



# U.S. Merit Systems Protection Board

CASE REPORT

DATE: June 13, 2008

**Note:** These summaries are descriptions prepared by individual MSPB employees. They do not represent official summaries approved by the Board itself, and are not intended to provide legal counsel or to be cited as legal authority. Instead, they are provided only to inform and help the public locate Board precedents.

## BOARD DECISIONS

- ▶ **Appellant: John Luzi**  
**Agency: Office of Personnel Management**  
**Decision Number: [2008 MSPB 121](#)**  
Docket Number: AT-831E-06-0901-B-1  
Issuance Date: June 5, 2008  
Appeal Type: CSRA - Employee Filed Disability Retirement

### **Retirement** **- Disability Retirement**

The appellant petitioned for review of a remand initial decision that affirmed OPM's determination that he is not entitled to disability retirement benefits. OPM issued a final decision denying the appellant's first application for disability retirement benefits in November 2004, and the Board affirmed that determination in March 2005. In July 2005, the appellant filed a second application, claiming that he was disabled by chronic Post-Traumatic Stress Disorder. OPM dismissed the appellant's second disability retirement application on the ground that he was basing his entitlement on the same medical conditions claimed in the first application for disability retirement. On appeal to the MSPB, the administrative judge (AJ) affirmed OPM's determination on the basis of res judicata (claim preclusion). On review, the Board vacated and remanded, finding that the appellant's claims were not completely barred by res judicata. [2007 MSPB 158](#), 106 M.S.P.R. 160. Specifically, the Board found that the appellant was entitled to a decision on the merits of his claim that, after the AJ's first decision in March 2005, his PTSD worsened while he was still employed in a covered position by the Postal Service. After considering the parties' additional evidence on remand, the AJ found that the appellant was entitled to a presumption of entitlement to disability retirement under *Bruner v. Office of Personnel Management*, [996 F.2d 290](#), 294 (Fed. Cir. 1993), but that he was not entitled to disability retirement because his medical condition was "situational."

**Holdings:** The Board denied the appellant's petition for review (PFR), and affirmed the initial decision as modified:

1. The Board disagreed with the AJ's determination that the appellant's condition was situational. The Board has rejected disability claims based exclusively on an employee's reaction to a particular workplace, but this was not the case here. The appellant's doctor testified that the appellant "is sensitized to contact with [the Postal Service] and has high level of phobic avoidance of anything related to [the Postal Service]."

2. Nevertheless, the Board found that the appellant failed to establish he entitlement to disability retirement. All of his new evidence post-dates his February 2006 separation from the Postal Service, and does not address his condition between the first MSPB decision and that separation. He thus failed to establish that his condition worsened during that period of time.

- **Appellant:** Robert S. Pasley  
**Agency:** Department of the Treasury  
**Decision Number:** [2008 MSPB 122](#)  
**Docket Number:** DC-1221-07-0810-W-1  
**Issuance Date:** June 5, 2008  
**Appeal Type:** Individual Right of Action (IRA)

**Whistleblower Protection Act**

- Abuse of Authority
- Contributing Factor
- Exhaustion of Remedy
- Personnel Actions – Covered Agency
- Protected Disclosure

The appellant petitioned for review of an initial decision that dismissed his IRA appeal for lack of jurisdiction. In May 2005, the appellant retired from his position as an Assistant Director in the agency's Office of the Comptroller of the Currency. He was later hired as a Senior Vice President at the Bank of America, but was informed in February 2007 that he was being laid off. Later the same month, he filed a complaint with OSC alleging reprisal for whistleblowing. After OSC notified him that it was terminating its investigation, he filed an IRA appeal with the MSPB. The AJ divided the appellant's allegations of retaliation for whistleblowing into 2 categories: pre-retirement allegations and his "private sector termination." Regarding the former, the appellant alleged that he disclosed to his second-level supervisor that his first-level supervisor abused his authority by arranging for a female peer of the appellant, with whom the first-level supervisor appeared to have a close personal and romantic relationship, to take over the appellant's role in cases he was supposed to be supervising and thus to diminish his responsibilities to a significant degree. He further alleged that, when his first-level supervisor found out that he had disclosed the situation to the second-level supervisor, the first-level supervisor told him he had made a serious mistake and that he would regret it, and later gave him the worst performance evaluation that he had received in 28 years, which adversely affected his receipt of

