



U.S. Merit Systems Protection Board

CASE REPORT

DATE: March 28, 2008

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BOARD DECISIONS

- ▶ **Appellant: Kevin McCarty**
Agency: Environmental Protection Agency
Decision Number: [2008 MSPB 21](#)
Docket Number: CH-1221-05-0902-B-1
Issuance Date: January 31, 2008
Appeal Type: Individual Right of Action (IRA)

Whistleblower Protection Act

- **Jurisdiction**
- **Protected Disclosure**

Board Procedures/Authorities

- **Bias**

The appellant petitioned for review of a remand initial decision that denied her request for corrective action in this IRA appeal. The agency terminated the appellant from her excepted service appointment as an Environmental Engineer under the Federal Career Intern Program. The appellant alleged that the agency's failure to convert her 2-year appointment to a permanent appointment was reprisal for whistleblowing. She alleged, inter alia, that she disclosed that her first-line supervisor usurped the legal authority granted by regulation to On-Scene Coordinators by interfering with a commitment that the agency made with stakeholders at the Circle Smelting Superfund Site. In the original proceeding, the administrative judge (AJ) dismissed the appeal on the basis that the appellant failed to demonstrate that she made any protected disclosures or that the agency perceived her as a whistleblower, and that she failed to demonstrate that any protected disclosure was a contributing factor in the agency's decision not to convert her appointment. On review, the Board found that the AJ erred by denying corrective action without addressing whether the Board has jurisdiction over the appeal, and by failing to provide the appellant with explicit information on what is required to establish jurisdiction. *McCarty v. Environmental Protection Agency*, [2007 MSPB 59](#), 105 M.S.P.R. 74.

On remand, after receiving an agency pleading which purported to concede Board jurisdiction, the AJ issued a remand initial decision in which he found that the Board has IRA jurisdiction over the appeal, but dismissed the appeal for failure to state a claim upon which relief can be granted.

Holdings: The Board granted the appellant's petition for review (PFR), vacated the initial decision, and remanded the appeal for further adjudication:

1. A dismissal for failure to state a claim upon which relief can be granted is appropriate in an IRA appeal only when the appeal is within the Board's jurisdiction but, even assuming the appellant can show she was subjected to a retaliatory personnel action, the Board would be unable to grant effective relief. That is not the case in this appeal; if the appellant is able to prove the merits of her claim, the Board would be able to issue an enforceable order granting her the relief she seeks: reinstatement to her position.

2. Both of the premises on which the AJ found jurisdiction were incorrect. First, it was improper for the AJ to rely on a purported finding of jurisdiction in the earlier initial decision, when the Board had vacated that decision and found that it did not adequately address the question of jurisdiction. Second, an agency cannot "concede" jurisdiction over an appeal, nor is jurisdiction subject to stipulation by the parties.

3. The Board found the record sufficiently developed to make a finding of jurisdiction. The appellant made nonfrivolous allegations that she disclosed a violation of regulation, specifically, that her first-line supervisor usurped the legal authority granted to On-Scene Coordinators, that her second-line supervisor was aware of the disclosure, and that the agency's decision to terminate her employment was taken in reprisal for her disclosure.

4. The AJ did not document any of the status conferences or the prehearing conference, so there was no basis to determine whether the AJ's denial of witnesses and other rulings was an abuse of discretion. Because the record as it exists is insufficient for the Board to conclude that the appellant received a fair opportunity to present and prove her case, the case must be remanded to afford her the opportunity to do so.

5. The Board found the AJ's conduct to be "troubling" in several instances. It was inappropriate for the AJ to suggest to the appellant during her testimony that her testimony was meaningless. Further, the AJ's questioning of the witnesses may have left the impression that the AJ was acting as an advocate for the agency rather than as an impartial decision maker when, for example, he negatively characterized the appellant and her union representative, interrupted the appellant before she had completed her question, misinterpreted what she said, and accused her of making an untrue statement. For these reasons, the Board found that a reasonable person could have the impression that the AJ allowed his personal feelings and views to so infect his consideration of the appeal as to create doubts about his ability to impartially resolve close and difficult questions of fact. The Board therefore directed that the appeal be assigned to a different AJ on remand.

