



U.S. Merit Systems Protection Board

CASE REPORT

DATE: May 2, 2008

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BOARD DECISIONS

- ▶ **Appellant: Larry F. Fisher**
Agency: Environmental Protection Agency
Decision Number: [2008 MSPB 51](#)
Docket Number: DC-1221-07-0640-W-1
Issuance Date: March 6, 2008
Appeal Type: Individual Right of Action (IRA)

Whistleblower Protection Act

- **Protected Disclosure**
- **Contributing Factor**
- **Clear and Convincing Evidence**

The appellant, a GM-14 Accountant, petitioned for review of an initial decision that dismissed his IRA appeal for lack of jurisdiction. He alleged that a 4-day suspension without pay was taken in reprisal for various disclosures that he alleged evidenced his reasonable belief that the top managers in his agency, as well as those in other agencies, had engaged in a gross waste of funds, abuses of authority, and violations of laws, rules, or regulations. Based on the written record, the administrative judge (AJ) dismissed the appeal on the basis that the appellant failed to make a non-frivolous allegation that he made any protected disclosures.

Holdings: The Board denied the appellant's petition for review (PFR), but reopened the appeal on its own motion, finding that the appellant established jurisdiction, but denied his request for corrective action on the merits:

- 1. The Board concluded that many of the appellant's alleged disclosures—concerning expenditures and hiring decisions—were not disclosures of gross mismanagement or a gross waste of funds. They amounted to nothing more than a questioning of management decisions and expenditures that are merely debatable.**
- 2. The appellant's alleged disclosures concerning the agency's purported knowing and willful violations of various accountability laws over a period of at least 8**

years, including the intentional deception of Congress during that time, are sufficient to satisfy the non-frivolous standard for disclosing violations of law, rules, or regulations. The appellant also made a non-frivolous allegation that these disclosures were a contributing factor in his 4-day suspension under the knowledge/timing test established by Congress in [5 U.S.C. § 1221](#)(e)(1)(A)-(B). Since it was undisputed that the appellant exhausted his administrative remedies before OSC, he established Board jurisdiction.

3. On the merits, the Board did not determine whether the appellant established by preponderant evidence that he made a protected disclosure, or that such whistleblowing activity was a contributing factor in the personnel action. It instead proceeded to the issue of whether the agency showed by clear and convincing evidence that it would have taken the same action absent the purported whistleblowing activity. Given the strength of the evidence in support of the appellant's 4-day suspension, the lack of evidence of a motive to retaliate, and the absence of any similarly situated non-whistleblowers, the Board concluded that the agency met its burden.

- ▶ **Appellant: Janet R. Nichol**
Agency: Office of Personnel Management
Decision Number: [2008 MSPB 52](#)
Docket Number: AT-0842-06-0480-R-1
AT-0842-06-0480-N-1
Issuance Date: March 6, 2008
Appeal Type: FERS - Regular Retirement Benefits

Retirement
- Service Credit

Holding: In a lengthy opinion, the Board denied the request for reconsideration filed by the Director of OPM to its earlier decision in this matter, [105 M.S.P.R. 201](#) (2007), which held that the appellant's annuity should be calculated using a single average salary amount for all her years of creditable service, prorated to account for her part-time service performed after April 6, 1985. The Board reaffirmed that decision as modified.

- ▶ **Appellant: Walter Youngblood, Jr.**
Agency: Office of Personnel Management
Decision Number: [2008 MSPB 53](#)
Docket Number: AT-831E-07-0804-I-1
Issuance Date: March 6, 2008
Appeal Type: CSRA - Employee Filed Disability Retirement

Retirement
- Annuities
- Disability Retirement

The appellant petitioned for review of an initial decision that affirmed an OPM reconsideration decision that dismissed his application for disability retirement benefits as untimely filed.

Holdings:

1. The Board affirmed the initial decision as the untimeliness of the appellant's request for reconsideration of his application for disability retirement. The application was filed 15 years following his separation from federal service, with no showing that he was mentally incompetent at the time of separation or within one year of separation.

2. The appellant's primary concern on PFR was his contention that he should have been eligible for regular retirement benefits. Although this matter was not addressed in OPM's reconsideration decision, it was addressed in a November 17, 2005 letter from OPM to the appellant. Because it appears that OPM does not intend to issue any further decision on this matter, the Board found it appropriate to address it. The Board affirmed OPM's determination that the appellant was not eligible for retirement benefits because he requested and received a refund of his retirement deductions in 1992, and the law does not allow him to make a redeposit of those contributions for the purpose of being allowed credit for his prior service.