monetary awards. The AJ found that the appellant failed to show that he had exhausted his administrative remedies with OSC with respect to these allegations, as required by [5 U.S.C. § 1214\(a\)\(3\)](#). She found that “there is no allegation in the complaint to OSC that prior to his retirement, as a result of whistleblowing he received a lower performance evaluation and an insufficient bonus.” Rather, she found that “all pertinent evidence submitted by the appellant established that all the appellant ever reported to OSC was that he received a lower performance evaluation because he voiced his dissatisfaction about the work he and another employee were assigned by [the first-level supervisor].” She found that “such claim is fundamentally different from the one he made to the Board in his IRA appeal and as such is a recharacterization of his allegations.”

With respect to the “private sector termination,” the appellant alleged that his being laid off by the Bank of America was the result of his whistleblowing, as the agency told the bank that it would not deal with the appellant as the bank’s liaison with the agency. The AJ found that the loss of his private sector job was not a personnel action covered under the Whistleblower Protection Act.

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

- 1. The appellant’s termination from the Bank of America was not covered by the WPA, because it does not meet the definition of “personnel action” since it was not taken with respect to an employee in a covered position in an agency or a governmental corporation, as required by [5 U.S.C. § 2302\(a\)\(2\)\(B\)](#).**
- 2. The Board found that the appellant did exhaust his administrative remedies before OSC with respect to his “pre-retirement allegations.” The key to determining whether an appellant has satisfied the exhaustion requirement in an IRA appeal is whether he provided OSC with a sufficient basis to pursue and investigation, not whether he correctly labeled the category of wrongdoing. The AJ appears to have focused on the appellant’s initial OSC complaint to determine whether he exhausted his administrative remedies. But the appellant amended that complaint to include the allegations raised in his IRA appeal, and again in his response to OSC’s preliminary close-out letter, which OSC acknowledged in its final close-out letter.**
- 3. The appellant made a non-frivolous allegation that he made a protected disclosure, i.e., that he had a reasonable belief that his disclosures revealed an abuse of authority, which occurs when there is an arbitrary or capricious exercise of power by a federal official that adversely affects the rights of any person or results in personal gain or advantage to himself or preferred other persons. In addition, a supervisor’s use of his influence to denigrate other staff members in an abusive manner and to threaten the careers of staff members with whom he disagrees constitutes an abuse of authority. The appellant’s disclosures relating to his first-level supervisor meet these requirements.**
- 4. The appellant made a non-frivolous allegation that his protected disclosure was a contributing factor in the agency’s decision to take or fail to take covered**

personnel actions, in this case his performance evaluation and his failure to obtain monetary awards.

- ▶ **Appellant: Bradford Mc Donald**  
**Agency: United States Postal Service**  
**Decision Number: [2008 MSPB 123](#)**  
Docket Number: CH-3443-07-0312-I-1  
Issuance Date: June 6, 2008

**Timeliness – PFR**

**Board Procedures**

- **Withdrawal of Appeal**
- **Reopening and Reconsideration**

The appellant petitioned for review of an initial decision that dismissed his appeal as withdrawn. The appellant filed an appeal with the Board's regional office in March 2007, and withdrew the appeal later that month. The AJ issued an initial decision dismissing the appeal as withdrawn on April 5, 2007. The decision informed the appellant that a petition for review of that decision must be filed by May 10, 2007. The appellant filed a PFR in January 2008, more than 8 months after the deadline.

