



U.S. Merit Systems Protection Board

CASE REPORT

DATE: June 27, 2008

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BOARD DECISIONS

- ▶ **Appellant: Edwin Joseph Tress, Jr.**
Agency: Office of Personnel Management
Decision Number: [2008 MSPB 125](#)
Docket Number: PH-0831-07-0644-I-1
Issuance Date: June 17, 2008
Action Type: Retirement/Benefit Matter

Timeliness - PFA

The appellant petitioned for review of an initial decision that dismissed his appeal as untimely filed. On July 24, 2007, the appellant received OPM's final decision reducing his retirement annuity. Three days later, he completed the MSPB appeal form contesting OPM's final decisions, but instead of sending to the MSPB, he mailed it to OPM. OPM did not forward it to the MSPB until September 14. The administrative judge (AJ) dismissed the appeal as untimely filed without good cause shown for the delay.

Holding: The Board reversed the initial decision and remanded the case for adjudication on the merits. Although the Board generally holds that an appellant's failure to follow explicit filing instructions does not constitute good cause for any ensuing delay, it has recognized an exception where appellants have timely but mistakenly sent appeals of OPM final decisions to OPM rather than to the MSPB, when: (1) The delay was caused in part by OPM's failure to redirect an otherwise timely appeal to the Board; (2) the appellant clearly intended to seek further review of OPM's decision; (3) the appellant was pro se (representing himself); and (4) there was no showing of prejudice to the agency. Those conditions have been met here.

- **Appellant: Joyce A. Brum**
Agency: Department of Veterans Affairs
Decision Number: [2008 MSPB 126](#)
Docket Number: PH-0752-07-0593-I-1
Issuance Date: June 19, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Timeliness - PFR

The appellant petitioned for review of an initial decision that affirmed the agency's action removing her from her position as a nursing assistant. The initial decision informed the appellant that this decision would become the Board's final decision unless a petition for review (PFR) was filed by January 24, 2008. The appellant mailed her PFR on February 9, 2008, more than two weeks late. The appellant did not respond to the show-cause issued by the Clerk of the Board.

Holding: The Board dismissed the PFR as untimely filed without good cause shown.

- **Appellant: Cecily A. Blount**
Agency: Department of the Treasury
Decision Number: [2008 MSPB 127](#)
Docket Number: PH-315H-07-0634-I-1
Issuance Date: June 19, 2008
Appeal Type: Termination of Probationers

Jurisdiction

- Probationers

Defenses and Miscellaneous Claims

- Harmful Error

The appellant petitioned for review of an initial decision that dismissed her appeal for lack of jurisdiction. It was undisputed that the agency terminated the appellant's employment during her probationary period in part for pre-appointment reasons. It was also undisputed that the agency did not follow the procedures required by [5 C.F.R. § 315.805](#), which include notice and an opportunity to respond. In dismissing the appeal for lack of jurisdiction, the AJ found that the agency's failure to comply with the procedural requirements of § 315.805 did not constitute harmful error.

Holdings: The Board granted the appellant's PFR, reversed the initial decision, and remanded the appeal for further adjudication:

1. An appellant must receive explicit information on what is required to establish an appealable jurisdictional issue. The AJ did not provide any notice to the appellant of a jurisdictional requirement relating to harmful error. Moreover, the AJ rejected the appellant's submissions filed subsequent to the agency's pleading on the jurisdictional issue, thereby preventing the appellant from addressing the issue of harmful error.

2. Based on the appellant's pleadings on PFR, the Board found that the appellant established jurisdiction over her appeal, and remanded the case to the regional office for further adjudication.

- **Appellant: Leonard P. Machulas**
Agency: Department of the Air Force
Decision Number: [2008 MSPB 129](#)
Docket Number: PH-3443-07-0282-I-2
Issuance Date: June 19, 2008

Miscellaneous Topics

- USERRA/VEOA/Veterans' Rights

The appellant petitioned for review of an initial decision that denied his request for corrective action regarding the agency's handling of his requests for leave for participating in active military duty summer camp in 1993. The AJ construed the appellant's appeal as a USERRA claim arising under *Butterbaugh v. Department of Justice*, [336 F.3d 1332](#) (Fed. Cir. 2003), and denied corrective action because the appellant "has not provided any evidence to show that he was forced to take military leave during a non-working time period, and that as a result was forced to use other types of approved leave."

