claim can establish that he exhausted his remedies before OSC by showing that he filed a request for corrective action with OSC and that either he received written notification from OSC that it was terminating its investigation, or that 120 days have passed since the appellant filed his request with OSC. Here, the appellant has submitted evidence that he sought corrective action from OSC on May 6, 2007 (the same month he filed his Board appeal), but the appellant did not allege that he received a termination letter, and 120 days had not elapsed, so the AJ correctly found that the Board lacked jurisdiction at the time the initial decision was issued. Nevertheless, 120 days have now passed, and it is the Board's practice to adjudicate an appeal under these circumstances. The IRA appeal is therefore remanded to the regional office for further adjudication, including a determination whether the appellant has non-frivolously alleged that he made a whistleblowing disclosure.

2. As with the IRA appeal, the AJ correctly determined that the Board lacked jurisdiction over the VEOA at the time the initial decision was issued, as the appellant submitted evidence suggesting that he filed a VEOA complaint with DoL on May 6, 2007. In a VEOA appeal, an appeal to the Board may not be brought where the Secretary of Labor has not resolved the complaint with 60 days unless the complainant "first provides written notification to the Secretary of such complainant's intention to bring such appeal" and provides the Board with evidence of compliance with this statutory requirement. [5 U.S.C. § 3330a](#)(d)(2). As the appellant has not alleged that he provided written notification to the Secretary of Labor of his intent to file a Board appeal, the Board affirmed the AJ's dismissal of the VEOA appeal for lack of jurisdiction.

3. Unlike the jurisdictional requirements of VEOA, an appellant may file a USERRA complaint directly with the Board without filed a complaint with DoL. Nevertheless, where, as here, an appellant seeks the assistance of the Secretary of Labor, he must exhaust his administrative remedies before DoL. Because the record shows that the appellant has not done so here, the Board affirmed the AJ's dismissal of the USERRA appeal for lack of jurisdiction.

- **Appellant: Sonia Morales**
Agency: Social Security Administration
Decision Number: [2007 MSPB 287](#)
Docket Number: CB-7121-07-0020-V-1
Issuance Date: December 4, 2007
Appeal Type: Arbitration Appeals/Grievances
Action Type: Arbitration

Arbitration/Collective Bargaining-Related Issues
- Interpretation of Contract

The appellant requested review of an arbitration decision that determined that her grievances over the agency's actions removing her for unsatisfactory performance and denying her a within-grade-increase were not arbitrable. The arbitrator found that the collective bargaining agreement (CBA) required the appellant to make an oral or written presentation at Step 3 of the grievance procedure, and when the union failed to schedule either an oral or written presentation within the 10-day period prescribed by the CBA, the agency properly denied the grievances.

Holdings: The Board reversed the arbitrator's decision, and remanded the case to the arbitrator for further consideration for the following reasons:

- 1. The Board has jurisdiction to review this arbitration decision under [5 U.S.C. § 7121\(d\)](#), because the subject matter of the grievance is one over which the Board has jurisdiction, the grievant alleged discrimination under [5 U.S.C. § 2302\(b\)\(1\)](#) in connection with the underlying action, and a final decision has been issued.**
- 2. An arbitrator's interpretation of the terms of a collective bargaining agreement is a legal matter that is fully reviewable by the Board. The Board found nothing in the CBA that supports a finding that the appellant was required to make an oral or written presentation (other than the written statements in the grievance itself) at Step 3 of the grievance procedure. The agreement provides only that a grievant has a right to make such a presentation.**

- **Appellant: Steven E. Heath**
Agency: United States Postal Service
Decision Number: [2007 MSPB 286](#)
Docket Number: PH-0752-07-0184-I-1
Issuance Date: December 4, 2007
Appeal Type: Adverse Action by Agency
Action Type: Suspension - Indefinite

Jurisdiction

- Settlement Agreements

The appellant petitioned for review of an initial decision that dismissed an appeal of an alleged constructive suspension as settled.