► **Appellant: Linda L. Allen**

Agency: Department of Defense

Decision Number: [2008 MSPB 54](#)

Docket Number: DC-0752-06-0761-X-1

Issuance Date: March 6, 2008

Appeal Type: Adverse Action by Agency

Action Type: Removal

Compliance

- Dismissal on Proof

This case was before the Board on the AJ's Recommendation, finding the agency in noncompliance with a final Board decision in which the appeal was resolved by a settlement agreement that was entered into the record. The AJ found that the agency had in two instances failed to remove from its records all references to matters required to be removed per the settlement agreement.

Holding: The agency has now deleted the improper materials from its records. Because the appellant was given an opportunity to respond, but has not done so, the Board assumes that she is satisfied with the agency's compliance. Accordingly, the Board dismissed the appellant's petition for enforcement as moot.

► **Appellant: Sylvester Grandberry**
Agency: Department of Homeland Security
Decision Number: [2008 MSPB 55](#)
Docket Number: DE-3443-07-0165-I-1
DE-3443-06-0300-R-1
Issuance Date: March 7, 2008

Miscellaneous Topics

- USERRA/VEOA/Veterans' Rights

The agency petitioned for review of an initial decision that found that it had violated the appellant's rights as a preference eligible under VEOA. While employed as an immigration information officer in Lincoln, Nebraska, the appellant was called to active military duty with the Army National Guard, where he served from December 2003 to July 6, 2005. He returned to civilian duty in Lincoln in August. In April 2005, during the appellant's absence on military duty, the agency issued vacancy announcement FS236771 for adjudication officer positions, including in Lincoln, Nebraska. The appellant was not informed of this announcement, however, and did not become aware of it until well after he had returned to civilian duty. The appellant filed an application with an agency human resources office on July 18, 2005 in which he expressed an interest in adjudication officer positions in Lincoln. He also sent a mailgram to the agency in December 2005 inquiring about the status of his application. He sent another mailgram on January 9, 2006, in which he referred to the April 2005 announcement and requested an opportunity to file an application under that announcement. In August through December 2005, the agency issued certificates listing persons eligible for adjudication officer positions in Lincoln. The appellant's name was not included on any of these certificates, and the agency has acknowledged that he was not considered for any positions filled under announcement FS236771.

After filing a complaint with the Department of Labor, the appellant filed an appeal with the MSPB, alleging that the agency had violated his rights as a preference eligible and returning service member by excluding him from consideration for vacancies under the April 2005 announcement. The AJ construed the appeal as raising claims under both VEOA and USERRA. In her decision, the AJ found that the agency violated the appellant's preference-eligible rights under VEOA. Specifically, she found that the agency violated [5 C.F.R. § 332.312](#) by failing to permit the appellant to file a late application for an adjudication officer position. The AJ found, however, that the agency had not violated the appellant's rights under USERRA.

Holdings: A majority of the Board, Chairman McPhie dissenting, reversed the initial decision regarding the appellant's rights under VEOA, vacated the initial decision regarding the appellant's rights under USERRA, and remanded the case to the regional office for further adjudication:

1. The AJ erred in finding that the agency violated VEOA. The law ([5 U.S.C. § 3330c](#)) gives the Board the authority to order relief when it determines that an agency has violated a right described in [5 U.S.C. § 3330a](#), i.e., rights granted to a preference eligible "under any statute or regulation relating to veterans'

preference.” While [5 C.F.R. § 332.312](#) grants rights to persons based on their military service, it makes no distinction between persons with preference eligibility and those without it. It is not, therefore, a regulation relating to veterans’ preference.

2. The Board found it necessary to remand the appellant’s USERRA claim for further adjudication because the AJ erred in addressing it solely as a possible violation of the statute’s anti-discrimination provision, [38 U.S.C. § 4311](#), without considering a possible violation of § 4313, which provides that an employee who has been absent from his civilian employment to perform military service generally is entitled to be employed, on his return, in the position in which he would have been employed had his civilian service not be interrupted by his military service. Although this provision does not expressly require that an agency consider the absent employee for promotions and other assignment opportunities that become available during his absence, the Board found that it was appropriate to so construe this provision.

