



# U.S. Merit Systems Protection Board

CASE REPORT

DATE: July 10, 2008

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## BOARD DECISIONS

- ▶ **Appellant: Charles W. Heckman**  
**Agency: Department of the Interior**  
**Decision Number: [2008 MSPB 128](#)**  
**Docket Number: SF-3443-05-0484-I-4**  
**Issuance Date: June 19, 2008**

### Miscellaneous Topics

#### - USERRA/VEOA/Veterans' Rights

The appellant petitioned for review of an initial decision (ID) that denied his requests for corrective action under VEOA and USERRA. At issue was the agency's failure to select him for numerous vacancies. With respect to the USERRA claim, the administrative judge (AJ) found that the appellant failed to prove that his military service was at least a motivating or substantial factor in the agency's failure to select him. With respect to VEOA, the AJ found that the appellant failed to prove a violation of his rights under any statute or regulation relating to veterans' preference.

**Holdings:** The Board affirmed the ID insofar as it denied the appellant's request for corrective action under USERRA, but vacated the portion of the ID that denied his request under VEOA. The Board granted that request in part, denied it in part, and dismissed it in part for lack of jurisdiction:

1. The appellant established Board jurisdiction with respect to 4 vacancy announcements, in that he exhausted his remedy with the Department of Labor (DOL), made nonfrivolous allegations that he is a preference eligible, the actions at issue took place after the enactment of VEOA, and that the agency violated his rights under a statute or regulation relating to veterans' preference.
2. With respect to 3 of these vacancies, the appellant failed to establish entitlement to corrective action on the merits.
  - a. Regarding one of these vacancy announcements, the agency selected someone other than the appellant under a merit promotion process, in which

preference eligibles are not entitled to any point preferences. Since the appellant clearly had the opportunity to compete under this vacancy announcement, he failed to establish that the agency violated his rights under a statute or regulation relating to veterans' preference.

- b. Regarding two of these vacancy announcements, the agency did not violate the appellant's veterans' rights in that it cancelled or did not make a selection under these announcements.

2. The appellant is entitled to corrective action under VEOA with respect to vacancy announcement ER-2005-0093. The AJ erred in finding that the Board lacked jurisdiction on the basis that this complaint was resolved by the DOL. DOL requested that the agency review the appellant's application and provide him consideration under the vacancy announcement. Instead, the agency told him that, to compensate for its error, it would provide the appellant with priority consideration for the next available equivalent position. DOL then agreed with the agency's determination and informed the appellant and the agency that it both found the remedy would be appropriate redress and considered the case closed. But the proper remedy for a VEOA violation is to reconstruct the selection process in compliance with applicable statutes and regulations relating to veterans' preference, and the Board ordered the agency to do so.

3. The appellant failed to establish Board jurisdiction over his remaining VEOA claims due to his failure to establish that he exhausted his DOL remedy.

4. The AJ correctly denied the appellant's request for corrective action under USERRA on the basis that the appellant failed to prove that his military service was at least a motivating or substantial factor in the agency's failure to select him.

- **Appellant: Oscar M. Gonzalez**  
**Agency: Department of Transportation**  
**Decision Number: [2008 MSPB 143](#)**  
Docket Number: SF-0432-07-0397-I-2  
Issuance Date: June 30, 2008  
Appeal Type: Performance  
Action Type: Removal

**Performance-Based Actions**

**Board Procedures/Authorities**

- Authority of AJs

**Defenses and Miscellaneous Claims**

- Collateral Estoppel

**Whistleblower Protection Act**

- Protected Disclosure
- Contributing Factor
- Clear and Convincing Evidence

The appellant petitioned for review of an ID that affirmed his removal for unacceptable performance under chapter 43. After holding a hearing, the AJ determined that the agency proved that the appellant's performance was unacceptable

under one critical element, that the appellant had been afforded a reasonable opportunity to demonstrate acceptable performance, and that none of the issues raised by the appellant excused his failure to demonstrate acceptable performance. She further found that the appellant failed to prove any of his affirmative defenses.

In his petition for review (PFR), the appellant contends that: (1) the agency failed to establish that his performance standards were valid and were adequately communicated to him; (2) the agency retaliated against him for various protected activities; and (3) the AJ erred by denying him a number of requested witnesses.