Holdings: The Board vacated the initial decision and remanded it to the regional office for further adjudication under the substantive provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRA):

1. The appellant's claim that he is entitled to military leave from October 23 to November 6, 1993, concerns a time period that predates the enactment of USERRA in 1994. Although the substantive provisions of USERRA do not apply retroactively, where a governmental action violated a veterans' protection statute in effect at the time the conduct occurred, the Board has jurisdiction under USERRA to adjudicate the claims.
2. The AJ erred in applying the substantive provisions of USERRA. The appellant's claims are governed by VEVRA, the predecessor statute to USERRA.
3. The AJ erred in construing the appeal as a *Butterbaugh* claim. The appellant was not contending that he was improperly charged military leave, but that the agency improperly denied his request for military leave. This claim may be cognizable under VEVRA. In adjudicating the VEVRA claim, the USERRA burdens of proof set forth at [38 U.S.C. § 4311\(c\)](#) apply.
4. The AJ's failure to inform the parties of their respective burdens of proof may have prejudiced the parties' substantive rights, and requires a remand.

- **Appellant: Richard H. Walker**
Agency: Department of Veterans Affairs
Decision Number: [2008 MSPB 130](#)
Docket Number: DC-0752-06-0871-I-1
Issuance Date: June 19, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Timeliness – PFA and PFR
Retirement
- Disability Retirement

The appellant petitioned for review of an initial decision that dismissed his appeal as untimely filed. The appeal of this removal action was filed about 6 months after the deadline for timely filing. The appellant did not respond to the AJ's order advising him of the timeliness issue, which afforded him to opportunity to provide additional evidence and argument on the issue. In the initial decision dismissing the appeal as untimely filed, the AJ found that it appeared that the appellant could have been mentally incapacitated during some of the time prior to his untimely filing, but that the existing documentation did not account for the entire period of time. The appellant filed a pro se PFR in January 2008, almost a year after the deadline for timely filing.

Holdings:

- 1. Based on the evidence submitted on review, the Board found that the appellant has shown good cause for both his untimely filed appeal and his untimely filed PFR, and that he was incapacitated by mental illness during the relevant time periods.**
- 2. On remand, the AJ should inquire into whether the agency met any obligation it may have had to the appellant under [5 C.F.R. § 844.202](#) to file a disability retirement application on his behalf. If the agency does not on its own accord file an application for the appellant, then the use of *French* procedures would be appropriate.**

- **Appellant: Yvonne Fannette Howerton**
Agency: Department of the Army
Decision Number: [2008 MSPB 131](#)
Docket Number: DC-0752-07-0913-I-1
Issuance Date: June 20, 2008
Appeal Type: Adverse Action by Agency
Action Type: Suspension - Indefinite

Timeliness - PFR

The appellant filed her PFR 35 days after the deadline for timely filing. Although she filed a motion to accept her late-filed petition, she did not provide any explanation for the delay in filing.

Holding: The Board dismissed the PFR as untimely filed without good cause shown.

- **Appellant:** Michael W. Harlston, Sr.
Agency: Office of Personnel Management
Decision Number: [2008 MSPB 132](#)
Docket Number: CH-831E-08-0043-I-1
Issuance Date: June 20, 2008
Appeal Type: CSRA - Employee Filed Disability Retirement

Mootness

The appellant petitioned for review of an initial decision that dismissed his appeal of OPM's denial of his application for disability retirement as moot. The appellant applied for and received immediate retirement under CSRS in 2006. In 2007, he applied for disability retirement. OPM determined that the appellant's retirement annuity was equal to the annuity he would receive with a disability retirement and issued a final decision constructively denying his application on the ground that it was moot. On appeal to the MSPB, the appellant did not respond to the AJ's show-cause order, and the AJ issued a decision finding the appeal moot on the same ground as had OPM. On PFR, the appellant implies that he believes he would be entitled to greater monetary benefits as a disabled annuitant. He also asserts for the first time that OPM's decision was discriminatory on the basis of his race and disability.