3. [5 C.F.R. § 332.312](#) is relevant to the appellant’s rights under § 4313, as it provides that individuals who could not file an application during the filing period because of military service are entitled to file applications for open competitive examinations after the closing date for receipt of applications. OPM’s Delegated Examining Operations Handbook has expanded the scope of 5 C.F.R. § 332.312 to include positions filled by agencies under their delegated examining authority.

4. Taken together, [38 U.S.C. § 4313](#), [5 C.F.R. § 332.312](#), and OPM’s guidance entitle employees to be considered for positions that are advertised in the employees’ absence for military duty, even when they are not actually filled until after the employees return to civilian employment. The appellant’s reemployment claim under USERRA must be remanded for further adjudication.

In his separate opinion, Chairman McPhie concurred insofar as the majority found no VEOA violation, but dissented from the USERRA analysis. He stated that the UERRA claim was not properly before the Board because the appellant had not petitioned for review of this issue. He also disagreed with the substance of the majority’s USERRA analysis. In his opinion, the majority extended § 4313 beyond protecting civilians from losing their own positions while on military duty, to an affirmative duty to consider the absent employee for competitive promotions in and other reassignment opportunities to other positions which become available during the employee’s absence. He finds such an interpretation not only incorrect as a matter of law, but that it would place an unworkable burden on federal employers.

- ▶ **Appellant: Ettie R. Lawrence**
Agency: Office of Personnel Management
Decision Number: [2008 MSPB 56](#)
Docket Number: DA-0831-07-0429-I-1
Issuance Date: March 12, 2008
Action Type: Retirement/Benefit Matter

Retirement

- Former Spouse Annuity

The appellant petitioned for review of an initial decision that affirmed an OPM final decision that determined that she is not entitled to a continuation of former spouse annuity benefits based on the service of her deceased former spouse. At issue in a previous appeal was the appellant's entitlement to a former spouse annuity. While the Board's final decision was on appeal to the U.S. Court of Appeals for the Federal Circuit, the parties entered into a settlement agreement that was accepted by the court. The agreement provided, inter alia, that the appellant would receive a former spouse annuity retroactive to June 11, 1998, and which would terminate on May 31, 2003. In accordance with the agreement, OPM retroactively awarded the appellant former spouse annuity benefits for the stated period. The appellant then contested the termination of the annuity. The AJ affirmed OPM's final decision denying a continued annuity, finding that the terms of the settlement agreement precluded the appellant from seeking a continuation of former spouse annuity benefits.

Holding: Neither the AJ nor the parties addressed a provision of the settlement agreement in which the appellant warranted and represented that "no other action or suit with respect to the claims advanced in this appeal is pending or will be filed in or submitted to any court, administrative body, or legislative body" A waiver of appeal rights in a settlement agreement is enforceable and not against public policy if the terms of the waiver are comprehensive, freely made, and fair, and such a waiver divests the Board of jurisdiction over an appeal. Accordingly, the Board vacated the initial decision to dismiss the appeal for lack of jurisdiction.

- ▶ **Appellant: Samuel S. Lee**
Agency: Office of Personnel Management
Decision Number: [2008 MSPB 57](#)
Docket Number: AT-0842-07-0967-I-1
Issuance Date: March 12, 2008
Appeal Type: FERS - Regular Retirement Benefits

Retirement

- Service Credit

OPM petitioned for review of an initial decision that reversed its reconsideration decision and ordered it to change the appellant's retirement records to give him service credit for the period from September 1977 through May 1999. The appellant, who has been employed by the District of Columbia Government and the Federal Government in various civilian capacity since the 1970s, retired in 2006. At issue was whether he

should receive service credit for the period from September 10, 1977, through May 2, 1979. OPM advised the appellant that it was unable establish his entitlement to credit for that position. The appellant maintained that his employment with the District of Columbia Government was involuntarily terminated on September 9, 1977, that he had challenged the termination, and that the matter had been resolved through an agreement providing for back pay for the period in question. In its final decision, OPM affirmed its determination that it could not substantiate the appellant's entitlement to service credit for this period.

On appeal to the Board, the AJ reversed OPM's reconsideration decision, reasoning that: The appellant had had retirement deductions taken from his pay up to the time of his separation on September 9, 1977, and was therefore a federal employee through that date; he had received back pay for the same position for the period in question; and he was therefore entitled to service credit for the disputed period.

