U.S. Merit Systems Protection Board

CASE REPORT DATE: January 4, 2008

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BOARD DECISIONS

► **Appellant: Thomas S. Evans**
Agency: Department of Homeland Security
Decision Number: 2007 MSPB 297
Docket Number: AT-0752-05-0844-I-1
Issuance Date: December 11, 2007
Appeal Type: Adverse Action by Agency
Action Type: Removal

Discrimination
- Physical/Mental Disability

The appellant petitioned for review of an initial decision that affirmed his removal for making intentional and material false statements on a pre-employment form, which asked him to list any "current medication" he was taking. The appellant listed only one medication, Prilosec. When the appellant was later subjected to random drug testing, he informed his supervisor that he was taking Adderal, a prescription drug that contains amphetamines, for treatment of attention deficit disorder. After a hearing, the AJ sustained the charge. Although the AJ acknowledged that the appellant was not taking Adderal at the time that he completed the SF-93, he found that the appellant had taken the drug in the past for his condition, and that his nonuse at the time he completed the SF-93 was temporary, and concluded that the response was false. The AJ found that the appellant did not prove his affirmative defenses of disability discrimination and violation of due process, and that the removal penalty was reasonable.

Holdings: A majority of the Board, Chairman McPhie dissenting, reversed the initial decision and ordered the agency to reinstate the appellant to employment:

1. By asking the appellant to disclose the medications he was taking prior to extending a job offer to him, the agency violated 42 U.S.C. § 12111(d) and 29 C.F.R. § 1630.13(a), and this violation constitutes discrimination based on disability.

a. Under 42 U.S.C. § 12112(d)(2) and (3), an employer "shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability" unless the employer has first made an offer of employment to the applicant. A medical examination or inquiry that falls within the scope of 42 U.S.C. § 12112(d)(2), and that precedes any offer of employment, violates 42 U.S.C. § 12112(a), (d)(1). It was uncontested that the agency did not extend the appellant a job offer before he completed the SF-93. The EEOC has promulgated regulations, 29 C.F.R. §§ 1630.13, 1630.14, and issued guidance on the subject.

b. Because the Board defers to the EEOC with respect to issues of substantive discrimination law, it was inappropriate for the AJ to dismiss EEOC guidelines interpreting discrimination law as "just a notice."

c. The 1997 Guidance makes clear that requests that applicants list all their "current medications" are not permitted at the pre-offer stage. This guidance also supports the proposition that, to the extent an employer's request for information about medications used includes psychiatric medications (such as the medication the appellant was charged with failing to disclose), the request may not be made prior to a job offer.

d. Both courts and the EEOC have found that requests that applicants disclose their medications prior to a job offer violate statutory and regulatory prohibitions on disability discrimination.

e. Although 42 U.S.C. § 12112(d) provides a "business necessity" exception to certain limits on disability-related inquiries, that exception does not apply at the pre-offer stage.

2. A response to an agency's question that is prohibited to the extent that it would elicit disability-related information from the applicant on a pre-offer-of-employment form, cannot form the basis of a charge of falsification. For that reason, the agency's charge cannot be sustained.

a. The Board found the decisions in *Downs v. Massachusetts Bay Transportation Authority*, 13 F. Supp. 2d 130 (D. Mass. 1998), and other courts persuasive. Not only do they specifically address matters the same as or very similar to those at issue here, the reasoning is consistent with the purpose of the part 1630 provisions the agency here violated.

b. The Board defers to the EEOC, which has taken the "position that the plain language of the [ADA] explicitly protects individuals with and *without* disabilities from improper disability-related inquiries and medical examinations." The Board therefore found it unnecessary to determine whether the appellant is a "qualified individual with a disability."

c. The Supreme Court decisions on which the dissent relies do not involve the ADA or otherwise address an issue concerning disability discrimination. To permit the general principles of these cases to negate the specific statutory mandates and prohibitions of the ADA would effectively thwart

the important policies underlying the ADA that Congress sought to promote.