Holdings:

- 1. A case is moot when the appellant has obtained all the relief he could have obtained had he prevailed before the Board or where it is impossible for the Board to grant further relief. Here, the appellant implies that he will receive greater monetary benefits under disability retirement, but has offered no evidence to rebut OPM's contrary determination. Even though OPM's determination appears to be correct, it has not provided its calculations that led to its conclusion that the two annuities would be the same. Under these circumstances, the record lacks any evidence from OPM to support its determination. Accordingly, the initial decision must be vacated and the appeal remanded to the regional office for further adjudication.**
- 2. The appellant has not explained in his PFR how and when he learned of the alleged discrimination and why he did not raise the issue below. In the absence of evidence that he was previously unaware of the basis for this allegation of discrimination, the matter is unreviewable.**

- **Appellant: Roy L. Hendricks**
Agency: Office of Personnel Management
Decision Number: [2008 MSPB 133](#)
Docket Number: AT-0831-07-0995-I-1
Issuance Date: June 20, 2008
Action Type: Retirement/Benefit Matter

Retirement

- **Deposit for Post-1956 Military Service**
- **Administrative Error**

The appellant petitioned for review of an initial decision that affirmed OPM's action reducing his CSRS annuity to eliminate credit for his post-1956 military service. The appellant retired in 2001 at the age of 55. Because he had post-1956 military service, he was informed that he must make a deposit to continue receiving credit for military service upon becoming eligible for Social Security benefits, and that his annuity might be reduced after age 62 if he did not make such a deposit. The appellant elected not to make the deposit. When he turned 62, OPM recomputed his annuity to eliminate credit for his post-1956 military service, reducing his monthly annuity by more than a thousand dollars. In his appeal, the appellant contended (including in sworn testimony) that he had relied on the advice of a retirement counselor with his employing agency, who mistakenly informed him that he did not have to make the deposit if he did not apply for Social Security benefits. The appellant further stated that, based on that representation, he calculated that the investment value of the money required for the deposit would outweigh the value of the Social Security benefits, and for this reason elected not to make the deposit. The AJ found it "inherently improbable" that the retirement counselor misled the appellant, and that he had been "elaborately and unequivocally" informed of the consequences of not making the deposit.

Holdings: The Board granted the appellant's PFR and reversed the initial decision, ordering OPM to provide the appellant with an opportunity to make a post-retirement deposit for his post-1956 military service:

- 1. OPM will permit a post-separation deposit for post-1956 military service only if the employee's failure to make the deposit prior to retirement was the product of administrative error under [5 C.F.R. § 831.2107](#)(a)(1). Under *McCrary v. Office of Personnel Management*, [459 F.3d 1344](#), 1349 (Fed. Cir. 2006), when an employee, at the time of election, asks for information regarding the amount of the military deposit or the consequences of failing to make a deposit, the government commits administrative error if its response either misrepresents the dollar amounts in question, or is so indirect, inaccurate, or incomplete as to confuse the employee as to the amount of the deposit or the effect of any failure to make the deposit.**
- 2. The appellant provided sworn testimony that the retirement counselor informed him that he did not have to make a deposit for his post-1956 military service if he did not apply for Social Security benefits, and that he would have made the deposit had he not received this erroneous advice. The agency adduced no evidence to**

rebut the appellant's claim. Contrary to the finding of the AJ, the Board did not find the appellant's version of events to be inherently unlikely. The Board has found on several occasions that an employing agency's retirement counselor misinformed the employee regarding the effect that failure to make a deposit for post-1956 military service would have on his annuity. While it is true that the appellant had access to correct information on this subject, the misleading advice of his employing agency constitutes administrative error.