Holdings: The Board affirmed OPM's reconsideration decision as modified by the Board's Opinion and Order, denying the appellant's request for service credit. The basic record for action on all CSRS annuity claims is the standard form 2806, or Individual Retirement Record (IRR). When determining whether OPM properly calculated a retirement annuity, the Board's review is limited to determining whether OPM properly relied on the IRR. Clearly, OPM did so here. If the appellant wishes to pursue his claim for service credit, he should seek amendment of this IRR by the District of Columbia Government. If he obtains such an amendment, he may request a new determination of his annuity entitlement from OPM.

► **Appellant: Joyce E. Kwartler**

Agency: Department of Veterans Affairs

Decision Number: [2008 MSPB 58](#)

Docket Number: NY-0752-07-0048-P-1

NY-0752-07-0048-I-1

NY-0752-07-0048-C-1

NY-0752-07-0048-A-1

Issuance Date: March 13, 2008

The appellant petitioned for review of an initial decision denying her motion for compensatory damages. The original appeal (I-1) concerned the appellant's removal from a GS-11, step 9 position effective September 29, 2006. That appeal was resolved pursuant to a settlement agreement, accepted into the record for enforcement, which provided that the agency would retroactively promote the appellant to a Grade 12, step 5 position, and the official personnel records would reflect that the appellant voluntarily retired from this position on September 29, 2006. Since that time, the appellant has filed a petition for enforcement (C-1), a motion for attorney fees (A-1), and a motion for compensatory damages (P-1). The AJ issued initial decisions in each of these matters, finding against the appellant on the merits.

Holding: In addition to denying the appellant's PFR in the compensatory damages appeal, the Board reopened the other appeals on its own motion and affirmed each

of the initial decisions involved, finding the settlement agreement valid and rejecting the appellant's contentions of error as without merit.

► **Appellant: Ivan Petric**

Agency: Office of Personnel Management

Decision Number: [2008 MSPB 59](#)

Docket Number: DC-0752-07-0642-I-1

Issuance Date: March 14, 2008

Action Type: Constructive Adverse Action

Timeliness – PFA

Jurisdiction

- Alleged Involuntary Retirement

The appellant petitioned for review of an initial decision that dismissed his appeal as untimely filed. The appellant asserted that his disability retirement was involuntary and that he was constructively removed. He claimed that he retired in order to receive workers' compensation benefits, and that OPM officials misled him about this by telling him that he would go onto the Office of Workers' Compensation Programs (OWCP) rolls, and off disability retirement. The agency moved to dismiss the appeal as untimely filed and for lack of jurisdiction. After considering the parties' submissions on both issues, the AJ dismissed the appeal as untimely filed, without ruling on the jurisdictional issue.

Holdings: The Board denied the appellant's PFR, but reopened the appeal on its own motion, vacating the initial decision and dismissing the appeal for lack of jurisdiction:

1. In an appropriate case, an AJ may assume that an appellant was subjected to an appealable action and dismiss the appeal as untimely filed. Such an approach is inappropriate, however, if the jurisdictional and timeliness issues are "inextricably intertwined," i.e., if resolution of the timeliness issue depends on whether the appellant was subjected to an appealable action. That is generally the case in a constructive removal appeal based on an alleged involuntary retirement, as the agency will not have provided the appellant with notice of his right to appeal. It was therefore error for the AJ to dismiss the appeal on timeliness grounds without first addressing jurisdiction.

2. The appellant failed to make a non-frivolous allegation that his disability retirement was involuntary:

- a. A retirement is involuntary if an agency has made misleading statements upon which the employee reasonably relied to his detriment. The appellant failed to do this because he did not make his assertions in the form of an affidavit, sworn statement, or declaration made under penalty of perjury, even though the AJ notified him of this requirement.**
- b. Moreover, the appellant's unsworn statements failed to make a non-frivolous allegation that he reasonably relied on agency misinformation to his detriment. The record shows that the appellant should have**

understood, prior to his retirement becoming effective, that he had not been approved to receive OWCP benefits.

- c. Even though the appellant argued that his retirement was involuntary based on agency misinformation, an argument can be made that his claim should be analyzed under the specific standard applied to alleged involuntary disability retirements—that there was an accommodation available on the date of his separation that would have allowed him to continue working, and that the agency did not provide him with that accommodation. The appellant’s submissions show that he did not allege that he could have continued to work with accommodations.