► **Appellant: Gilbert L. Rodriguez**
Agency: Department of Homeland Security
Decision Number: [2008 MSPB 25](#)
Docket Number: DA-0752-07-0091-I-1
Issuance Date: January 31, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Whistleblower Protection Act
- Protected Disclosure

The appellant petitioned for review of an initial decision that affirmed his removal from his position as a Deportation Officer on misconduct charges. All three charges stemmed from incidents occurring on March 25, 2001, when the appellant was transporting aliens who had been apprehended by the Immigration & Naturalization Service to various locations in a passenger bus. One of the prisoners had been severely injured while being taken into custody. The county jail refused to accept custody of that prisoner, who was transported by ambulance to a local hospital, and later determined to have sustained a broken neck. When the appellant arrived at his District Office with the remaining prisoners, he unplugged the IDENT camera, which is part of a system used to enter photographs and fingerprints, along with personal biographical data, into a database, and told his supervisor that the machine was not functioning. The AJ found that the appellant intentionally unplugged the IDENT camera to avoid having to process the aliens through the IDENT system, which would have required him to remain at the District Office for a minimum of two additional hours. The AJ sustained all 3 charges and found that the removal penalty was within the bounds of reasonableness.

In his initial filing, the appellant had alleged that his removal was the result of reprisal for his whistleblowing activity, and identified his March 26, 2001 memorandum to his District Director regarding the events of the previous day as his protected disclosure. The AJ advised him that this document did appear to contain any disclosures protected by [5 U.S.C. § 2302\(b\)\(8\)](#), and ordered the appellant to submit additional information on this issue. In his response, the appellant asserted that the memorandum was “a disclosure of information that he had reason to believe was a violation of law.” The AJ then issued an order advising the parties that she was not accepting the whistleblower claim as an affirmative defense.

Holdings: The Board granted the appellant’s PFR, but affirmed the initial decision as modified, still sustaining the appellant’s removal:

- 1. The Board found that the AJ properly sustained all 3 charges of misconduct against the appellant.**
- 2. Neither the AJ’s order nor the initial decision explained why the AJ decided not to accept the appellant’s whistleblowing claim as an affirmative defense; nor did the AJ cite any authority in support of this determination. This was error. Nevertheless, the Board examined the March 26, 2001 memorandum and concluded that it does not contain any information that the appellant could have reasonably believed evidenced a violation of law or any other type of misconduct identified in**

5 U.S.C. § 2302(b)(8). Even if the memorandum had revealed such misconduct, it would not qualify as a protected disclosure because the record demonstrates that the appellant wrote it in the normal course of his duties.

3. The Board agreed with the AJ's determination that the removal penalty was within the bounds of reasonableness.

► **Appellant: Gary Dilorenzo**

Agency: Department of Veterans Affairs

Decision Number: 2008 MSPB 29

Docket Number: AT-1221-06-0015-B-1

Issuance Date: February 6, 2008

Appeal Type: Individual Right of Action (IRA)

Whistleblower Protection Act

- Clear and Convincing Evidence

The appellant petitioned for review of a remand initial decision that denied his request for corrective action in this IRA appeal. The agency removed the appellant from his Respiratory Therapist (RT) position during his probationary period. The appellant alleged that the action was taken in reprisal for his whistleblowing, specifically for telling his supervisors that other RTs were not properly administering medication, causing patients to receive less medication than ordered. Following a hearing, the AJ found that the appellant had established jurisdiction over his appeal, but that the agency had shown by clear and convincing evidence that it would have terminated the appellant absent his whistleblowing. Specifically, the AJ found that the agency terminated the appellant because his supervisor lost confidence in the appellant's truthfulness, the appellant had performed nursing duties outside of his job description, and other RTs were not comfortable in the appellant's presence because he was not a team player.