In his dissent, Chairman McPhie first noted that the appellant does not claim that his removal for falsification amounted to a failure to accommodate his disability, or that it amounted to disparate treatment on account of that disability. He also noted that the agency did not violate the plain language of 42 U.S.C. § 12112(d) or 29 C.F.R. § 1630.13, as the agency did not ask the appellant whether he was an individual with a disability, and it did not ask him for information about the nature of severity of any such disability. The Chairman assumed, for purposes of analysis, that the agency violated the EEOC guidance, as the majority found, but stated that the ultimate issue is whether disciplining an employee for falsifying a response to a question that violates the EEOC's 1995 guidance promotes the efficiency of the service under 5 U.S.C. § 7513. While the policies underlying the EEOC guidance are important, the Supreme Court's decisions in Lachance v. Erickson, 522 U.S. 262 (1998), and *Bryson v. United States*, 396 U.S. 64 (1969), stand for the proposition that a federal employee does not have the right to lie, even as a response to an improper question.

► **Appellant: Samuel L. Kinsey**
Agency: Department of the Navy
Decision Number: 2007 MSPB 293
Docket Number: DC-1221-07-0491-W-1
Issuance Date: December 10, 2007
Appeal Type: Individual Right of Action (IRA)

Whistleblower Protection Act
- Contributing Factor
- Exhaustion of Remedy
- Protected Disclosure

The appellant, an employee at the Norfolk Naval Shipyard, volunteered in 2005 for temporary duty in Kuwait in support of Operation Iraqi Freedom. While assigned there, he heard rumors that two of his co-workers and his temporary duty supervisor were involved in a scheme to defraud the government by claiming more on their per diem than they actually spent for off-base housing. The appellant visited the apartment in question while off duty, and later asked one of its occupants why he had moved out of a luxury hotel to stay in the apartment. The co-worker responded that he was making an extra $5,000 per month on his per diem, and he asked the appellant not to tell anyone. After he subsequently became involved in a physical confrontation with the co-worker, the appellant requested to return from his assignment early because he felt threatened. When he returned from Kuwait, the appellant reported to agency officials and investigative units that he had been assaulted by the co-worker and that his supervisor and co-workers were involved in a travel fraud scheme. Subsequently, the appellant's request to return to temporary duty in Kuwait was denied because the new supervisor indicated that his return would be bad for morale.

The appellant filed a complaint of retaliation for whistleblowing with OSC, and after receiving correspondence from OSC informing him that it was terminating its

investigation, he filed an IRA appeal with the Board. In her acknowledgment order and a show-cause order, the AJ advised the appellant that the scope of an IRA appeal is limited to those disclosures and personnel actions raised in the employee's complaint to OSC, and that he had not shown that the allegations raised in his appeal had been raised before OSC. The AJ directed the appellant to provide evidence in the form of correspondence with OSC showing the issues raised in his complaint; she also directed him to provide specifics as to the disclosures he had made. The appellant did not respond to either the acknowledgment order or the show-cause order. In her initial decision, the AJ dismissed the appeal for lack of jurisdiction, finding that the appellant failed to show that he had exhausted his administrative remedy with OSC. The AJ further found that the appellant failed to show that he had a reasonable belief that his disclosures evidence a violation of law, rule, or regulation, or any of the other categories of wrongdoing specified in 5 U.S.C. § 2302(b)(8). Finally, the AJ found that the appellant failed to show that his alleged whistleblowing disclosures were a contributing factor in the agency's decision denying his request to return to Kuwait.

In his petition for review, the appellant asserted that he did not have an opportunity to respond to the AJ's order because he was TDY in Guam without access to his personal files, and the evidence he needed to proceed with his case is controlled by the NCIS. He also submitted as new evidence OSC's final decision letter.

Holdings: The Board vacated the initial decision and remanded the appeal to the regional office for further adjudication for the following reasons:

1. Based on the record below, the AJ properly found that the appellant failed to make a nonfrivolous allegation that he exhausted his remedies before OSC because he did not identify the protected disclosures in his OSC complaint with sufficient specificity. The appellant's new evidence, OSC's final decision letter, satisfies this burden. This evidence constitutes new and material evidence that was unavailable when the record below closed.

