



U.S. Merit Systems Protection Board

CASE REPORT

DATE: May 19, 2008

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BOARD DECISIONS

- ▶ **Appellant: Jerome Deas**
Agency: Department of Transportation
Decision Number: [2008 MSPB 101](#)
Docket Number: AT-0752-07-0563-I-1
Issuance Date: May 12, 2008
Appeal Type: Adverse Action by Agency
Action Type: Constructive Adverse Action

Jurisdiction
Discrimination
Mootness

The appellant petitioned for review of an initial decision that dismissed his appeal as moot. While the appellant was under investigation for allegations of misconduct, the agency issued a “notice of proposed enforced leave” in which it alleged that he made intimidating remarks in the hearing of his fellow workers while he was a respondent in the agency investigation, and placed him on administrative leave. The agency never issued a written decision on the suspension proposal, but it later changed the status of the appellant’s absence from administrative leave to sick leave, without telling the appellant that it was making this change. After the appellant learned of the agency’s action, he filed a Board appeal requesting compensatory damages and alleging that the agency action was motivated by race discrimination. After the appeal was filed, the agency issued a letter in which it stated that “this change [in the appellant’s leave status] was regretfully made in error.” The agency stated that it had changed the appellant’s leave status back to administrative leave, restored the appellant’s sick leave, and corrected its records, and it moved to dismiss the appeal as moot. The AJ ordered the appellant to submit evidence and argument as to whether the agency had completely rescinded its action, and also ordered the appellant to set forth a nonfrivolous allegation of race discrimination. The appellant sought discovery as to the latter matter, and filed motions to compel, which the AJ denied in part. In dismissing the appeal as moot, the AJ ruled that there was no genuine issue that the agency had returned the appellant to

administrative leave, restored the appellant's sick leave, and removed all documents pertaining to the action from his personnel file, thus completely rescinding the merits of the action. The AJ further found that the appellant failed to make a nonfrivolous allegation of discrimination.

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

1. The agency failed to establish that it completely rescinded the appellant's constructive suspension.

- a. **The Board's jurisdiction is determined by the nature of an agency's action at the time an appeal is filed with the Board, and an agency's unilateral modification of its adverse action after an appeal has been filed cannot divest the Board of jurisdiction unless the appellant consents to such forfeiture, or unless the agency completely rescinds the action being appealed. When an appellant has an outstanding claim of discrimination and has raised what appears to be a further claim for compensatory damages, the agency's complete rescission of the adverse action does not make the matter moot because it does not afford the appellant all the relief he could receive if the matter had been adjudicated and he had prevailed.**
- b. **The agency had subjected the appellant to an appealable suspension at the time the appellant filed his appeal because he had been in an enforced sick leave status for more than 14 days.**
- c. **The current record is insufficient to support the AJ's finding that the agency took all steps necessary to completely rescind the appellant's suspension, as it has neither alleged nor offered evidence to indicate that it purged the notice of proposed suspension from any of the appellant's personnel files.**
- d. **If the appeal had been adjudicated and the appellant had prevailed, a Board order to cancel the suspension would have required the agency to place the appellant in a duty status, unless the agency could establish a strong overriding interest in keeping the appellant in an administrative leave status. The agency did not return the appellant to a duty status or establish a strong overriding interest in keeping the appellant in an administrative leave status.**
- e. **This case is distinguishable from others in which the Board has found an appeal moot despite an agency's failure to return the appellant to a duty status because those cases, unlike the present one, involved appellants who were in a non-duty status prior to the rescinded action for reasons unrelated to the action being appealed.**

2. While the appellant's allegations are insufficient on the current record to allege a prima facie case of race discrimination on the basis of disparate treatment, the AJ abused her discretion in denying the appellant the opportunity to complete discovery regarding the suspension proposal.