A majority of the Board denied the appellant's PFR. Member Sapin issued a dissenting opinion explaining why she believed the agency did not establish by clear and convincing evidence that it would have terminated the appellant's employment in the absence of his whistleblowing. She found the strength of the agency's evidence in support of its action to be "extremely weak," noting that the supervisor's belief that the appellant had lied was based on hearsay, and that the supervisor did not ask those with direct knowledge what was said. Ms. Sapin also stated that she found no evidence that the appellant ever performed nursing or other duties except those that were appropriate for an RT. She found that the evidence showed a strong motive to retaliate, stating that one supervisor's testimony came "very close to saying that it was the appellant's whistleblowing that made the RTs feel uncomfortable." She also cited deposition testimony indicating that the appellant's whistleblowing contributed to the same supervisor's efforts to have the appellant terminated.

► **Appellant: Don A. Mynard**
Agency: Office of Personnel Management
Decision Number: [2008 MSPB 23](#)
Docket Number: DA-0831-06-0436-A-1
Issuance Date: January 31, 2008
Action Type: Attorney Fee Request

Attorney Fees
- Prevailing Party

The appellant petitioned for review of an addendum initial decision dismissing his motion for attorney fees relating to the merits phase of his retirement appeal as untimely filed, and denying his motion for attorney fees relating to the compliance phase of his appeal on the basis that the appellant's petition for enforcement (PFE) did not result in the issuance of an enforceable judgment, as required by *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, [532 U.S. 598](#) (2001).

In the merits case, the Board's initial decision determined that the appellant established that his failure to make a pre-separation deposit for his post-1956 military service was due to administrative errors committed by his former employing agency, and ordered OPM to set a time limit during which he could make the appropriate deposit. About six weeks after this initial decision became the Board's final decision, the appellant filed a PFE alleging that OPM had not contacted him or his attorney concerning the computation of his deposit or the amount of time he would have to make the deposit. OPM responded that it was awaiting a response from the Defense Finance and Accounting Service regarding the appellant's military pay. OPM later notified the appellant of the amount of the deposit due and afforded him an opportunity to notify OPM of his election regarding the deposit. Based on this action, the AJ dismissed the compliance action as moot.

Holdings: A majority of the Board, Chairman McPhie dissenting, affirmed the AJ's dismissal of the attorney fees motion on the merits action as untimely filed without good cause shown, but vacated the initial decision as to the attorney fees motion on the compliance action, and remanded the case to the regional office for further adjudication:

1. In ruling that a motion for attorney fees could not be granted for the compliance proceeding because no enforceable judgment was issued in that proceeding, the AJ relied on two cases, *Buckhannon*, and *Mulero-Echevarria v. Office of Personnel Management*, [93 M.S.P.R. 154](#) (2002). The Board found, however, that neither it nor its reviewing court has issued a precedential decision that specifically addresses the issue in this case, i.e., whether, for the purposes of awarding attorney fees for the compliance phase of a Board appeal, *Buckhannon* applies to preclude such an award where the appellant's compliance efforts do not result in an enforceable order or a Board-approved settlement agreement that materially alters the legal relationship of the parties.

2. The Board's oversight of the parties' compliance efforts provides the PFE process with sufficient Board imprimatur to allow an appellant to qualify as a "prevailing party" under [5 U.S.C. § 7701\(g\)\(1\)](#), even in the absence of a Board order finding the agency in conformance or an agreement executed by the parties to settle compliance matters.

In his dissent, Chairman McPhie stated that he would have found good cause for the untimely filing of the attorney fees motion on the merits case. On the motion for attorney fees in the compliance proceeding, he agreed with the majority's view that *Buckhannon* does not preclude an award of attorney fees that is dismissed as moot without issuance of an enforceable judgment or a Board-approved settlement of the compliance issues. In his case, however, he would have found that the relief received by the appellant was not causally related to the initiation of compliance proceedings before the Board. The Chairman concluded in this regard that OPM was already in the process of complying with the Board's order when the appellant filed his petition for enforcement.