2. Contrary to the AJ's finding that the appellant's disclosures were based on mere rumors, the record shows that the appellant's allegations of travel fraud were based on his personal observation of suspicious circumstances, and admissions of misconduct by one of the participants. Similarly, the appellant's allegation that a co-worker assaulted him was clearly based on personal observation of the incident.

3. Regarding the contributing factor issue, the AJ determined that the appellant failed to make a nonfrivolous allegation that the manager who denied his request to return to Kuwait had any knowledge of the appellant's whistleblowing disclosures. That manager's affidavit, however, suggests that he was aware of the appellant's disclosures when he denied the appellant's request to return to Kuwait. The appellant therefore has made a nonfrivolous allegation that his disclosures were a contributing factor in the agency's action.

► **Appellant: Bruce M. Swinford**
Agency: Department of Transportation
Decision Number: 2007 MSPB 296
Docket Number: DC-1221-07-0032-W-1
Issuance Date: December 10, 2007
Appeal Type: Individual Right of Action (IRA)

Whistleblower Protection Act
- Protected Disclosure
- Contributing Factor
Jurisdiction
- Retirement

The appellant petitioned for review of an initial decision that dismissed his IRA appeal for lack of jurisdiction. The appellant was a Financial Specialist with the Federal Highway Administration. In his complaint to OSC, he alleged that he was placed on a performance improvement plan (PIP), denied the use of sick leave, and ultimately forced to retire in reprisal for his whistleblowing disclosures. He alleged that he informed his agency's Office of Inspector General (OIG) and the FBI that he was directed to take funds from a state "other than the state specified by law," and that the agency violated federal law when it failed to update sliding scale information for public domain, resulting in incorrect payments to the states, including duplicate payments "involving millions of dollars." The AJ dismissed the appeal for lack of jurisdiction without holding the requested hearing, finding that the appellant failed to make protected whistleblowing disclosures, and that his retirement was not directly appealable to the Board because he failed to make any nonfrivolous allegations that his retirement was involuntary.

Holdings: Although the Board denied the PFR for failure to meet the criteria for review under 5 C.F.R. § 1201.115, it reopened the appeal on its own motion to address the IRA jurisdictional analysis and the appellant's allegation that his retirement was involuntary. The Board vacated the initial decision and remanded for further adjudication for the following reasons:

1. The appellant made nonfrivolous allegations that he made protected whistleblowing disclosures regarding violations of law. The Board noted in this regard that the agency's Office of Inspector General regarded the appellant's allegations to be sufficiently viable so as to require conducting an investigation and, ultimately, corrective action.

2. The Board concluded that the appellant made a nonfrivolous allegation that his protected disclosures were a contributing factor in the agency's decision to take several personnel actions, finding that the appellant made nonfrivolous allegations that his supervisor had knowledge of his alleged protected disclosures.

3. The Board concluded that the appellant made a nonfrivolous allegation that his retirement was involuntary, noting that the appellant alleged that his supervisor threatened to abolish his job and "make things difficult" for him if he did not choose to retire, and placed him on a PIP two weeks after he became eligible to

retire. In addition, the appellant averred that he was coerced into retirement because of financial necessity when he was unable to work because of his health, and the agency denied his request for sick leave unless he immediately retired.

► **Appellant: David M. Vitale**
Agency: Department of Veterans Affairs
Decision Number: 2007 MSPB 300
Docket Number: PH-0752-07-0264-I-1
Issuance Date: December 11, 2007
Appeal Type: Adverse Action by Agency
Action Type: Constructive Adverse Action

Timeliness
Jurisdiction
- Retirement

The appellant petitioned for review of an initial decision that dismissed his appeal of an allegedly involuntary retirement as untimely filed without good cause shown. The appellant availed himself of the internal EEO process before filing his appeal with the Board. The final agency decision was issued January 23 , 2007, and the appellant filed his appeal on February 25, 2007. In a motion to dismiss, the agency asserted that the appeal was untimely filed by 3 days because the appellant received the final agency decision on January 23. The AJ issued a show-cause order to the appellant regarding both timeliness and jurisdiction, but the appellant's response addressed only the jurisdictional issue. Based on the written record, and without addressing the issue of jurisdiction, the AJ dismissed the appeal as untimely filed without good cause shown.