- **Appellant: James Fitzgerald**
Agency: Department of the Air Force
Decision Number: [2008 MSPB 102](#)
Docket Number: SF-315H-08-0119-I-1
Issuance Date: May 12, 2008
Appeal Type: Termination of Probationers

Jurisdiction

- Covered “Employee”

Board Procedures/Authorities

- Interlocutory Appeals

This case was before the Board on interlocutory appeal from the AJ’s ruling staying the proceedings and certifying for review her ruling that the Board has jurisdiction over this appeal. Effective August 7, 2005, the appellant was appointed to the excepted service position of WG-10 Aircraft Mechanic as a National Guard Technician (NGT) with the Adjutant General at Andrews Air Force Base, Maryland. This appointment was subject to the completion of a 1-year trial period and required the appellant to remain an active member of the Air National Guard. The appellant successfully completed his trial period, at which time he received a career-conditional appointment to a WG-10 Aircraft Mechanic position in the competitive service at March Air Reserve Base in California. This position was subject to the completion of a 1-year probationary period. The agency terminated the appellant in November, prior to the completion of the 1-year probationary period. At issue in this appeal was whether the appellant is an employee with appeal rights to the Board. The AJ ruled that the appellant is an employee under [5 U.S.C. § 7511](#)(a)(1)(A)(i) and (ii), in that his time in the NGT position counted toward the 1-year “current continuous service” requirement in the statute.

Holdings: The Board affirmed the AJ’s ruling as modified, vacated the stay order, and returned the case to the AJ for adjudication on the merits:

- 1. The requirements for an interlocutory appeal under [5 C.F.R. §§ 1201.91 to 1201.93](#) are satisfied, in that the record shows that the ruling involves an important question of law or policy about which there is substantial ground for difference of opinion, and an immediate ruling will materially advance the completion of the proceeding, or that the denial of an immediate ruling will cause undue harm to a party or the public.**
- 2. Prior service in the excepted service can count toward the 1-year current continuous service requirement for individuals in the competitive service under [5 U.S.C. § 7711](#)(a)(1)(A)(ii). Throughout section 7511, the phrase “current continuous service” is used without specifying that such “service” must be in the competitive or excepted service. This interpretation is consistent with OPM’s regulation at [5 C.F.R. § 752.402](#)(b), which does not define current continuous employment as a period of service confined to either the competitive or excepted service.**

3. The appellant's NGT service, along with his service as an Aircraft Mechanic at March Air Reserve Base, provided him with 1 year of current continuous service under [5 U.S.C. § 7711\(a\)\(1\)\(A\)\(ii\)](#).

► **Appellant: Anne Haefele**

Agency: Department of the Air Force

Decision Number: 2008 MSPB 103

Docket Number: [AT-0752-07-0446-X-1](#)

Issuance Date: May 12, 2008

Appeal Type: Adverse Action by Agency

Action Type: Removal

**Compliance
Settlement**

This case was before the Board pursuant to the AJ's Recommendation finding that the agency breached the terms of a settlement agreement. The parties entered into an oral settlement agreement, which the AJ accepted into the record for enforcement, which resolved an appeal of the agency's removal action. The settlement provided that the agency would substitute a 1-day suspension for the removal action, and that the appellant would resign. It is undisputed that the agency failed to process the personnel actions required by the oral settlement agreement. The agency asserted that the agreement was not intended to be binding until it was reduced to writing and signed by the parties, that the appellant and her representative did not sign and return a transcription of the settlement agreement provided by the agency, and that it could not process the agreed upon personnel actions absent a signed agreement. The AJ found the agency to be in noncompliance with its obligations under the oral settlement agreement, and gave the appellant the choice between enforcement of the settlement agreement and rescission of the agreement and reinstatement of her appeal. She chose the latter.

Holdings: The Board adopted the Recommendation, vacated the initial decision in the merits proceeding, and forwarded the case to the regional office for reinstatement of the underlying appeal:

- 1. An oral settlement agreement is valid and binding on the parties. Even where there is language suggesting that the oral agreement will be reduced to writing, that alone is insufficient to invalidate an otherwise valid oral agreement. Only where the record shows that the parties did not intend to be bound until the settlement agreement was reduced to writing and signed is an oral settlement agreement not binding on the parties.**
- 2. The oral settlement agreement did not indicate that the agreement was conditioned in any way upon it being reduced to writing and signed by the parties.**
- 3. In construing the terms of a settlement agreement the words of the agreement itself are of paramount importance, and parol evidence will be considered only if the agreement is ambiguous. (Parol evidence is evidence other than the terms of the agreement itself.) Because there is no ambiguity in the settlement agreement, the Board rejected consideration of a statement by an agency technical advisor as to what was "intended" and "understood."**