- ▶ **Appellant: Teresa M. Bonk**
Agency: Department of Homeland Security
Decision Number: [2008 MSPB 134](#)
Docket Number: DC-0752-05-0397-I-1
Issuance Date: June 23, 2008
Action Type: Constructive Adverse Action

Timeliness - PFR

The appellant petitioned for review of an initial decision that dismissed for lack of jurisdiction her claim of an involuntary disability retirement. The PFR was filed approximately 2½ years after the deadline specified in the initial decision. In her response to the Clerk's notice on timeliness, the appellant said she was unable to find a lawyer and was confused about whether her appeal was properly an MSPB matter or an EEOC matter, and that, after the AJ dismissed her case, she pursued her claim with the EEOC before filing her PFR with the Board.

Holding: The Board dismissed the PFR as untimely filed without good cause shown. The initial decision clearly notified the appellant of the deadline for filing a PFR and the correct means of doing so.

- ▶ **Appellant: Timothy L. Vores**
Agency: Department of the Army
Decision Number: [2008 MSPB 135](#)
Docket Number: CH-3443-07-0552-I-1
Issuance Date: June 23, 2008

Miscellaneous Topics

- USERRA/VEOA/Veterans' Rights

The appellant petitioned for review of an initial decision that dismissed his appeal for lack of jurisdiction. After exhausting his remedy with the Department of Labor, the appellant filed an appeal with the Board asserting that the agency violated his veterans' preference rights under VEOA in connection with his application for a position as a resident in the Internal Medicine Residency Program (IMRP) at the William Beaumont Army Medical Center in El Paso, Texas. The agency filed a motion to dismiss on the grounds that veterans' preference rights do not apply to placement in the IMRP. The AJ found that, under *Scarnati v. Department of Veterans Affairs*, [344 F.3d 1246](#) (Fed. Cir. 2003), the appointment of medical professionals made pursuant to [38 U.S.C. §§ 7401](#) and [7403](#) can be made without regard to civil service appointments, and that

the appellant therefore failed to make a non-frivolous allegation that the agency violated his rights under a statute or regulation related to veterans' preference.

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

1. The Board reopened the appeal on its own motion because the record shows that the AJ based his legal conclusion on an incorrect finding of fact and application of law. The AJ's finding that residents at Beaumont are hired under the authority of [38 U.S.C. §§ 7401](#) and [7403](#) is incorrect. Residents in Beaumont's IMRP are selected under the authority of [38 U.S.C. § 7406](#). It was therefore necessary to determine whether the reasoning of the *Scarnati* decision nonetheless applies.

2. The Board found the reasoning of the court in *Vores v. Department of Veterans Affairs*, [113 F. App'x. 916](#) (Fed. Cir. 2004), to be persuasive. That case involved the appellant's nonselection for a residency in the IMRP at a Veterans Administration Medical Center. The court rejected the appellant's attempt to distinguish his VEOA case from *Scarnati*, finding that the pertinent language in [38 U.S.C. § 7406\(a\)\(1\)](#) authorizing the appointment of qualified persons to residencies and internships "without regard to civil service or classification law, rules, or regulations" to be "identical in substance" to the language in [38 U.S.C. § 7403\(a\)\(1\)](#).

► **Appellant: James J. Spinella**

Agency: Office of Personnel Management

Decision Number: [2008 MSPB 136](#)

Docket Number: NY-0845-07-0295-I-1

Issuance Date: June 23, 2008

Appeal Type: FERS - Collection of Overpayment

Action Type: Retirement/Benefit Matter

Retirement

- Annuity Overpayment

OPM petitioned for review of an initial decision that reversed its final determination regarding an annuity overpayment received by the appellant. The appellant retired under FERS in 1999. In 2006, OPM conducted an audit and determined that an incorrect high-3 average salary had been used to compute his annuity. This resulted in his monthly annuity being reduced by \$183 per month. In addition, OPM determined that the appellant had received an overpayment of \$13,477. The appellant did not dispute the existence or amount of the overpayment, but requested reconsideration and/or waiver. OPM found that the appellant was without fault in the creation of the overpayment, but found that the appellant had failed to show that recovery of the debt would be against equity and good conscience. OPM did, however, adjust the repayment schedule from 34 to 80 installments. On appeal to the MSPB, the AJ determined that recovery of the debt would be against equity and good conscience, finding that OPM's 79-month delay in adjusting the appellant's annuity was unconscionable under the totality of the circumstances.