► **Appellant: Anthony J. Haasz, Sr.**
Agency: Department of Veterans Affairs
Decision Number: [2008 MSPB 60](#)
Docket Number: PH-3443-07-0469-I-1
Issuance Date: March 14, 2008

Miscellaneous Topics

- USERRA/VEOA/Veterans’ Rights

The appellant petitioned for review of an initial decision that dismissed his VEOA appeal. The appellant, a 5-point preference eligible who is employed as Maintenance Mechanic Supervisor, applied for a merit promotion under announcement 07-45 for the position of Engineering Technician. Of the 4 applicants, only the appellant was found qualified. Although he was referred to the selecting official for consideration and interviewed, his was not selected. After announcement 07-45 had closed, the agency posted a new vacancy announcement (V117-LY-7) for the Engineering Technician position, but the appellant did not apply for this position. The appellant asserted that he was denied the right to apply for the second vacancy because the agency failed to list it with the state employment service office, which the appellant alleged was in violation of an unspecified law. After considering the parties submissions on both the merits of the appeal and the issue of Board jurisdiction, the AJ dismissed the appeal based on the parties’ written submissions.

Holdings: The Board denied the appellant’s PFR, reopened the appeal on its own motion, reversed the initial decision, and denied the appellant’s claim on the merits:

- 1. The precise grounds for the dismissal were unclear; while the initial decision concludes by stating that the appeal was dismissed “for failure to state a claim,” the first paragraph indicates that a hearing was not held because the appellant failed to allege a non-frivolous basis for the Board having jurisdiction over the matter.**
- 2. The appellant established jurisdiction over his appeal by: (1) showing that he exhausted his remedy with the Department of Labor; and (2) making non-frivolous allegations that he is a preference eligible, the action complained of occurred on or after October 30, 1998, and that the agency violated his rights under a statute or regulation relating to veterans’ preference. Regarding this last element, an**

appellant's allegation, in general terms, that his veterans' preference rights were violated is sufficient to meet the non-frivolous allegation requirement.

3. Dismissal for failure to state a claim is appropriate only if, taking the appellant's allegations as true and drawing all reasonable inferences in his favor, he cannot prevail as a matter of law. Because the AJ relied on documentary evidence, it was inappropriate to dismiss the appeal for failure to state a claim upon which relief can be granted.

4. The Board has the authority to decide a VEOA appeal on the merits, without a hearing, when there is no genuine dispute of material fact and one party must prevail as a matter of law.

5. With regard to the appellant's non-selection under the first vacancy announcement, the AJ correctly observed that veterans' preference does not apply to in-service placement actions such as promotions.

6. With regard to the second vacancy announcement, the appellant is not entitled to relief, even if the agency failed to provide a required notice, as none of the pertinent statutes and regulations ([5 U.S.C. §§ 3327](#), 3300, [5 C.F.R. §§ 330.102, .107](#)) relates to veterans' preference.

- ▶ **Appellant: Robert O. White, Sr.**
Agency: Government Printing Office
Decision Number: [2008 MSPB 61](#)
 Docket Number: DC-0752-07-0729-I-1
 Issuance Date: March 14, 2008
 Appeal Type: Adverse Action by Agency
 Action Type: Reduction in Grade/Pay

Board Procedures/Authorities

- Discovery

The appellant petitioned for review of an initial decision that affirmed his 14-day suspension and demotion. The agency demoted the appellant from Lead Police Officer PQ-06 to Police Officer, PQ-05, on a charge of failing to follow Post Orders by permitting two women to enter and remain in the lobby of a secure agency building without verifying that they had the required identity badges and without examining the bag carried by one of them. After a hearing, the AJ found that the agency proved its charge, that the appellant had failed to prove his affirmative defenses of harmful error, race discrimination, and retaliation for union activity, and that the agency's penalty was reasonable and promoted the efficiency of the service.

Holdings: The Board granted the appellant's PFR, affirmed the initial decision with respect to the charge and with respect to the appellant's affirmative defenses of harmful error and reprisal for union activity, but vacated the initial decision with respect to the appellant's affirmative defense of race discrimination and the penalty, and remanded the appeal for further adjudication:

1. The Board concurred with the AJ that the agency proved its charge by preponderant evidence, and noted that the appellant did not raise any objection to

the AJ's findings regarding his affirmative defenses of harmful error and reprisal for union activity.