Holdings:

- 1. Although the appellant alleged that he was seeking to undo the settlement agreement on the basis of a “mutual mistake,” he essentially was asserting that he made a bad bargain. The Board therefore denied his petition for review.**
- 2. The Board reopened the appeal on its own motion because there is a question as to the Board’s jurisdiction over the appeal. The issue of jurisdiction is always before the Board and may be raised at any time by either party or sua sponte by the Board.**
- 3. Before accepting a settlement agreement into the record for enforcement, an AJ must determine that the subject matter of the appeal is within the Board’s jurisdiction. In constructive adverse action appeals, non-frivolous allegations do not establish jurisdiction; the appellant must prove the elements of the action by preponderant evidence. Here, the parties attempted to establish Board jurisdiction by stating that, “[f]or settlement purposes, the Postal Service and Appellant stipulate that the M.S.P.B. has jurisdiction over this appeal.” Parties may stipulate to facts, but the ultimate question of jurisdiction is a legal conclusion not subject to stipulation. Because the parties did not stipulate to facts that would establish jurisdiction, their attempted stipulation was not effective.**
- 4. Because the Board currently lacks proof of jurisdiction over this appeal, the settlement agreement cannot be entered into the record for enforcement purposes. Thus, the parties settled under the potentially mistaken belief that the agreement would be enforceable by the Board. On remand, the parties may, if they wish, resuscitate and validate the settlement agreement, either by agreeing that the settlement is not enforceable by the Board, or by making factual stipulations sufficient to establish Board jurisdiction. If not, the settlement agreement must be deemed invalid and the AJ must proceed to determine whether jurisdiction exists.**

- ▶ **Appellant: Jesse G. Zendejas, Sr.**
- Agency: Department of Homeland Security**
- Decision Number: [2007 MSPB 283](#)**
- Docket Number: SF-0752-07-0383-I-1
- Issuance Date: December 4, 2007
- Appeal Type: Adverse Action by Agency
- Action Type: Removal

Arbitration/Collective Bargaining-Related Issues

- Election of Remedy

Board Procedures/Authorities

- Reopening and Reconsideration

- Withdrawal of Appeal

The appellant requested reopening of his appeal, which was dismissed as withdrawn. After filing an appeal of his removal, the appellant submitted a request to withdraw the appeal to pursue the matter through the agency's internal grievance process. The AJ issued an order notifying the appellant that withdrawing the appeal would prevent him from refileing it in the future, and afforded him 7 days to consider his decision. After neither party responded to the order, the AJ dismissed the appeal as withdrawn. In his current filings, the appellant suggests that the agency did not permit him to challenge his removal under the negotiated bargaining procedure.

Holdings: The Board reopened the appeal, vacated the initial decision, and remanded the appeal to the regional office for further adjudication.

1. It is generally appropriate to treat a request for reconsideration of an appellant-initiated dismissal of a petition for appeal as a late-filed petition for appeal or as a request to reopen and reinstate a prior appeal. Here, the Board treated the appellant's submission as a request to reopen his original appeal.

2. Under [5 U.S.C. § 7121\(e\)\(1\)](#), an employee subjected to an adverse action may appeal the matter to the Board or pursue the matter through a negotiated grievance procedure under a collective bargaining agreement, but he may not do both, and the action that was taken first generally is regarded as reflecting a binding election. Here, the appellant filed an appeal with the Board before attempting to pursue the negotiated grievance procedure.

2. An appellant's decision to withdraw his appeal ordinarily will be accorded finality, but the Board may make an exception if the withdrawal was based on misinformation or misunderstanding. When he withdrew his Board appeals, it appears that the appellant mistakenly believed that he would still be able to challenge his removal under the negotiated procedure, and nothing in the record suggests that any attempt was made to correct the appellant's apparent misunderstanding. Under these circumstances, the Board remanded the case to the regional office to determine whether the dismissal of the appellant's appeal should be considered to be without prejudice and, if so, whether the appellant exercised due diligence in seeking reopening of his appeal.

- ▶ **Appellant: Lawrence E. Smith**
Agency: United States Postal Service
Decision Number: [2007 MSPB 289](#)
Docket Number: CH-0752-07-0355-I-1
Issuance Date: December 5, 2007
Appeal Type: Adverse Action by Agency
Action Type: Suspension - Indefinite

Jurisdiction

The appellant petitioned for review of an initial decision that dismissed his appeal for lack of jurisdiction. The appellant filed an appeal from the agency's decision to place him in "emergency off-duty status" from his city carrier position. The agency moved to dismiss on the basis that the appellant is not a preference-eligible employee with appeal rights to the Board. The appellant did not respond to the agency's pleading, or to the AJ's show-cause order, and the AJ issued an initial decision dismissing the appeal for lack of jurisdiction.