Holdings: The Board remanded the appeal to the regional office for further adjudication:

1. Under [5 U.S.C. § 8470\(b\)](#) and [5 C.F.R. § 845.301](#), a waiver of recovery of an overpayment may be granted when the annuitant is without fault and recovery would be against equity and good conscience. Generally, recovery is against equity and good conscience when it would cause financial hardship, the annuitant can show that because of the overpayment he relinquished a valuable right or changed positions for the worse, or recovery could be unconscionable under the circumstances. The unconscionability standard is a high one, which will be granted only under exceptional circumstances. Such circumstances include, but are not limited to, cases where there has been an exceptionally lengthy delay by OPM in adjusting an annuity, or where OPM is otherwise grossly negligent in handling the case.
2. OPM acted promptly and decisively upon discovering the overpayment. While this does not absolve OPM of its unexplained failure to conduct a timely audit, this delay does not rise to the level of gross negligence. In the absence of other “exceptional circumstances,” the Board found that recovery of the debt would not be unconscionable.
3. The AJ did not reach the question of whether the appellant is entitled to waiver on the grounds of financial hardship. The appellant’s Financial Resources Questionnaire indicates that he and his spouse have a combined average monthly income of \$9,000, average monthly expenses of \$9,430, and liquid assets under \$5,000, suggesting that he may be entitled to a waiver based on financial hardship. The case was remanded for further adjudication on this issue, including the opportunity for the appellant to submit updated financial information.

- ▶ **Appellant: David C. Stoddard**
Agency: Department of the Army
Decision Number: [2008 MSPB 137](#)
Docket Number: DA-0752-07-0550-I-1
Issuance Date: June 23, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Adverse Action Charges
- Absence-Related
Penalty

The appellant petitioned for review of an initial decision that affirmed his removal for creating a disturbance and for absence without leave (AWOL). The first charge was based on an incident the day after the Virginia Tech shootings, in which the appellant told two co-workers that they were number 34 and 35, and that when he was done with them, he would go upstairs and “take out” two other agency employees. The second charge alleged that the appellant was AWOL on four days in March and April 2007. Following a hearing, the AJ found that the agency met its burden of proof on both

charges, that the appellant failed to establish his affirmative defenses, and that the removal penalty is reasonable and promotes the efficiency of the service.

Holdings: The Board affirmed the initial decision as modified, still affirming the agency's removal action:

1. The agency failed to establish its AWOL charge, which was based on the appellant's alleged failure to comply with a leave restriction letter that required a letter from a medical provider to justify any sick leave absences. The appellant provided certificates from a licensed nurse to cover his absences, and the agency did not object to these certificates until it proposed the appellant's removal. The Board found that the appellant made a "good faith effort to comply with instructions that were at best ambiguous." Under these circumstances, it found that the AWOL charge should not have been sustained.

2. The Board found that the removal penalty was within the bounds of reasonableness for the sustained charge, finding that, "[e]ven if the appellant intended his remarks as a joke, at a minimum he displayed profound bad judgment in making such statements the day after the Virginia Tech shootings, and the effect on the workplace was clearly disruptive to the agency's mission."

► **Appellant: Bernard A. Williams, Jr.**

Agency: Department of the Army

Decision Number: [2008 MSPB 138](#)

Docket Number: AT-0752-07-0992-I-1

Issuance Date: June 23, 2008

Miscellaneous Topics

- USERRA/VEOA/Veterans' Rights

The appellant petitioned for review of an initial decision that denied his request for corrective action in this USERRA appeal. The appellant alleged that he was treated differently from non-veterans, in that the agency extended the appointments of non-veterans serving in term appointments but did not extend his appointment. The AJ found that the appellant established jurisdiction, but based on the written record, found that the appellant failed to prove by preponderant evidence his assertion that the agency treated him differently from others based on his military status.