- ▶ **Appellant: Diane S. Jaussaud**
Agency: Department of the Navy
Decision Number: [2008 MSPB 22](#)
Docket Number: SF-0752-05-0140-A-1
Issuance Date: January 31, 2008

Attorney Fees
- Prevailing Party

A majority of the Board denied the agency's petition for review of an initial decision that partially granted the appellant's motion for attorney fees in a compliance proceeding, ordering the agency to pay \$7,339.80 in fees. In a separate concurring opinion, Chairman McPhie explained why he believed the appellant was a prevailing party in the compliance proceeding.

- ▶ **Appellant: Austin H. Brown**
Agency: Department of the Army
Decision Number: [2008 MSPB 24](#)
Docket Number: DC-0752-06-0697-I-2
Issuance Date: January 31, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Settlement
- Validity

The appellant petitioned for review of an April 2007 initial decision that dismissed his appeal of a removal action as settled. The appellant asserts that the settlement agreement entered into the record for enforcement was not the settlement agreement he signed. Specifically, he alleges that someone replaced the first two pages of the settlement agreement he signed with two pages containing different terms, but left the original signature page intact. He further alleges that his attorney and the agency

representative ignored his prompt and repeated requests for a copy of the fully executed settlement agreement and that he first obtained a copy of the agreement just 5 days before filing his petition for review.

Holdings: The Board granted the PFR, vacated the initial decision, and remanded the appeal for further adjudication:

1. The Board found that the appellant's discovery of new and material evidence—the fully executed agreement he obtained 5 days before filing his PFR—provided good cause for his delay in filing the petition.

2. The appellant has made un rebutted allegations of fact that the settlement agreement on record is either a forgery or is invalid on the basis that the parties did not agree to the same terms. His allegations are to some extent corroborated by the agreement in the record, which contains internal inconsistencies. First, the text of the second page of the agreement does not flow logically or grammatically onto the signature page that follows it. Second, the text on the signature page is smaller and less distinct than the text on the other pages. Third, the facsimile transmission data in the top margin of the pages of the settlement agreement indicates that the signature page was faxed three times while the other pages of the agreement were faxed only twice.

► **Appellant: Kent D. Kluge**

Agency: Office of Personnel Management

Decision Number: [2008 MSPB 26](#)

Docket Number: DA-844E-07-0325-I-1

Issuance Date: January 31, 2008

Appeal Type: FERS - Employee Filed Disability Retirement

Retirement

- Disability Retirement

The appellant petitioned for review of an initial decision that affirmed OPM's determination that he was not entitled to disability retirement benefits. A majority of the Board denied the PFR. Member Sapin dissented. She would have found that the evidence confirms that the appellant suffers from heart problems, bleeding ulcers, first stage emphysema, Reiter's Syndrome, migraines, colon problems, uncontrollable diarrhea, stomach pains, major stress and depression, bipolar disorder, psychiatric problems, and panic attacks. She also cited evidence that the Social Security Administration approved disability benefits for the same conditions, effective September 1, 2006, which is prior to the appellant's last day in a pay status. She also cited evidence that the appellant does not handle his own financial affairs, and that he has engaged in multiple suicide attempts and had 12 mental hospital admissions.

► **Appellant: Carolyn Z. Dodd**
Agency: Office of Personnel Management
Intervenor: Karen Dodd
Decision Number: [2008 MSPB 27](#)
Docket Number: AT-0831-07-0410-I-1
Issuance Date: February 1, 2008

Retirement
- Survivor Annuity

The appellant petitioned for review of an initial decision that sustained OPM's reconsideration decision regarding the calculation of her former spouse survivor annuity. The appellant and her former husband, Eric Dodd, were both employed by the federal government. During their divorce proceedings, they entered into a separation agreement, which was incorporated into the final decree of dissolution, that provided, inter alia, that "each party shall retain each other as a listed survivor on their annuity, which states that the survivor listed shall rec[ei]ve 55% of the pension upon the death of the pension owner, but only 25% upon remarriage." Mr. Dodd subsequently married Karen Dodd and, upon his retirement in 2006, elected a maximum survivor annuity for Karen Dodd. The appellant contended that she was still entitled to retain her 55% survivor annuity, but OPM determined that she was entitled to only 25% of the maximum survivor annuity benefit. On appeal, the AJ concluded that the separation agreement was ambiguous, but that it was clear that the appellant was entitled to at least a 25% survivor annuity, and affirmed OPM's reconsideration decision.