Holdings: The Board denied the petition for review, but reopened the appeal on its own motion, vacated the initial decision, and remanded the case to the regional office for further adjudication.

- 1. The initial decision was correct based on the information available to the AJ at that time. In the interim, however, a different AJ in a separate appeal has found that the appellant is a preference-eligible employee with appeal rights to the Board, and the Board took official notice of this finding.**
- 2. The agency's placement of the appellant on "emergency off-duty status" constitutes a constructive suspension appealable to the Board, provided that the appellant was placed on enforced leave for more than 14 days. On remand, the AJ must determine whether the constructive continued for more than 14 days.**

- ▶ **Appellant: Robert H. Lary, Jr.**
Agency: United States Postal Service
Decision Number: [2007 MSPB 291](#)
Docket Number: DE-0752-02-0233-M-1
Issuance Date: December 5, 2007
Appeal Type: Adverse Action by Agency
Action Type: Removal

Board Procedures **- Remands**

This case was before the Board pursuant to its previous decision, [2007 MSPB 220](#) (Sept. 20, 2007), ordering compliance with the Federal Circuit's decisions, which found that the agency materially breached the parties' settlement agreement by failing to provide certain documents to enable him to timely file an application for disability retirement. The court directed the Board to enter a decree of specific performance, despite the appellant's death. Consistent with the Court's instructions, the Board ordered the agency to vacate and expunge any and all of the appellant's prior removals

and related documents, and to issue a new letter of decision removing the appellant indicating medical inability to perform as the reason for the removal. The Board also ordered the agency to provide certain documents related to an application for disability retirement. Finally, the Board ordered the agency to provide the appellant (the personal representative had been substituted as the appellant) with any back pay he may be due.

Holdings:

1. The agency has provided evidence that it has prepared the necessary documents and provided them to the appellant, and the Board finds the agency in compliance as to this matter.

2. Contrary to the appellant's assertion, the Court's Order did not automatically entitle him to back pay; the Court stated only that the agency should award back pay he may be due if it is determined that he would have been entitled to disability retirement. There has no determination of entitlement to disability retirement. It would be improper for the Board to decide that issue in the first instances, as OPM is the agency charged by statute with adjudicating disability retirement issues.

► **Appellant: Richard D. DeGrant**

Agency: Office of Personnel Management

Decision Number: [2007 MSPB 288](#)

Docket Number: SF-844E-07-0514-I-1

Issuance Date: December 5, 2007

Appeal Type: FERS - Employee Filed Disability Retirement

Action Type: Retirement/Benefit Matter

Retirement

- Disability Retirement

The appellant petitioned for review of an initial decision that dismissed his appeal as untimely filed. In March 2000, OPM granted the appellant's application for disability retirement. In a 2003 reconsideration decision, OPM discontinued the appellant's disability retirement benefits based on its determination that the appellant was able to return to work. The appellant did not appeal to the Board from that decision. In September 2006, the appellant's doctor sent a letter to OPM stating his medical opinion that the appellant was "temporarily totally disabled" as of July 31, 2006. The doctor submitted a similar letter in October 2006. In an April 2007 letter, OPM noted its 2003 reconsideration decision, and stated that he had exhausted all of his administrative and appeal rights, and the next step would be to file an appeal with the Board. The appellant did so, stating that the remedy he was seeking was to have his disability retirement benefits reinstated as of July 31, 2006. In response to the AJ's show-cause order, the appellant further stated, "All I want to do is to have my retirement disability [sic] reinstated." OPM responded that the appeal should be dismissed as an untimely attempt to contest its 2003 reconsideration decision, and the AJ dismissed the appeal as untimely filed on that basis.

Holding: The appellant is entitled to have his annuity reinstated if OPM finds that his disability has recurred. [5 C.F.R. § 844.404](#)(b)(1). The appellant has repeatedly made clear that he is seeking reinstatement of his annuity as of July 31, 2006, but

OPM has repeatedly characterized the appellant's request as seeking to challenge its 2003 reconsideration decision. Ordinarily, the Board lacks jurisdiction to hear an appeal of a retirement matter when OPM has not issued a reconsideration decision on the matter, but the Board recognizes an exception when OPM refuses to render a decision on the matter at issue. Under the circumstances, the Board will treat OPM's April 2007 letter as a final decision that the appellant is not entitled to reinstatement of his disability retirement annuity, and remanded the case to the regional office for adjudication on the merits.