2. The AJ abused her discretion by denying the appellant's motion to compel discovery, which prejudiced the appellant's ability to present his affirmative defense of race discrimination:

- a. The Board will not reverse an AJ's rulings on discovery matters absent an abuse of discretion. Although the appellant's motion to compel discovery was filed after the date set by the AJ, it was filed within the time limit set by the Board's regulation, [5 C.F.R. § 1201.73](#)(d)(4), i.e., within 10 days of either the date of service of the objections of the responding party or the date of the expiration of the time to respond. As the agency's response to the appellant's discovery request was not served until the last day it was due, which was the deadline set by the AJ for the completion of discovery, the AJ effectively denied the appellant any opportunity to contest any of the agency's objections, file a motion to compel, or follow up with requests for further discoverable material based upon the agency's initial response.
- b. The discovery request in question—for disciplinary records of other agency Police Officers to determine whether other officers of a different race received lesser discipline for similar offenses—was reasonably calculated to lead to the discovery of admissible evidence, and the AJ's ruling therefore prejudiced the appellant's ability to present his affirmative defense of race discrimination.

► **Appellant:** Sylvia M. Reilly
Agency: Office of Personnel Management
Decision Number: [2008 MSPB 62](#)
Docket Number: DE-831E-07-0359-I-1
Issuance Date: March 14, 2008
Appeal Type: CSRA - Employee Filed Disability Retirement

Retirement

- Disability Retirement

OPM petitioned for review of an initial decision that reversed its reconsideration decision denying the appellant's application for a disability retirement annuity. The appellant resigned from her position as a letter carrier with the U.S. Postal Service effective March 15, 2006. She subsequently applied for disability retirement based on chronic asthma. The AJ found that she became disabled, while still employed in her CSRS-covered position, as a result of her chronic asthma and the dust and other impurities she would come into contact with, and that her asthma resulted in deficiencies in her conduct, performance, and attendance. He further found that the appellant's asthma could not be effectively controlled and that the agency was unable to accommodate her.

Holdings: The Board granted the PFR, reversed the initial decision, and sustained OPM's reconsideration decision:

1. In order to show entitlement to a disability annuity under the CSRS, an appellant must have become disabled while employed in a position subject to the CSRS. It is error for an AJ to cite and rely on medical evidence dated after the applicant was separated from employment, without making a finding of whether the appellant was disabled at the time of her separation. Here, all of the evidence cited by the AJ post-dates the appellant's resignation, and does not address her condition at the time of her resignation.

2. The record does contain medical evidence from the period before the appellant's resignation, but this evidence does not indicate that the appellant's asthma was of disabling severity.

3. It is well settled that a disability annuitant claimant must establish the extent to which her disability can or cannot be controlled, and the appellant did not submit any evidence on this issue.

4. Although it appears that the appellant may have had an attendance deficiency, the medical and other evidence of record fails to show persuasively that this deficiency resulted from her asthma.

- ▶ **Appellant: Stephen R. Erkins**
Agency: United States Postal Service
Decision Number: [2008 MSPB 63](#)
Docket Number: CH-0752-07-0449-I-1
Issuance Date: March 14, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Discrimination

The appellant petitioned for review of an initial decision that affirmed the agency's removal action. The removal action was based on a single charge of improper conduct, in which the agency alleged that the appellant requested and used sick leave for times he was obligated to appear as a party in court proceedings. Following a hearing, the AJ found that the agency proved 7 of the 8 specifications, and that the removal penalty was reasonable and would promote the efficiency of the service.

Holdings: The Board affirmed the initial decision insofar as it sustained the agency's charge of misconduct, vacated the decision as to the penalty, and remanded the case for adjudication of the appellant's affirmative defenses of retaliation for protected EEO activity and discrimination:

1. The Board summarily affirmed the initial decision insofar as it sustained the agency's charge of misconduct, finding that the appellant's allegations on PFR were without merit.

2. Even if an agency proves its charges by a preponderance of the evidence, the Board cannot sustain the agency's action if the appellant shows that the decision was based on any prohibited personnel practice (PPPs) described in [5 U.S.C. § 2302\(b\)](#). The appellant asserted two PPPs in his appeal and in a prehearing

submission: discrimination; and retaliation for participating in protected EEO activity. Neither issue was addressed in the initial decision.

3. An AJ must apprise an appellant of the applicable burdens of going forward with the evidence and of proving a particular affirmative defense, as well as the kind of evidence the appellant is required to produce to meet his burden. The AJ never did this with respect to the discrimination claim, and only did so at the start of the hearing with respect to the retaliation claim, but this was insufficient because the appellant had no real opportunity to obtain the necessary evidence or prepare relevant arguments prior to the start of the hearing.