- **Appellant: Carolyn A. Miller**
Agency: Department of the Army
Decision Number: [2008 MSPB 104](#)
Docket Number: AT-0752-05-0990-X-1
Issuance Date: May 12, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Compliance

This case was before the Board on the AJ's Recommendation finding that the agency was not in compliance with its obligations under the Board's final order. In the merits proceeding, the Board mitigated the agency's penalty of removal from a General Investigative Specialist position to a 60-day suspension. In her petition for enforcement, the appellant complained that she was not placed in her former position, but was instead placed into a Support Specialist position. She further alleged that the agency had not adequately explained its calculations of back pay and interest and the restoration of her leave. The agency contended that the nature of the appellant's misconduct disqualified her from working in her former position in the Office of Inspector General (OIG), and that it was in compliance with its obligations as pay, interest, and leave. The AJ found that the agency was not in compliance with its obligations as to either matter.

Holdings:

- 1. The Board rejected the agency's argument that, because it detailed the appellant to a non-OIG position prior to her removal, the status quo ante would be to place her in a similar non-OIG position. The appellant's position of record at the time of her removal was the one she had held in OIG.**
- 2. The agency has not established that it has reinstated the appellant to her former position or that it has reassigned her to a substantially similar position.**
 - a. If an agency does not return and employee to her former position, it must show that: (1) It has a strong overriding interest or compelling reason requiring reassignment to a different position; and (2) it has reassigned the employee to a position which is substantially similar to the former position.**
 - b. The agency has articulated an overriding interest or compelling reason for not returning the appellant to her OIG position. The AJ found in the original proceeding that the appellant's conduct was unsuitable, tended to detract from her character, and reflected a betrayal of trust.**
 - c. The responsibilities of the appellant's new position as a Support Specialist are not substantially similar to those of her former position.**
 - d. The Board ordered the agency to reinstate the appellant to her former position or reassign her to a position which is substantially similar to that position.**
- 3. The agency has submitted credible evidence that is paid the appellant the correct amount of back pay, interest on back pay, and provided other benefits as required.**

- **Appellant: Mary Rose Diefenderfer**
Agency: Department of Transportation
Decision Number: [2008 MSPB 105](#)
Docket Number: SE-1221-03-0298-W-3
Issuance Date: May 13, 2008
Appeal Type: Individual Right of Action (IRA)

Whistleblower Protection Act
- Covered Personnel Actions
- Exhaustion of Remedy

Both parties petitioned for review of an initial decision that denied the appellant's request for corrective action in this IRA appeal and found that the appellant failed to show that her resignation was involuntary. The appellant worked for the Federal Aviation Administration in various positions from 1988 until her resignation in November 1999. She alleged that she was subjected to a number of personnel actions in retaliation for making whistleblowing disclosures. In a prehearing order, the AJ found that the appellant had made nonfrivolous allegations that she made at least one protected disclosure, that the agency had taken several covered personnel actions against her, and that her disclosure was a contributing factor in at least one of the personnel actions. He further found that the appellant exhausted her OSC remedy. After holding a hearing, he issued an initial decision finding that the agency had presented clear and convincing evidence that it would have taken its personnel actions in the absence of any protected disclosures. He further found that the appellant's resignation was voluntary.

Holdings: The Board affirmed the initial decision in part, vacated it in part, and remanded the appeal to the regional office for further adjudication:

1. The AJ correctly determined that the appellant failed to make a nonfrivolous allegation that her exclusion from a particular office, or the revocations of her medical certifications, constituted personnel actions.