- ▶ **Appellant: Barbara A. Jackson**
Agency: Department of Defense
Decision Number: [2007 MSPB 279](#)
Docket Number: CH-1221-06-0643-W-1
Issuance Date: November 30, 2007

Defenses and Miscellaneous Claims

- Res Judicata

Timeliness

The appellant petitioned for review of an initial decision that dismissed her appeal on res judicata grounds. This matter has a long and complicated procedural history. The appellant applied to OPM for disability retirement in July 2000. After OPM denied the application, she appealed to the Board, which affirmed the denial, and then to the Court of Appeals for the Federal Circuit, which also affirmed the action in July 2004. While that matter was proceeding, the agency removed the appellant for having been unavailable for work for the preceding year. A timely appeal was filed with the Board's regional office, but this appeal was dismissed on the basis that the appellant wished to pursue the matter as a discrimination complaint. The agency dismissed the appeal on the ground that the appellant's previous filing of a Board appeal regarding her removal precluded her pursuit of a discrimination complaint. The EEOC upheld the dismissal, as did a U.S. district court in July 2004. In January 2006, about a year and a half later, the appellant filed a complaint with the Office of Special Counsel, alleging that agency officials had acted improperly in connection with her removal. After OSC notified the appellant that it terminated its investigation, the appellant filed an IRA appeal with the Board's regional office. The AJ dismissed the appeal, finding that adjudication of the appellant's claims was barred under the doctrine of res judicata because of the previous appeal relating to her removal.

Holding: Although the withdrawal of an appeal is ordinarily accorded finality, the Board will find an exception when the withdrawal was based on misinformation or a misunderstanding. Here, it appears that the appellant reasonably believed, at the time she withdrew her appeal in 2001, that she would be able to pursue the matter as a discrimination complaint. It was therefore inappropriate to dismiss the appeal on res judicata grounds. Nevertheless, the Board found that the current appeal, initiated about a year and a half after both of her other legal proceedings had been completed, was untimely filed without good cause shown.

- ▶ **Appellant: Martin F. Salazar**
Agency: Department of Energy
Decision Number: [2007 MSPB 290](#)
Docket Number: AT-0752-99-0626-C-2
Issuance Date: December 5, 2007
Appeal Type: Adverse Action by Agency
Action Type: Suspension - More than 14 Days

Timeliness

The appellant petitioned for review of an initial decision that dismissed his appeal as settled.

Holding: The petition for review was filed approximately 3 years after the deadline specified in the initial decision. The Board dismissed the petition as untimely filed without good cause shown.

- ▶ **Appellant: Robbie D. McGowan-Butler**
Agency: Department of Justice
Decision Number: [2007 MSPB 278](#)
Docket Number: SF-0432-06-0735-I-2
Issuance Date: November 30, 2007
Appeal Type: Performance
Action Type: Removal

Performance-Based Actions

- Performance Standards – Objectivity/Reasonableness

The agency petitioned for review of an initial decision that reversed its removal action. The initial decision found, inter alia, that Critical Element (1) of the appellant's performance standards was invalid because it did not define the Minimally Successful level of performance that is required to avoid removal. A majority of the Board denied the agency's PFR, which means that the initial decision becomes the Board's final decision. Chairman McPhie issued a dissenting opinion in which he acknowledged Board law that, under a 5-level system, an agency must define the Minimally Successful level of performance, because an employee cannot be removed or demoted for performance meeting that threshold; only "unacceptable" performance can for the basis for an adverse action. The Chairman also agreed with the AJ's conclusion that no Minimally Successful level could be extrapolated between the Fully Successful and Unacceptable levels; for the tasks described in Critical Element (1), performing below the level defined as Fully Successful equates to being Unacceptable. As a practical matter, the Chairman concluded that, for Critical Element (1), there in fact was no Minimally Successful level, and to invalidate the agency's action for failing to define one elevates form over substance. The appellant was given notice of the minimum level of performance expected of her, as required by [5 U.S.C. § 4302\(b\)](#), and Critical Element (1) was valid.

COURT DECISIONS

The U.S. Court of Appeals for the Federal Circuit has not issued any precedential decisions reviewing MSPB decisions since the last Case Report. The Court has, however, issued nonprecedential decisions reviewing MSPB decisions, which can be found at the Court's [website](#).