- ▶ **Appellant: Joseph V. Arrieta**
Agency: Department of Homeland Security
Decision Number: [2008 MSPB 64](#)
 Docket Number: DC-0752-07-0665-I-1
 Issuance Date: March 17, 2008
 Appeal Type: Adverse Action by Agency
 Action Type: Suspension - Indefinite

Timeliness - PFR
Miscellaneous Agency Actions
- Indefinite Suspensions

The appellant petitioned for review of an initial decision that dismissed his appeal of an indefinite suspension as withdrawn. The appellant indefinitely suspended the appellant from his position as a Deportation Officer pending the outcome of an investigation by the agency's Office of Inspector General (OIG). The agency stated that the suspension would be terminated, and the appellant returned to a paid duty status, upon the completion of the investigation, but added that the suspension would continue through the notice period if an adverse action was proposed against him. The appellant filed a Board appeal challenging his indefinite suspension, but later moved to withdraw the appeal, stating that the OIG investigation had been completed. The AJ dismissed the appeal as withdrawn on August 7, 2007. About 3½ months later, the appellant sought to reopen his appeal, stating that he had not been returned to paid status upon receiving the OIG final investigation. He provided the Board with a notice of proposed removal dated October 29, 2007.

Holdings: The Board denied the appellant's PFR as untimely filed without good cause shown, but forwarded the pleading to the regional office for docketing and processing as a separate appeal challenging the continuation of the appellant's indefinite suspension:

- 1. The appellant failed to establish good cause for the 2½ delay in filing his PFR.**
- 2. The appellant's submission could be considered as a separate appeal challenging the continuation of his indefinite suspension. In *Rhodes v. Merit Systems Protection Board*, [487 F.3d 1377](#), 1381 (Fed. Cir. 2007), the Federal Circuit recently held that the imposition of an indefinite suspension and the failure to terminate that suspension after the condition subsequent has occurred are separately reviewable agency actions.**

- ▶ **Appellant: Susan K. McDonnell**
Agency: Department of Agriculture
Decision Number: [2008 MSPB 65](#)
Docket Number: DE-1221-07-0427-W-1
Issuance Date: March 17, 2008
Appeal Type: Individual Right of Action (IRA)

Whistleblower Protect Act
- Protected Disclosure

The appellant petitioned for review of an initial decision that dismissed her IRA appeal for lack of jurisdiction. In her complaint to OSC, and in her subsequent appeal to the Board, the appellant alleged that her supervisor took personnel actions against her in retaliation for whistleblowing disclosures. Without holding a hearing, the AJ dismissed the appeal for lack of jurisdiction, finding that the appellant failed to make a non-frivolous allegation that she made a disclosure protected by [5 U.S.C. § 2302\(b\)\(8\)](#).

Holdings: The Board granted the appellant’s PFR, reversed the initial decision, and remanded the case to the regional office for further adjudication:

- 1. The appellant’s disclosure that her supervisor canceled a vacancy announcement that he had previously approved in order to laterally assign a different employee who was unqualified for the position, as a favor to another management official, was a protected disclosure under the WPA. The Board has held that disclosures about hiring and selection improprieties, including giving preferential treatment to friends, may constitute non-frivolous allegation of protected disclosures that statutory provisions have been violated.**
- 2. The appellant’s other 3 purported whistleblowing disclosures were not protected.**
- 3. The appellant made a non-frivolous allegation that her protected disclosure was a contributing factor in a covered personnel action—her supervisor preventing her from supervising her subordinate.**

- ▶ **Appellant: Ori E. Scriffiny**
Agency: Office of Personnel Management
Decision Number: [2008 MSPB 66](#)
Docket Number: DE-0831-07-0307-I-1
Issuance Date: March 20, 2008
Action Type: Retirement/Benefit Matter

Defenses and Miscellaneous Claims
- Equitable Estoppel

OPM petitioned for review of an initial decision that review of an initial decision that reversed its reconsideration decision denying as untimely the appellant’s request to elect a maximum survivor annuity for her spouse. When she retired in 2004, the appellant elected a partial survivor annuity for her spouse. In 2007, she requested that this be changed to a maximum survivor annuity. OPM denied the request as untimely, as it was not filed within 18 months of the appellant’s retirement, as required by law

and regulation. On appeal to the Board, the AJ reversed OPM's determination, and ordered OPM to grant the appellant's request, on the basis that the appellant's employing agency had committed affirmative misconduct by providing misinformation to the appellant concerning her survivor annuity election. Specifically, the AJ found that the appellant expressed that she wanted to provide for the maximum possible benefits and continuing health insurance for her husband, who is disabled, and the human resources employee instructed her to select a partial survivor annuity rather than a maximum survivor annuity.