Holding: The AJ erred in failing to hold a hearing on the appellant's claim as he had requested. The Board's reviewing court has held that USERRA requires that "any veteran who requests a hearing shall receive one." The case was remanded to the regional office for further adjudication.

- **Appellant: Joseph P. Carson**
Agency: Department of Energy
Decision Number: [2008 MSPB 139](#)
Docket Number: AT-1221-98-0250-C-7
AT-1221-96-0948-C-1
AT-1221-98-0623-C-7
Issuance Date: June 23, 2008
Appeal Type: Individual Right of Action (IRA)

Compliance

Defenses and Miscellaneous Claims

- Res Judicata

Whistleblower Protection Act

The appellant petitioned for review of a compliance initial decision that dismissed his petition for enforcement (PFE) of the Board's final decision in *Carson v. Department of Energy*, [85 M.S.P.R. 171](#) (*Carson I*), *dismissed per curiam*, 243 F.3d 567 (Fed. Cir. 2000) (Table), as barred by res judicata, and that denied his motion to have his whistleblower reprisal claim docketed as an IRA appeal. In *Carson I*, the Board ordered the agency, inter alia, to cancel a directed reassignment from Oak Ridge, Tennessee to Germantown, Maryland, and to return the appellant to the full range of duties and work assignments consistent with his position description and past assignments as a GS-14 General Engineer. The Board ordered the agency to complete this action no later than 20 days after the date of the decision. In a later enforcement proceeding, the Board found that the agency did not violate *Carson I* when it placed the appellant in the position of GS-14 Technical Facility Representative in the Oak Ridge Operations Office. *Carson v. Department of Energy*, [88 M.S.P.R. 260](#) (2001) (*Carson II*). In this proceeding, the appellant alleged that the agency failed to take the corrective action that the Board ordered in *Carson I* within 20 days of the decision, and in reprisal for his whistleblowing activity that was the subject of *Carson I*. The AJ treated the filing as a PFE of the Board's final decision in *Carson I* rather than as an IRA appeal, on the basis that the appellant had not exhausted his administrative remedies before OSC. The agency then moved to dismiss the PFE as barred by the doctrine of res judicata. In response, the appellant stated that he agreed with the agency that res judicata precludes a PFE, and asserted that he was filing a new IRA appeal. Without holding the hearing requested by the appellant, the AJ dismissed the appellant's PFE as barred by res judicata, and denied the appellant's request to have his reprisal claim docketed as a separate appeal under the Whistleblower Protection Act.

Holdings: The Board affirmed the initial decision regarding the dismissal of the appellant's PFE, and dismissed the appellant's IRA appeal as barred by the doctrine of res judicata.

1. The AJ correctly found that the appellant's allegations of agency noncompliance with the Board's final decision in *Carson I* are barred by the doctrine of res judicata.