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

- 1. The AJ properly applied collateral estoppel to the issue of the validity of the appellant's performance standards and the communication of those standards to the appellant. Collateral estoppel (issue preclusion) is appropriate when the issue is identical to that involved in a previous adjudication, the issue was actually litigated in the prior action, the determination on the issue was necessary to the resulting judgment, and the party against whom issue preclusion is sought had a full and fair opportunity to litigate the issue in the prior action. All of these criteria have been met with respect to a prior Board appeal in which the appellant challenged the agency's denial of a within-grade increase.**
- 2. The appellant waived any objections to the AJ's rulings with respect to his requested witnesses because he did not object to those rulings below.**
- 3. The appellant has not shown any error in the AJ's findings with respect to his non-whistleblower retaliation claims. His arguments on PFR amount to mere disagreement with the findings below.**
- 4. The appeal must be remanded for further adjudication of the appellant's claim of retaliation for whistleblowing:**
  - a. In an otherwise appealable action where the agency has proven its case, the appellant must show by preponderant evidence that he made a protected disclosure and that the disclosure was a contributing factor in the agency's personnel action. If the appellant makes this prima facie showing, the burden shifts to the agency to show by clear and convincing evidence that it would have taken the same personnel action absent the protected disclosure.**
  - b. The appellant established that he disclosed a violation of law ([18 U.S.C. § 701](#)) by giving testimony to the agency's Office of Inspector General concerning agency employees involved in obtaining fake identification badges.**
  - c. The appellant established the contributing factor element under the knowledge/timing test, in that his supervisor was aware of his testimony, including his testimony that the supervisor possessed a fake identification badge, and the removal action occurred slightly more than a year after his protected disclosure.**

- d. Because the AJ incorrectly found that the appellant failed to establish that his whistleblowing was a contributing factor in his removal, she did not adjudicate whether the agency established by clear and convincing evidence that it would have taken the same personnel action absent the appellant's protected disclosure. A remand to the regional office for further adjudication is therefore required.

► **Appellant: Winifred W. Walker**  
**Agency: Department of the Air Force**  
**Decision Number: [2008 MSPB 144](#)**  
Docket Number: DA-0752-07-0228-I-2  
Issuance Date: July 1, 2008  
Appeal Type: Adverse Action by Agency  
Action Type: Suspension - More than 14 Days

#### **Timeliness - PFR**

The appellant petitioned for review of a November 19, 2007 ID that dismissed his appeal of an alleged constructive suspension for lack of jurisdiction. The decision notified the appellant that it would become the Board's final decision unless a PFR was filed on or before December 24, 2007. The appellant filed a PFR 46 days late, on February 8, 2008. Because both the appellant and her attorney were e-filers, they were notified by email that the ID had been issued and could be accessed at e-Appeal Online. In a motion and affidavit asking the Board to excuse the late filing of the PFR, the appellant's attorney asserted that she did not discover that the decision had been issued until January 8, 2008. She further asserted that notification of the ID was sent to an outdated email address.

**Holding: The Board dismissed the PFR as untimely filed without good cause shown for the delay:**

- 1. The record shows that, throughout the appeal process below, all notices and orders were sent to the attorney's "outdated" email address, and she apparently received those documents since the record shows that she continued to respond to them, even after she allegedly switched to another email address in August 2007.**
- 2. There is no evidence in the record that the attorney ever advised the AJ that her email address had changed, as she was required to do.**
- 3. Even taking the attorney's assertions as true, she failed to contact the Board until 30 days after she learned that the ID had been issued and the PFR filing deadline had passed. This does not evidence due diligence or ordinary prudence.**
- 4. Notice of the issuance of the ID was sent via email to the appellant as well as his attorney, and the appellant has not submitted an affidavit or statement signed under penalty of perjury stating that he did not receive the ID when the AJ transmitted it to him.**

- **Petitioner: Adrian H. Garcia**  
**Agency: Office of Personnel Management**  
**Decision Number: [2008 MSPB 145](#)**  
Docket Number: CB-1205-08-0007-U-1  
Issuance Date: July 2, 2008  
Appeal Type: Request for Regulation Review

**Miscellaneous Topics**  
- **Regulation Review**

The petitioner requested the Board to review OPM's regulations at [5 C.F.R. § 315.806](#)(a)-(b), which provide that a probationary employee can appeal a termination not required by statute which he or she alleges was based on partisan political reasons or marital status. The petitioner alleges that § 315.806 is inconsistent with OPM's regulation at [5 C.F.R. § 720.901](#), which provides that an agency may not effect the termination of a probationer for "political reasons." He asserts that the difference between "political reasons" and "partisan political reasons" requires agencies to commit prohibited personnel practices in violation of [5 U.S.C. §§ 2301](#) and [2302](#) and [5 C.F.R. § 720.901](#).