- a. The appellant failed to establish that her exclusion from the Flight Standards District Office constituted a "significant change in duties, responsibilities, or working conditions" under [5 U.S.C. § 2302\(a\)\(2\)\(A\)\(xi\)](#), as the appellant did not identify any effect the exclusion had on her duties, responsibilities, or working conditions.**
- b. The AJ did not err in determining that the agency's revocation of her medical certification was not a covered personnel action as a decision concerning pay or benefits under [5 U.S.C. § 2302\(a\)\(2\)\(A\)\(ix\)](#). The appellant did not allege that her failure to hold a medical certificate caused, or was even a factor in, any nonselection of which she complained.**

2. The Board vacated the AJ's findings as to several matters, including the voluntariness of her resignation, and remanded these matters to the regional office for further adjudication.

- a. The AJ excluded from consideration as allegedly retaliatory personnel actions the appellant's nonselection for the positions of assistant air crew**

program manager and assistant principal operations inspector. While the appellant did raise these matters prior to the AJ's prehearing order defining the scope of the hearing, the record does not establish whether these matters were raised before OSC, as required by [5 U.S.C. § 1214\(a\)\(3\)](#). OSC's failure to mention these nonselections does not preclude a finding that the appellant exhausted her OSC remedy with respect to them.

- b. In excluding the appellant's claim that she was ordered to undergo a psychiatric examination in reprisal for protected disclosures, the AJ appeared to assume that [5 U.S.C. § 2302\(a\)\(2\)\(A\)\(x\)](#) covers only direct orders. An action may be covered under this provision even if the instructions at issue include language sometimes associated with offers or recommendations.
- c. The AJ based his conclusion that the appellant's resignation was voluntary in part on findings that the agency did not engage in any acts of reprisal against the appellant due to her protected disclosures. Because the appeal is being remanded for further consideration of some of the appellant's claims of reprisal, and because these claims are intertwined with the appellant's claim that her resignation was involuntary, further consideration of the latter claim is appropriate.

► **Appellant: Kenneth K. Kamahele**
Agency: Department of Homeland Security
Decision Number: [2008 MSPB 106](#)
Docket Number: SF-0752-06-0866-I-1
Issuance Date: May 15, 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 charges of misconduct against the appellant, but which mitigated the agency's removal penalty to a 90-day suspension. The appellant was Assistant Federal Security Director-Screening of the Honolulu International Airport. The agency removed him on two charges: inappropriate conduct towards Transportation Security Administration employees; and lack of candor during a management inquiry. Following a hearing, the AJ found that the agency proved 2 of its 5 specifications of the first charge: that he suggested to Screening Managers that they offer employment applications for Jack-in-the-Box (a fast-food restaurant) to screeners who complained or raised issues; and that he used derogatory terms such as "punk," "bully," and "scum," while counseling a particular screener, that he told this screener that he would put the screener in prison if he had the chance, and that he played an air violin and cut the screener off when the screener tried to explain his conduct. The AJ found that the agency proved 1 of its 2 specifications under the second charge, finding that the appellant exhibited a lack of candor when he failed to admit possessing and joking about Jack-in-the-Box applications. As to the reasonableness of the penalty, the AJ found that the deciding

official did not consider all of the relevant *Douglas* factors, i.e., whether the appellant acted for financial gain, the appellant's dependability during 4 years of service, and the fact that the appellant's supervisors at the Airport still had confidence in his work. The AJ therefore found that the agency's penalty determination was not entitled to deference and he independently weighed the relevant factors, concluding that a 90-day suspension was the maximum reasonable penalty.

Holdings: The Board affirmed the initial decision's findings on the charges, but reversed the initial decision's holding on the penalty, and sustained the appellant's removal:

1. Because the agency failed to identify any internal inconsistencies or inherent improbability in the AJ's fact finding or other basis sufficient to overcome the special deference which reviewing bodies must necessarily accord the factual determinations of the original trier of fact, the Board sustained the AJ's findings with respect the merits of the charges.

2. The Board found that the AJ improperly weighed the *Douglas* factors and substituted his own judgment for that of the deciding official.

- a. Based on the misconduct with which the appellant was charged, "financial gain" was not a relevant factor in this case and the AJ erred by considering it.**
- b. The deciding official stated that he considered the appellant's length of service and his lack of any prior discipline. The deciding official thus did in essence consider the appellant's dependability during his service with the agency.**