Holding: The Board agreed that the separation agreement was ambiguous, being subject to 3 reasonable interpretations: (1) that the appellant's survivor annuity would be reduced to 25% upon Mr. Dodd's remarriage so that he could provide a partial survivor annuity for his current spouse; (2) that the appellant's survivor annuity would be reduced to 25% upon her remarriage because her income would be increased by her new spouse's earnings; or (3) that the appellant's survivor annuity would be reduced to 25% upon either party's remarriage. The Board determined that it need not resolve the ambiguity because the result will be the same no matter which way the agreement is interpreting, because of the effect of [5 C.F.R. § 838.921\(d\)](#). The Board determined that the effect of subsections (1) and (3) of paragraph (d) was that the particular portion of a court order providing for a reduction in the former spouse's survivor annuity upon the employee's or annuitant's remarriage will not be processed, and the former spouse will receive an unreduced survivor annuity. Accordingly, the Board ordered OPM to correct its records to reflect that the appellant's entitlement to a survivor annuity of 55% has not be affected by Mr. Dodd's remarriage or election of survivor annuity benefits for his subsequent spouse.

- **Appellant: Mattie M. Settlers**
Agency: Office of Personnel Management
Decision Number: [2008 MSPB 28](#)
Docket Number: SF-0831-07-0185-C-1
Issuance Date: February 6, 2008

Retirement

- **Survivor Annuity**
- **Annuity Overpayment**

The appellant petitioned for review of an initial decision that denied her petition for enforcement (PFE). In the merits proceeding, the Board reversed OPM's reconsideration decision denying the appellant's application for a survivor annuity based on the federal service of her deceased spouse, and ordered OPM to waive the statutory time limit and accept the request to elect a survivor annuity. With her PFE, the appellant attached a letter from OPM that asserted a claim for \$67,614 against Mr. Settlers' estate, explaining that the debt was the difference between the annuity paid to Mr. Settlers and the reduced annuity that he should have received to provide the appellant with a survivor annuity. The appellant asked the Board to order OPM to waive recovery of the overpayment. The AJ issued an order informing the appellant that two separate issues were involved—the overpayment claim and the compliance matter—and that the Board might lack jurisdiction to decide the overpayment claim because the Board only has such jurisdiction when OPM has rendered a final decision. After receiving information that OPM had submitted an Explanation of Benefits to the appellant detailing how survivor annuity payments would be made in the future, and had provided evidence that it made a lump-sum payment and one monthly payment, the AJ issued an initial decision denying the PFE. The AJ acknowledged that the appellant disagreed with the amount of the monthly survivor annuity, but stated that the appellant could ask OPM to reconsider the payment amount, and could file a new appeal if she disagreed with OPM's final decision as to that matter.

Holding: Although the Board generally lacks jurisdiction to hear an appeal of a retirement matter that has not been addressed in an OPM reconsideration decision, it has recognized an exception where OPM has failed to render a decision on the matter in issue. That exception applies in this case. The appellant has asked OPM to waive repayment of the overpayment amount, the issues of waiver and compliance are intertwined, and the record indicates that OPM does not intend to issue a decision on the appellant's request. Accordingly, the Board vacated the initial decision and remanded the matter to the regional office for further proceedings on the merits of the appellant's overpayment claim.