**Holding:** The Board denied the petitioner's request for regulation review. In exercising its jurisdiction under [5 U.S.C. § 1204](#)(f)(1), the Board is authorized to declare an OPM rule or regulation invalid if the Board determines that such provision would, either on its face or as implemented, require the commission of a prohibited personnel practice as defined by [5 U.S.C. § 2302](#)(b). The Board's regulation at [5 C.F.R. § 1201.11](#) requires the petitioner to identify the prohibited personnel practice that the regulation purportedly requires to be committed, and to explain "in detail" why the challenged regulation, or its implementation, requires the commission of a prohibited personnel practice. The petitioner does not specifically identify the prohibited personnel practice that the regulation purportedly requires to be committed, nor has he explained why this would occur.

- **Appellant: Robert P. Isabella**  
**Agency: Department of State**  
**Petitioner: Office of Personnel Management**  
**Decision Number: [2008 MSPB 146](#)**  
Docket Numbers: AT-3443-05-0550-R-1  
AT-0330-05-0409-R-1  
Issuance Date: July 2, 2008

**Board Procedures/Authorities**  
- **Reopening and Reconsideration**  
**Miscellaneous Topics**  
- **USERRA/VEOA/Veterans' Rights**

Pursuant to [5 U.S.C. § 7703](#)(d), the Director of OPM requested review of the Board's final decision, [2007 MSPB 186](#), 106 M.S.P.R. 333, in which the Board held that the agency violated the appellant's veterans' preference rights when it did not

waive the age requirement for the Diplomatic Security Service Special Agent position for which he had applied.

**Holdings: The Board denied the Director’s petition for reconsideration and affirmed its final decision:**

1. The Board rejected the Director’s contention that the statutory authority to set maximum entry ages “takes precedence over” the waiver provision of the Veterans Preference Act, [5 U.S.C. § 3312](#). The starting point for interpreting a statute is the language of the statute itself, which governs absent a clearly expressed legislative intent to the contrary. Section 3312 clearly provides that OPM or other examining agency “shall waive . . . requirements as to age, height, and weight, unless the requirement is essential to the performance of the duties of the position . . . .” There is no conflict between this provision and the authority to set minimum and maximum entry age restrictions, as provided in [22 U.S.C. § 4823](#) or [5 U.S.C. § 3307\(d\)-\(e\)](#).

2. The Board rejected the Director’s argument that the Board must defer, under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, [467 U.S. 837](#) (1984), to OPM’s interpretation of the statutory terms. *Chevron* describes a two-step process. First, a court must consider whether the intent of Congress is clear; if it is, then the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress and “that is the end of the matter.” Deference to an agency’s interpretation of the statute is only appropriate if the statute is silent or ambiguous with respect to the specific issue. Here, the pertinent statutes are clear and their application is straightforward; therefore, there is no cause to proceed to the second step of *Chevron*.

3. For the reasons given in its previous decision, the Board rejected the Director’s contention that the maximum entry age is essential to the performance of the position.

► **Appellant: John T. Cardinal**

**Agency: Office of Personnel Management**

**Intervenors: Office of Personnel Management and Rose Cespedes Cardinal**

**Decision Number: [2008 MSPB 147](#)**

Docket Number: CH-0831-07-0683-I-1

Issuance Date: July 3, 2008

Action Type: Retirement/Benefit Matter

**Retirement**

**- Survivor Annuity**

Because the Board members could not agree on the disposition of the PFR, the ID, which ordered OPM to accept a partial waiver of Intervenor Rosa Cardinal’s survivor annuity, and to adjust the reduction in the appellant’s retirement annuity consistent with the waiver, became the Board’s final decision. Chairman McPhie issued a separate opinion explaining why he would have granted OPM’s PFR to find that Intervenor Rosa Cardinal is not entitled to waive her right to any part of her survivor annuity because she is not an annuitant.