Holdings: Although the Board denied the appellant's petition for review, it reopened the appeal on its own motion, vacated the initial decision, and dismissed the appeal for lack of jurisdiction.

1. The Board could not resolve the timeliness issue because:

a. Proper procedures were not followed in addressing the timeliness issue, in that the AJ did not inform the appellant of the date that a document triggering the right to appeal is presumed to have been received. In addition, the AJ should have ordered the agency as well as the appellant to submit evidence on the timeliness issue.

b. Neither the show-cause order nor the initial decision addressed the appellant's assertion that he received the final agency decision on January 26, 2007, not January 23, as the agency asserted. If he received the FAD on January 23, the appeal would have been timely filed.

c. In light of the appellant's medical impairments, he should have but did not receive the notice specified in *Lacy v. Department of the Navy*, 78 M.S.P.R. 434, 437 (1998), for establishing good cause.

d. The appeal need not be remanded for further adjudication of the timeliness issue, as the record on jurisdiction is fully developed.

2. An employee-initiated action such as a retirement is presumed to be voluntary. A retirement is tantamount to a removal, and is within the Board's jurisdiction, if the employee demonstrates that the employer engaged in a course of action that made working conditions so difficult or unpleasant that a reasonable person in that employee's position would have felt compelled to resign or retire. Based on the totality of the record evidence, the Board found that the appellant failed to establish that his retirement was involuntary.

► **Appellant: Laurence M. Flannery**
Agency: Department of State
Decision Number: 2007 MSPB 298
Docket Number: DC-0842-07-0548-I-1
Issuance Date: December 11, 2007
Appeal Type: FERS - Regular Retirement Benefits

Retirement
- Deposits

The appellant petitioned for review of an initial decision sustaining the agency's denial of her application to deposit retirement contributions for service performed under various temporary or intermittent appointments during 1989 through 1997. Prior to the enactment of section 321 the Foreign Relations Authorization Act (FRAA) of 2002, Pub. L. No. 107-228, 116 Stat. 1350, 1380-83, service such as the appellant's could not be credited toward a FERS annuity. Section 321 permits individuals who were employed under certain authorities during that time period, and who meet certain criteria, to receive FERS retirement credit for their service on payment of a deposit covering that service. Although the appellant appeared to meet the criteria of the statute, the agency, after obtaining advice from OPM, found that the appellant was not eligible to make a deposit for her service under OPM interim regulations that specify that an individual is not eligible to make a deposit for this purpose unless she is an "employee" or "former employee" whose employment is covered by FERS. The AJ rejected the appellant's argument that OPM's regulations are inconsistent with the language and purpose of section 321 of the FRAA, and affirmed the agency's action.

Holdings: The Board reversed the initial decision and ordered the agency to allow the appellant to make the deposit she seeks to make.

1. The Board found no error in the agency's position that the appellant's service did not qualify as FERS-covered service by an "employee" as defined in 5 U.S.C. § 8401(11). Because the appellant has had no service as an "employee," the agency's denial of her application to make a deposit appears to be consistent with OPM's regulations.

2. When a statute is silent or ambiguous with respect to the matter at issue, and when the agency responsible for implementing the statute has promulgated regulations interpreting the matter, the regulatory interpretation is entitled to deference if it is based on a permissible construction of the statute. If the entent of Congress is clear, however, a regulatory provision that is inconsistent with that intent is not entitled to deference. Nothing in section 321 suggests that its benefits

are available only to persons who have performed service as an "employee." Instead of using terms such as "employee" or "former employee" to refer to persons eligible to make deposits, section 321 refers consistently and repeatedly to those persons as "individuals," and the Board found nothing in the legislative history that reflects an intent to limit the provision's coverage to persons meeting the definition of "employee" contained in 5 U.S.C. § 8401(11).