- **Appellant: Floyd G. Jordan**
Agency: Office of Personnel Management
Decision Number: [2008 MSPB 31](#)
Docket Number: CH-0831-07-0398-I-1
Issuance Date: February 11, 2008

Retirement

- **Discontinued Service Retirement**

Hearings

- **Right to a Hearing**

Discrimination

The appellant petitioned for review of an initial decision that affirmed OPM's denial of his application for a discontinued service retirement annuity. The appellant separated from his position with the Postal Service in 1994, pursuant to a settlement agreement that resolved his appeal of his removal. On appeal to the Board's regional office, the AJ determined that the appellant did not qualify for discontinued service retirement under [5 U.S.C. § 8336\(d\)](#).

Holdings: The Board granted the appellant's PFR, but affirmed the initial decision as modified, still affirming OPM's denial of the appellant's application for a discontinued service retirement annuity:

1. It was error for the AJ to refuse to adjudicate the appellant's claims of age and race discrimination and to fail to give him mixed-case appeal rights. Under [5 U.S.C. § 7702](#), the Board must render a decision on allegations of discrimination raised in conjunction with otherwise appealable actions, and OPM's decision denying a discontinued service retirement was appealable to the Board.
2. As a matter of law, the retirement statutes allow OPM no discretion in determining an individual's entitlement to an annuity. If OPM correctly applied the criteria set forth in [5 U.S.C. § 8336\(d\)](#), there can be no improper discrimination.
3. The appellant does not meet the requirements for discontinued service retirement under [§ 8336\(d\)\(1\)](#), which requires that the applicant's separation from the service have been involuntary. Both the Board and its reviewing court have previously upheld the validity of the settlement agreement reached in the appellant's prior removal appeal in which he voluntarily resigned from the Postal Service in 1994. Under the doctrine of collateral estoppel, that issue cannot be relitigated in this appeal.
4. The appellant does not meet the requirements for discontinued service retirement set forth in [§ 8336\(d\)\(2\)](#). The fact that the Postal Service may have offered an early-out retirement to specific employees in 1992 is irrelevant to the current appeal because he has not established that an early-out retirement was offered to him at the time he separated from service in 1994.
5. The AJ did not abuse her discretion by denying the appellant's request for an in-person hearing because the appeal did not present any genuine issues of

material fact and the appellant did not show good cause for his failure to appear for the scheduled telephonic hearing on three separate occasions.

- **Appellant: Dennis J. Leeds**
Agency: United States Postal Service
Decision Number: [2008 MSPB 30](#)
Docket Number: CH-0752-07-0155-X-1
Issuance Date: February 8, 2008
Action Type: Constructive Adverse Action

Compliance

This case is before the Board on the AJ's Recommendation finding that the agency was in partial noncompliance with its obligations under a written settlement agreement that resolved this appeal. The appellant's petition for enforcement alleged that the agency had failed to provide back pay or reinstate his health benefits, dental insurance, and flexible spending account. The AJ found that the agreement did not address the appellant's flexible spending account and dental insurance plan. The AJ further found, however, that the agency had not shown that it had completed the process of processing the appellant's restoration of health benefits and back pay award, and therefore was not in compliance with the parties' settlement agreement.

Holdings:

- 1. The Board denied the appellant's PFE regarding the back pay issue because the appellant had not submitted a PS Form 8038 to the agency, which was necessary to the agency complying with its obligations.**
- 2. With regard to health benefits issue, the Board found that the terms of settlement agreement itself were sufficient to require the agency to take action; subsidiary forms from the appellant such as the PS 8038 or an SF 2810 were not required. The Board ordered the agency to reinstate the appellant's health insurance to the date on which it was cancelled.**

- **Appellant: Katina Powe**
Agency: United States Postal Service
Decision Number: [2008 MSPB 32](#)
Docket Number: CH-0752-06-0609-C-1
Issuance Date: February 12, 2008
Action Type: Reduction in Grade/Rank/Pay

Compliance

The appellant petitioned for review of an initial decision that dismissed her petition for enforcement. In the appeal on the merits, the Board reversed the agency's action reducing the appellant's grade and pay, and ordered the agency to provide her with the back pay and benefits she would have received in the absence of the demotion action.