- ▶ **Appellant: Saffareene Gray**  
**Agency: General Services Administration**  
**Decision Number: [2008 MSPB 148](#)**  
Docket Number: CB-7121-08-0009-V-1  
Issuance Date: July 3, 2008  
Action Type: Arbitration

#### **Arbitration/Collective Bargaining-Related Issues**

The appellant requested review of an arbitration decision that sustained her removal under chapter 75 for performance and conduct reasons.

**Holdings: The Board sustained the arbitrator's decision affirming the removal:**

- 1. The Board has jurisdiction, as the subject matter of the grievance (a removal) is within its jurisdiction, the appellant alleges that the action at issue constitutes discrimination under [5 U.S.C. § 2302](#)(b)(1), and the arbitrator has issued a final decision.**
- 2. The appellant failed to show that the arbitrator erred as a matter of law in interpreting civil service law, rule, or regulation in sustaining the agency's charges.**
- 3. The appellant failed to show that the agency discriminated against her. She raised a bare claim of color discrimination, but did not present any evidence supporting an inference of discrimination.**
- 4. The appellant failed to show that the arbitrator erred as a matter of law in sustaining the removal penalty.**

- ▶ **Appellant: Russell Hart**  
**Agency: Department of Transportation**  
**Decision Number: [2008 MSPB 149](#)**  
Docket Number: AT-0752-07-0660-I-1  
Issuance Date: July 3, 2008  
Appeal Type: Adverse Action by Agency  
Action Type: Suspension - Indefinite

#### **Jurisdiction**

#### **Miscellaneous Topics**

##### **- Statutory Construction**

Both parties petitioned for review of an ID that found that the appellant had been constructively suspended and ordered cancellation of that action. The appellant is an Air Traffic Controller (ATC) with the Federal Aviation Administration (FAA). He was temporarily medically disqualified from performing his ATC duties for several months. He requested, but was denied, administrative duties during this time. On appeal to the Board, the AJ determined that the appellant had been constructively suspended. The AJ reversed the action, without addressing the merits, on the ground that the agency failed to follow the procedures required by [5 U.S.C. § 7513](#)(b). The AJ did not, however, order restoration of leave.



**Holdings:** The Board denied the appellant's PFR, granted the agency's cross-PFR, vacated the ID, and remanded the appeal to the regional office for further adjudication:

1. The appellant has not presented a persuasive reason for modifying prior Board precedent holding that the Back Pay Act does not apply to the FAA, or that the collective bargaining agreement or any other source provides authority for the Board to order restoration of leave.
2. The Board agreed with the AJ's determination that the appellant had sustained a suspension that was appealable to the Board, as he was involuntarily placed in a non-pay, non-duty status for more than 14 days.
3. The Board held that the FAA is not covered by chapter 75 of Title 5 of the United States Code.
  - a. In 1996, Congress eliminated the right of FAA employees to appeal certain actions to the MSPB. Four years later, the Ford Act reinstated Board appeal rights for FAA employees, including a suspension exceeding 14 days.
  - b. The Ford Act, [49 U.S.C. § 40122](#), provides that, except for 8 named exceptions, the "provisions of title 5 shall not apply" to the FAA's personnel management system. Chapter 75 is not included under any of the 8 exceptions. Accordingly, the FAA is not required to follow chapter 75 procedures.
4. A remand is necessary to determine whether the agency followed its internal procedures before it suspended the appellant and if not, whether the agency committed harmful procedural error under its own rules, and for adjudication of other issues as appropriate.

► **Appellant: George Bruton**  
**Agency: Department of Veterans Affairs**  
**Decision Number: [2008 MSPB 150](#)**  
 Docket Number: CH-0752-06-0580-I-1  
 Issuance Date: July 3, 2008  
 Appeal Type: Adverse Action by Agency  
 Action Type: Removal

**Adverse Action Charges**

- **Absence-Related**

**New Evidence**

The appellant petitioned for review of an ID that affirmed his removal from the federal service on a charge of absence without leave (AWOL). The appellant was a Housekeeping Aid at an agency hospital. After suffering a knee injury in 2002, he began receiving workers' compensation benefits from the Office of Workers' Compensation Programs (OWCP). Thereafter, he worked light-duty assignments restricted to 4 hours per day. In 2005, the appellant's physician further restricted the appellant to working 3 hours per day. Later the same year, OWCP determined that the appellant could work 8 hours per day with certain physical restrictions, and terminated



his compensation benefits. The agency directed the appellant to return to work, 8 hours per day, but the appellant only worked 3 hours each day. The agency removed the appellant on charges of being AWOL 5 hours each day. After a hearing, the AJ found that the agency proved its charge, that the appellant failed to prove his affirmative defense of disability discrimination, and that the penalty of removal was within the bounds of reasonableness.