3. OPM's position may be based on the view that, in the absence of any FERS-covered service, obtaining credit for service covered under section 321 would serve no purpose, as that section only provides the opportunity to obtain FERS retirement credit to those individuals who subsequently serve in a position covered by FERS. OPM is correct that obtaining FERS credit for service does not cause the service to be covered by FERS and, in the absence of any FERS-covered service, no amount of creditable service can make an individual eligible for a FERS annuity. But the only issue before the Board is whether the appellant is eligible to obtain credit for her during by making a deposition under section 321 of the FRAA.

► **Appellant: Timothy D. McFarland**
Agency: Department of Transportation
Decision Number: 2007 MSPB 299
Docket Number: PH-0752-06-0028-I-3
Issuance Date: December 11, 2007
Appeal Type: Adverse Action by Agency
Action Type: Suspension - More than 14 Days

Back Pay

Both parties petitioned for review of an initial decision that mitigated the appellant's punishment for misuse of government-leased property and failure to follow instructions from a 90-day suspension to a 30-day suspension, and ordered the agency to provide the appellant with back pay. In its PFR, the agency argues that the AJ erred by awarding back pay to the appellant because the Back Pay Act, 5 U.S.C. § 5596, does not apply to the Federal Aviation Administration, an issue that was not raised below.

Holdings: The Board granted the agency's PFR, denied the appellant's cross-PFR, and affirmed the initial decision as modified.

1. Although the Board will not ordinarily entertain an argument that is raised for the first time on petition for review, unless it is based on new and material evidence, it did so here because ordering relief under the Back Pay Act was clearly erroneous, and the procedural posture of the case precluded an opportunity to litigate the issue below.

2. The Back Pay Act is a waiver of sovereign immunity, and the Board may not order the sovereign to expend funds from the public fisc without an explicit waiver of the sovereign's immunity. Although the Back Pay Act generally provides such a waiver, 49 U.S.C. § 40122(g)(2) has the effect of making certain provisions of Title 5 of the U.S. Code—including the Back Pay Act—inapplicable to FAA employees. Although the Administrator of the FAA has the authority adopt the substance of

any portion of title 5, the Back Pay Act has not been made applicable to FAA employees. Accordingly, the initial decision is vacated only insofar as it ordered a back pay award; the remainder of the initial decision, including the mitigation to a 30-day suspension, is unchanged.

► **Appellant: Lawson A. Rose**
Agency: United States Postal Service
Decision Number: 2007 MSPB 294
Docket Number: CH-0752-07-0231-I-1
Issuance Date: December 10, 2007
Appeal Type: Adverse Action by Agency
Action Type: Removal

Adverse Action Charges
- Threats

The appellant petitioned for review of an initial decision that affirmed his removal on a charge of Unacceptable Conduct/Violent and Threatening Behavior Towards Co-Workers. The charge related to an incident in which the appellant, a Mail Handler, went to the attendance control office and allegedly shouted at 2 clerks, "Give me my [time] card before I blow your brains out." After the clerks informed the appellant that his card was not in the office, he left, then returned about 10 minutes later and allegedly acted as though he was holding a machine gun/firearm and making machine gun sounds while pointing at the 2 clerks. He then allegedly laughed and walked away. After a hearing, the AJ found that the agency proved its charge by preponderant evidence, that the action promotes the efficiency of the service, and that the removal penalty was reasonable.

Holding: The Board denied the appellant's PFR, but reopened on its own motion to correct an error of law. The AJ incorrectly identified the charge as "making statements that caused anxiety and disruption in the workplace," and stated that intent was not an element of the charge. When an agency's charge is labeled as a threat, as it was here, the agency must establish the elements of a threat charge as set forth in *Metz v. Department of the Treasury*, 780 F.2d 1001 (Fed. Cir. 1986). After analyzing the evidence under the *Metz* factors, the Board concluded that the agency proved its threat charge by preponderant evidence and that removal was a reasonable penalty.