Holdings: The Board granted the appellant's PFR, reversed the compliance initial decision, found the agency in non-compliance with the underlying decision on the merits, and ordered the agency to establish that it has provided the appellant with the back pay and benefits to which she is entitled:

1. Although the agency stated its intention to pay the appellant a 3% Pay for Performance salary increase retroactive to January 2007, it still has not done so, more than a full year since the Board's decision ordering back pay and benefits became final. The Board therefore found the agency in non-compliance on this matter.

2. The appellant continues to assert, without rebuttal, that she has not received any back pay because the agency has instructed her not to cash the back pay checks it tendered to her as a result of its concern that the checks would constitute an overpayment of back pay to which she is entitled. The initial decision on the merits instructed the agency that, if there was a dispute as to the amount of back pay, the agency was to pay the appellant the undisputed amount.

3. As to the calculation of the proper amount of back pay, the agency has failed to submit the information and evidence required under [5 C.F.R. § 1201.183\(a\)\(1\)](#). If the agency intends to assert that the appellant is not entitled to back pay for any part of the duration of its unjustified or unwarranted personnel action, it must submit concrete and positive evidence that establishes that the appellant was not ready, willing, and able to perform the duties of her Supervisor position for that period of time. If the agency intends to assert that the appellant is not entitled to back pay for periods during which the appellant received OWCP wage replacement benefits, it will need to submit concrete and positive evidence that establishes that the appellant's receipt of those benefits was not caused by nor related to its unjustified or unwarranted personnel action.

- ▶ **Appellant:** Michael A. Endres
Agency: Department of Veterans Affairs
Decision Number: [2008 MSPB 34](#)
Docket Number: DE-3443-06-0055-X-1
Issuance Date: February 14, 2008

Compliance

In a recent decision, [2007 MSPB 301](#), 107 M.S.P.R. 455, the Board found the agency in continued non-compliance with a final Board decision that ordered the agency to reconstruct the selection process for a particular vacancy, and otherwise comply with the requirements of [5 U.S.C. §§ 3317](#) and 3318.

Holding: The Board found that the agency's selection process is now consistent with the requirements of law and dismissed the appellant's petition for enforcement.

► **Appellant: David Dean**
Agency: Consumer Product Safety Commission
Decision Number: [2008 MSPB 33](#)
Docket Number: AT-3443-07-0398-I-1
Issuance Date: February 14, 2008

Miscellaneous Topics
- USERRA/VEOA/Veterans' Rights

The appellant petitioned for review of an initial decision that dismissed his VEOA claim for lack of jurisdiction. He had applied for a number of Product Safety Investigator positions, which were advertised in numerous locations under both merit promotion and competitive vacancy announcements. The appellant's name was placed on a list of candidates for various vacancies. In some instances, he was not selected; in others, the vacancy announcements were cancelled and re-announced. The AJ dismissed the appeal for lack of Board jurisdiction on the basis that the appellant did not non-frivolously allege that his non-selection violated a statute or regulation related to veterans' preference.

Holdings: The Board denied the appellant's PFR, but reopened the appeal on its own motion to vacate the initial decision, and deny the appellant's request for corrective action on the merits:

- 1. The only jurisdictional issue in question is whether the appellant alleged a violation of his rights under a statute or regulation relating to veterans' preference. The Board will liberally construe an appellant's claims of violation of his veterans' preference. Applying that liberal standard here, the Board found that the appellant alleged a violation of his rights under a statute or regulation relating to veterans' preference by arguing that the agency issued multiple job announcements and notifications to confuse him based on his veteran status, and to deny him his rights as a preference-eligible veteran.**
- 2. On the merits, the Board noted that it has held that nothing prevents an agency from soliciting applications from the general public and from merit promotion applicants simultaneously, and that an individual is not entitled to veterans' preference points under merit promotion procedures. The Board has also held that an agency does not violate a preference-eligible veterans' rights under the VEOA when it cancels a vacancy announcement. The Board found no violation of the appellant's rights as a preference-eligible veteran.**