- a. Res judicata (claim preclusion) precludes parties from relitigating issues that were, or could have been, raised in the prior action if: (1) The prior judgment was rendered by a forum with competent jurisdiction; (2) the prior judgment was a final judgment on the merits; and (3) the same cause of action and the same parties or their privies were involved in both cases.
 - b. These criteria have been met. The appellant's claim of noncompliance based on the agency's failure to take corrective action no later than 20 days after the Board's final order in *Carson I* could have been raised in the earlier PFE in *Carson II*.
2. The AJ erred by declining to docket the appellant's whistleblower reprisal claim as an IRA appeal.
- a. Contrary to the AJ's finding, the appellant did present evidence that he exhausted his administrative remedy with OSC. He presented evidence that he filed a complaint with OSC on April 11, 2007, and more than 120 days had elapsed when he initiated a new proceeding with the MSPB.
 - b. The AJ erred in refusing to docket the appeal as an IRA appeal on the grounds that the appellant would be unable to set forth a personnel action, reasoning that the action he would be raising is the agency's noncompliance with the Board's final decision in *Carson I* and the Board and the Federal Circuit have repeatedly found the agency in compliance with *Carson I*. However, the appellant alleged not only that the agency failed to comply within 20 days, but also that the agency delayed taking corrective action until November 2000 in reprisal for his whistleblowing activity. The Board has held that a corrective action is a "personnel action" under [5 U.S.C. § 2302\(a\)\(2\)\(A\)\(iii\)](#) and that a lengthy delay in taking a corrective action can constitute a "failure to take" a personnel action under 5 U.S.C. § 2302(b). The appellant thus raised a cognizable IRA claim.
3. In *Carson v. Department of Energy*, [398 F.3d 1369](#), 1378 (Fed. Cir. 2005), the court determined that the appellant's transfer in November 2000 rather than September 1999 was "self-inflicted," rather than the product of retaliatory animus. This new IRA appeal alleging that the agency delayed the appellant's transfer in reprisal for his whistleblowing activity is barred under the doctrine of res judicata.

► **Appellant: Bruce L. Williams**
Agency: Office of Personnel Management
Decision Number: [2008 MSPB 140](#)
Docket Number: AT-844E-04-0902-I-2
Issuance Date: June 24, 2008
Appeal Type: FERS - Employee Filed Disability Retirement
Timeliness - PFR

Holding: The Board dismissed the appellant's PFR as untimely filed by more than 2½ years with no showing of good cause for the delay.

► **Appellant: Merrie J. Leite**
Agency: Department of the Army
Decision Number: [2008 MSPB 141](#)
Docket Number: SF-3443-07-0070-I-1
Issuance Date: June 24, 2008

Miscellaneous Topics
- USERRA/VEOA/Veterans' Rights
Mootness

The appellant petitioned for review of an initial decision that dismissed her USERRA appeal as moot. When the appellant was called to military duty in January 2003, she was serving as Chief, Resource Management, GS-13. During her absence, the agency abolished her position and created the position of Financial Manager, GS-14. Although the appellant competed for this position, another candidate was selected. When she returned to civilian duty in October 2006, the appellant was assigned to a GM-13 position, but for the next 4 months, was detailed to unclassified duties. In February 2007, she was assigned to the position of Supervisory Executive Assistant, YC-0301-2/0. The appellant filed a USERRA appeal after first seeking relief from the Department of Labor. After holding a hearing, the AJ found that: (1) the GS-14 position to which the appellant claimed reemployment rights was a new position and that its higher grade was not due to the accretion of duties; (2) this position was filled competitively and the evidence showed that the appellant would not have been assigned to the position even if she had not been absent for military duty; (3) she was entitled to be reemployed in a position of like status to her former position; (4) the status of the GS-13 position to which the appellant was initially reassigned upon her return to civilian employment was not like her former position and violated the appellant's reemployment rights; (5) the Supervisory Executive Assistant position to which the appellant was assigned was like her former position; and (6) because the appellant lost no wages or benefits as a result of the improper initial assignment, she had received all the relief she would have received if she had prevailed in her appeal, and the appeal was therefore moot.

Holdings: The Board affirmed the initial decision as modified, denying the appellant's request for corrective action on the merits of her USERRA claim:

1. If the appellant were to prevail on her claim that she was entitled to be reemployed in the GS-14 Financial Manager position, or another position of like status, she would be entitled to further relief. Because the appellant has never withdrawn this claim, her appeal is not moot.

2. Because the record does not show with reasonable certainty that the appellant would have been promoted to the GS-14 position but for her military service, the Board denied her USERRA claim on the merits.

- a. Under [38 U.S.C. § 4313\(a\)\(2\)\(A\)](#), the appellant was entitled to be restored on her return to civilian duty to "the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is

qualified to perform.” Courts have interpreted this provision under the “escalator principle,” i.e., an employee returning from military service steps back on the seniority escalator not at the point she stepped off, but as the precise point she would have occupied had she kept her position continuously.