► **Appellant: Judith J. Hosford**
Agency: Office of Personnel Management
Decision Number: 2007 MSPB 295
Docket Number: AT-0845-07-0053-I-1
Issuance Date: December 10, 2007
Appeal Type: FERS - Collection of Overpayment
Action Type: Retirement/Benefit Matter

Retirement
- Annuity Overpayment
- Disability Retirement

The appellant petitioned for review of an initial decision that affirmed OPM's reconsideration decision, which found that the appellant received an overpayment of annuity benefits. Prior to determining her regular annuity benefit, OPM paid the appellant an estimated annuity benefit. OPM subsequently informed the appellant that it had overpaid her in the amount of $929.58 for this period. The reason for the overpayment was the method used by OPM to calculate the appellant's annuity. Because it determined that the appellant was eligible for immediate, optional retirement, OPM computed the appellant's disability retirement annuity benefits under the formula for an optional retirement under 5 U.S.C. § 8452(c)(2). In making this determination, OPM credited the appellant with approximately 7 years of service under the Civil Service Retirement System, despite the fact that she had received a refund of her retirement contributions for this service. On appeal to the Board, the AJ found that OPM had correctly calculated the appellant's retirement annuity, and that she had received the overpayment as calculated by OPM.

In her PFR, the appellant argued that she is entitled to receive the FERS Retiree Annuity Supplement for the period between the effective date of her retirement and the date on which she began receiving Social Security benefits, and that here repayment should be reduced by the amount of that supplement.

Holdings: Although the Board denied the appellant's PFR, it reopened the appeal on its own motion and ordered OPM to issue a new final decision.

1. The FERS Retiree Annuity Supplement is not available to employees, such as the appellant, who are receiving a disability retirement annuity. OPM's calculation of her retirement annuity was therefore correct.

2. In her pleadings and testimony below, the appellant claimed that her disability retirement was involuntary because it was based upon misinformation provided by her employing agency and OPM. Specifically, the appellant averred that she would not have filed for disability retirement if she had been informed that she qualified for an immediate optional retirement. The Board agreed, and ordered OPM to convert the appellant's retirement from a disability retirement to an immediate optional retirement.

► **Appellant: Gary R. Alexander**
Agency: Office of Personnel Management
Decision Number: 2007 MSPB 292
Docket Number: DA-0845-07-0079-I-1
Issuance Date: December 6, 2007
Appeal Type: FERS - Collection of Overpayment
Action Type: Retirement/Benefit Matter

Retirement
- Annuity Overpayment

The appellant petitioned for review of an initial decision that affirmed OPM's reconsideration decision that found that the appellant had been overpaid $53,766.89, and must repay that sum. In requesting reconsideration of OPM's initial finding in this regard, the appellant did not check the box on the form requesting waiver. He did, however, state, "If I have to repay the overpayment my family will be faced with the choice of overpayment [sic] deduction or dropping my life insurance protection." In its reconsideration decision, OPM did not address the issue of waiver. On appeal to the Board, the appellant complained that the reconsideration decision "failed to "consider my financial situation." In a subsequent pleading, he stated that OPM did not consider his "current state of health and ability to repay." In his final submission, the appellant stated that OPM denied his request for waiver "because I made an 'administrative' mistake in not checking a box and not using the word wavier [sic] in my appeal to OPM." The AJ affirmed the reconsideration decision, finding that the Board lacks jurisdiction over the waiver issue because the appellant did not seek waiver from OPM. In his petition for review, the appellant asserted that the AJ erred in failing to address his request for waiver.

A majority of the Board denied the appellant's petition for review. Member Sapin dissented. She recognized that, as a general rule, the Board lacks jurisdiction over an issue that OPM does not address in a reconsideration decision, but stated that the Board has recognized a limited exception where an appellant raises an issue in a reconsideration request and OPM fails to address it despite repeated request. Here, she would have found that the appellant had only one opportunity to raise the waiver issue before OPM and did so, and alleged 3 times in his Board appeal that OPM erroneously failed to address the request.

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.