**Holding: The Board dismissed the appeal as untimely filed without good cause shown. It also found that the appellant failed to establish a basis for reopening the appeal.**

- ▶ **Appellant: Joseph S. Fanelli**  
**Agency: Department of Agriculture**  
**Decision Number: [2008 MSPB 124](#)**  
Docket Number: CB-7121-07-0028-V-1  
Issuance Date: June 10, 2008  
Appeal Type: Arbitration Appeals/Grievances

**Arbitration/Collective Bargaining-Related Issues**

- **Interpretation of Contract**
- **Review Authority of MSPB**

The appellant requested review of an arbitration decision that found his grievance of the agency's removal action to have been untimely filed. The agency removed the appellant from his position as a GS-11 Microbiologist, effective April 24, 2004. The appellant elected to grieve his removal through the agency's negotiated grievance procedure. Instead of proceeding with a Step 1 grievance, the appellant sought to initiate the grievance at the Step 3 level by submitting a May 13, 2004 letter to the deciding official and Center Director, which he supplemented in a May 23, 2004 letter. The deciding official issued a written decision finding that the appellant's grievance was untimely filed. The matter was submitted to arbitration, and the arbitrator issued a decision finding that the appellant's Step 3 grievance was untimely filed.

**Holdings: The Board granted the appellant's request for review, but sustained the arbitrator's decision:**

1. The Board has jurisdiction to review the arbitration decision under [5 U.S.C. § 7121\(d\)](#), as the subject matter of the grievance (a removal) is one over which the Board has jurisdiction, the appellant has alleged discrimination in connection with that action, and a final decision has been issued.
2. The Board noted that, where the determinative issue results from an arbitrator's interpretation of a collective bargaining agreement (CBA) provision involving a purely procedural issue, some cases, e.g., *Hackerman v. Social Security Administration*, [72 M.S.P.R. 23](#) (1996), and *Sweeney v. Department of the Army*, [69 M.S.P.R. 392](#) (1996), have deferred to the arbitrator's interpretation without discussion, but that in *Morales v. Social Security Administration*, [2007 MSPB 287](#), 107 M.S.P.R. 360, the Board gave greater scrutiny to the arbitrator's interpretation. The Board therefore found it appropriate to clarify the appropriate standard of review.
3. An arbitrator's interpretation of the CBA should only be vacated when it fails to draw its essence from the CBA, and any doubts concerning the propriety of the merits of an arbitrator's decision must be resolved in favor of the decision.
  - a. Federal common law has created a principle of judicial deference to arbitral decisions under a functional standard which recognizes arbitration's unique role in labor-management relations.
  - b. The Board found the holdings of the Federal Labor Relations Authority to be persuasive guidance in this area. The FLRA has consistently held that an arbitration award is deficient only when it fails to draw its essence from the CBA, i.e., when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the CBA as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement.
4. Under this standard, the Board found no basis for finding that the arbitrator's interpretation failed to draw its essence from the Negotiated Agreement, that his interpretation manifested an infidelity to this obligation, or that he erred as a matter of law in interpreting civil service law, rule, or regulation. Accordingly, the appellant had not overcome the greater degree of deference afforded to arbitration decisions.

## COURT DECISIONS

- ▶ **Petitioner: Douglas Kahn**  
**Respondent: Department of Justice**  
**Court: U.S. Court of Appeals for the Federal Circuit**  
Docket Number: [2007-3216](#)  
Issuance Date: June 11, 2008

### **Whistleblower Protection Act - Protected Disclosure**

The petitioner appealed from an initial decision, which became the Board's final decision, that dismissed his IRA appeal for lack of jurisdiction on the ground that his disclosures were made as part of his normal job duties. Kahn is a Special Agent with the Drug Enforcement Administration. He was a member of a Task Force operating out of the DEA's Beaufort, Georgia Office investigating drug crimes. The Task Force was comprised of DEA agents and local law enforcement officers who were designated as Task Force Agents (TFAs). One of the local officers was Donald Annis. The Beaufort Office reported to Steven Mitchell, the Resident Agent in Charge (RAC) of the DEA's Charleston Resident Office. During the Task Force's investigation, an individual who had recently been released from prison and who had an extensive criminal record contacted the Task Force and expressed an interest in becoming a confidential source. Eventually, Annis proceeded to utilize the individual as a confidential source. Kahn had a series of communications with RAC Mitchell relating to what Kahn stated was improper conduct of TFA Annis regarding the confidential source. Specifically, Kahn reported to his superiors that Annis had used the confidential source without having him documented and registered as a DEA source and that Annis had been involved with the confidential source in a drug transaction without following required procedures. Kahn also raised the issue of Annis's conduct with Annis's superiors at the Beaufort Country Sheriff's Office, and the Sheriff removed Annis from the Task Force. Thereafter, an Assistant United States Attorney who had worked with Annis complained of "integrity problems" in Kahn's investigative work for DEA. As a consequence, DEA's Office of Professional Responsibility conducted an investigation of Kahn, and ultimately cleared him of all charges of misconduct. Even though the DEA's OPR found no wrongdoing on Kahn's part, the United States Attorney's Office conducted its own investigation. It too determined that Kahn had not engaged in any wrongdoing, but recommended that Kahn be transferred to a post outside the State of South Carolina. The DEA transferred him to Atlanta, Georgia, and Kahn filed a complaint with OSC, followed by his IRA appeal with the MSPB.