- b. Under this principle, the Supreme Court has rejected the argument that a returning employee is required to show the “absolute foreseeability” of his advancement in order to establish his entitlement to it, but the courts have drawn a distinction between “perquisites of seniority,” where the advancement or other benefit was dependent on continuing employment, and situations in which the advancement or other benefit was dependent on fitness and ability and the exercise of discriminating managerial choice. They have also held that the benefits to be granted under the escalator principle must have been reasonably certain to have accrued in the employee’s absence, and that a showing that advancement was based on fitness and ability was inconsistent with a finding that the “reasonable certainty” test was satisfied.
- c. Applying these principles to the facts of this case, the record does not show with reasonable certainty that the appellant would have been promoted to the GS-14 Financial Manager position but for her military service.

► **Appellant: John-Pierre Baney**
Agency: Department of Justice
Decision Number: [2008 MSPB 142](#)
Docket Number: DA-3443-08-0012-I-1
Issuance Date: June 25, 2008

Miscellaneous Topics
 - **USERRA/VEOA/Veterans’ Rights**
Defenses and Miscellaneous Claims
 - **Res Judicata/Collateral Estoppel**
Whistleblower Protection Act

The appellant petitioned for review of an initial decision that dismissed his appeal for lack of jurisdiction. The appellant raised several matters in this appeal: matters relating to military leave during the period from 1987 to 2000; alleged violations of the No Fear Act; alleged racial discrimination and USERRA violations in connections with agency actions that took place in 2002 and 2003; alleged retaliation for whistleblowing; and that the agency improperly charged him annual leave for his military service in July and August 2007. The AJ ruled that: (1) The appellant’s claims concerning military leave from 1987 to 2000 were barred by res judicata because they have been addressed in a prior Board appeal; (2) the No Fear Act was not an independent basis for Board jurisdiction; (3) the appellant’s claims concerning agency actions in 2002 and 2003 were barred by collateral estoppel because the Board had determined in a prior appeal that it lacked jurisdiction over these claims; and (4) the appellant had failed to provide

additional information concerning his claim that he was improperly charged annual leave in 2007, despite the AJ's order to do so.

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

1. The appellant's USERRA claims concerning both his military leave between 1987 and 2000 and agency actions in 2002 and 2003 are barred by collateral estoppel, as they were litigated in a prior Board appeal. The Board declined to rule definitively whether some of these claims were also barred under the doctrine of res judicata.

2. Although the appellant did not provide additional details concerning his 2007 USERRA claim in response to the AJ's order, he did allege facts sufficient to establish Board jurisdiction over this claim. An appellant who raises a USERRA claim has an unconditional right to a hearing. As the appellant requested a hearing, the appeal must be remanded to the regional office.

3. Although the appellant raised whistleblower reprisal, the AJ failed to provide notice of what the appellant needed to prove in order to establish Board jurisdiction. This matter must therefore also be remanded for further adjudication.

COURT DECISIONS

- ▶ **Petitioner:** Clifford B. Meacham, et al.
Respondent: Knolls Atomic Power Laboratory
Court: United States Supreme Court
Docket Number: [06-1505](#)
Issuance Date: June 19, 2008

Discrimination
- Age Discrimination

Holding: An employer defending a disparate-impact claim under the ADEA bears both the burden of production and the burden of persuasion for the "reasonable factors other than age" affirmative defense under [29 U.S.C. § 623\(f\)\(1\)](#).

- ▶ **Petitioner:** Mark S. Leighton
Respondent: Office of Personnel Management
Court: U.S. Court of Appeals for the Federal Circuit
Docket Number: [2008-3144](#)
Issuance Date: June 17, 2008

Retirement
- Annuities

This case involved the proper calculation of a disability retirement annuity under [5 U.S.C. § 8452\(a\)\(2\)\(B\)](#) as to the amount that such an annuity should be reduced when

the individual receive disability insurance benefits from the Social Security Administration.

Holding: The court held that OPM properly computed Leighton's disability retirement annuity under FERS, affirming the Board's final decision.