Holdings: The Board granted the PFR, vacated the initial decision, and affirmed OPM's reconsideration decision:

1. The Board has recognized 3 bases for waiving a filing deadline prescribed by statute or regulation: (1) the statute or regulation provides for a waiver; (2) an agency's affirmative misconduct may preclude enforcement of the deadline under the doctrine of equitable estoppel; and (3) an agency's failure to provide a notice of rights and the applicable filing deadline may warrant a waiver. Neither the first or third bases have any applicability here.

2. The Board need not reach OPM's argument that the Supreme Court's decision in *Office of Personnel Management v. Richmond*, [496 U.S. 414](#), 416, 434 (1990), precludes the application of equitable estoppel.

3. The facts of this case do not warrant the application of equitable estoppel. a. Neither the Board nor the federal courts has established a clear test for when the government has engaged in affirmative misconduct that would justify the application of equitable estoppel. But certain principles have emerged, including that the negligent provision of misinformation does not constitute affirmative misconduct. The Board adopted that principle, and found it sufficient to resolve this case. Although the record supports the conclusion that the human resources employee provided misinformation on which the appellant relied to her detriment, there is no evidence that the employee knew that the advice she gave was incorrect.

- ▶ **Appellant: Kimberly K. Lopez**
- Agency: Department of the Navy**
- Decision Number: [2008 MSPB 67](#)**
- Docket Number: SF-0752-07-0352-I-1
- Issuance Date: March 20, 2008
- Appeal Type: Adverse Action by Agency
- Action Type: Removal

Penalty

Both parties petitioned for review of an initial decision that sustained the agency's charge but mitigated the appellant's removal to reinstatement to a specified position.

Holding: After considering the extremely complicated procedural history of this employment controversy, the Board held that the only issue before it was the reasonableness of the penalty, and found that removal was within the bounds of reasonableness.

► **Appellant: Elizabeth A. Sage**
Agency: Department of the Army
Decision Number: [2008 MSPB 68](#)
Docket Number: CH-3443-07-0588-I-1
Issuance Date: March 20, 2008

Jurisdiction
Miscellaneous Agency Actions
- Indefinite Suspensions

The appellant petitioned for review of an initial decision that dismissed her appeal for lack of jurisdiction. The appellant is the Clinical Director of the substance abuse program at the agency's Ireland Army Community Hospital in Fort Knox, Kentucky. The agency proposed to suspend the appellant for 45 days for disciplinary reasons, and placed her clinical privileges in abeyance pending action by a credentials committee. The agency thereafter set aside the proposed suspension, and subsequently dismissed the privileging action, ordering the full restoration of the appellant's clinical privileges and the removal from her record of all adverse documentation. In her Board appeal, the appellant alleged that she had been subjected to a constructive suspension. She alleged, inter alia, that, she had been "locked out of her job for the past nine months (relegated to licking stamps)", and that her supervisor "verbally and mentally abused [her] by yelling at her, belittling her, silencing her, and ostracizing her," which placed her under such extreme stress that she was forced to take a total of 158.50 hours of sick leave and approximately 350 hours of annual leave." Without holding a hearing, the AJ found that "no appealable action has been shown to have occurred," concluding that the appellant had not been suspended because she had not been placed in a temporary status without duties and pay, and because she had remained a paid employee of the agency at all times pertinent to the appeal.

Holdings: The Board denied the appellant's PFR, but reopened the appeal on its own motion, vacated the initial decision, and remanded the case for further adjudication:

- 1. An employee who has been forced to use sick leave, annual leave, or leave without pay for a period exceeding 14 days has been subjected to a constructive suspension appealable to the Board under [5 U.S.C. §§ 7512\(2\)](#) and [7513\(d\)](#). Ordinarily, the key question for jurisdictional purposes is whether the employee or the agency initiated the absence. Proof of intolerable working conditions compelling an employee to be absent may support a finding of a constructive suspension in certain circumstances where the employee also shows that she put the agency on notice of the objectionable working conditions and requested assistance or remediation from the agency.**
- 2. An appellant must receive explicit information on what is required to establish an appealable jurisdictional issue. The appellant's allegations and supporting documentation were sufficient to require the AJ to issue a notice of the elements of a constructive suspension claim as described above. Because the AJ did not do so, a remand is necessary to afford the appellant an opportunity to submit evidence**

and argument to show that the Board has jurisdiction over her appeal as a constructive suspension.