Although he acknowledged that Kahn's position description confirmed that investigating the professional misconduct of Task Force agents such as TFA Annis did not form part of his normal duties, the AJ reasoned that, in discussing Annis's use of the confidential source with his superiors, Kahn was engaged in the core purpose of his position as a Criminal Investigator, and that his reports represented "disclosures made as part of normal duties through normal channels," and were therefore not protected under [5 U.S.C. § 2302\(b\)\(8\)](#).

**Holding:** The court held that the petitioner made non-frivolous allegations that his disclosures were made outside of his normal duties, and remanded the case to the MSPB for a hearing on the merits:

1. To establish jurisdiction over an IRA appeal, an appellant must make non-frivolous allegations that he engaged in whistleblowing activity by making a protected disclosure under [5 U.S.C. § 2302\(b\)\(8\)](#), and that the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action under 5 U.S.C. § 2302(a).
2. The standard for determining whether a disclosure is non-frivolous is analogous to that for summary judgment, i.e., the petitioner must show the existence of a material fact issue to support Board jurisdiction. The determination of whether an allegation of jurisdiction is non-frivolous is made based entirely on the written record, and a hearing with respect to the existence of jurisdiction is unnecessary.
3. Whether a disclosure is unprotected because it was made as part of an employee's normal job duties is governed by the framework set forth in *Huffman v. Office of Personnel Management*, [263 F.3d 1341](#) (Fed. Cir. 2001), in which the court described 3 categories into which a disclosure may fall, only the latter 2 of which are protected under the WPA: (1) disclosures made as part of normal duties through normal channels; (2) disclosures as part of normal duties outside of normal channels; and (3) disclosures outside of normal duties. The third category involves the situation "in which the employee is obligated to report the wrongdoing, but such report is not part of the employee's normal duties or the employee has not been assigned those duties."
4. The petitioner's contention that his disclosures fell within category 3 were supported by the fact that investigating the professional misconduct of Task Force agents such as Annis did not fall within his job description, and his affidavit, in which he stated that he, like all DEA Special Agents, is obligated to report misconduct if he is aware of it, but that this is not part of his normal duties with DEA. The government's contrary assertion is based on the Resident Agent in Charge's declaration, in which he stated that he designated Kahn to report to him daily regarding administrative matters and law enforcement operations, and that such reporting would have included Kahn's communications concerning Annis. The court concluded that, although this is a close case, the combination of Kahn's job description and the competing sworn statements of Kath and the RAC places the evidence on the question of Kahn's normal duties in equipoise, which means there is a genuine issue of material fact. Accordingly, the petitioner has presented non-frivolous allegations that his reports concerning Annis were not part of his normal duties, and a hearing on the merits is required.

► **Petitioner: Richland Security Service Co.**  
**Respondent: Chertoff**  
**Court: United States Supreme Court**  
Docket Number: [06-1717](#)  
Decision Below: [472 F.3d 1370](#) ((Fed. Cir. 2006)  
Issuance Date: June 2, 2008

**Attorney Fees**

**Holding:** Under the Equal Access to Justice Act (EAJA), [5 U.S.C. § 504\(a\)\(1\)](#) and [28 U.S.C. § 2412\(d\)\(1\)\(A\)](#), a prevailing party in a case brought by or against the Government may recover fees for paralegal services at the market rate for such services.