The appellant filed his PFR more than 14 months after the deadline for timely filing. With his PFR, he included a new decision from the Employees' Compensation Appeals Board (ECAB) that reversed the earlier OWCP decision and reinstated his workers' compensation benefits.

**Holdings: The Board granted the appellant's PFR, reversed the ID, and ordered the agency to restore the appellant to employment:**

**1. The discovery of new evidence may establish good cause for the untimely filing of a PFR if the evidence was not readily available before the close of the record below, and if it is of sufficient weight to warrant an outcome different from that of the ID. The ECAB ruling met these requirements, and the appellant filed his PFR within 3 weeks of the ruling, demonstrated that he acted promptly and with due diligence.**

**2. An adverse action based on a charge of AWOL cannot be sustained if OWCP determines that the employee was entitled to compensation benefits as a result of a work-related injury for the entire period charged as AWOL. Here, ECAB's decision reverses an earlier OWCP decision that terminated the appellant's benefits, and it covers the entire period of the agency's AWOL charge.**

- ▶ **Appellant: Thomas D. Gaudin**  
**Agency: Department of the Treasury**  
**Decision Number: [2008 MSPB 151](#)**  
 Docket Number: AT-0752-07-0539-I-1  
 Issuance Date: July 9, 2008  
 Appeal Type: Adverse Action by Agency  
 Action Type: Removal

### **Penalty**

The agency petitioned for review, and the appellant filed a cross-PFR, of an ID that mitigated the appellant's removal to a demotion. The agency (IRS) removed the appellant from the position of GS-9 Lead Contact Representative on charges of (1) failing to properly file Federal income tax returns for 2001 and 2002, (2) failing to timely pay his income tax liability for tax years 2001 through 2004, and (3) failing to complete Form 7995 (Outside Employment or Business Activity Request Form) for approval of an outside business activity for tax years 2001 and 2002. The agency alternatively charged that the appellant's alleged misconduct under the first charge was willful under section 1201(b)(9) of the Restructuring and Reform Act of 1998 (RRA). The deciding official determined that the appellant willfully understated his Federal tax liability under the RRA, and followed agency procedures for such cases, forwarding the matter to the Commissioner's § 1203 Review Board (CRB) for mitigation consideration.

The CRB did not mitigate the removal penalty, and the deciding official effected the appellant's removal.

On appeal to the Board, the AJ sustained 4 of the 6 specifications under the first charge, and both of the other charges. The AJ found that none of the misconduct under the first charge was willful, however, and therefore found no violation of the RRA. The AJ found that the removal penalty was not within the bounds of reasonableness for several reasons: his outstanding performance evaluations; the appellant's promotion from GS-7 to GS-9 after the audit that resulted in the charges against him; there was no evidence that the appellant's position provided him with any more than average knowledge regarding his income tax returns for 2001 and 2002; the appellant had been nominated for the Careers & the Disabled magazine's employee of the year award; and there was no basis for imposing a penalty with regard to the second and third charges because the appellant paid the tax liability immediately after the audit, before it was assessed, and he would have been allowed to operate the outside business. The AJ mitigated the penalty to a demotion to a GS-7 position.

**Holdings: The Board affirmed the ID as modified, still mitigating the removal penalty to a demotion:**

- 1. The Board denied the appellant's cross-PFR because it did not meet the criteria of [5 C.F.R. § 1201.115](#).**
- 2. The Board agreed with the AJ's determination that the agency failed to prove that the appellant's misconduct was willful, and that the appellant provided a reasonable cause or explanation for his actions. Thus, the agency failed to prove its charge of misconduct under the RRA.**
- 3. The AJ failed to perform a legally sufficient review of the penalty under the circumstances of the case. In particular, the AJ erred by independently weighing the relevant mitigating factors without specifically determining first that the agency-imposed penalty was too severe or that the deciding official failed to demonstrate that he considered any specific, relevant mitigating factors before deciding upon the penalty, or otherwise abused his discretion.**
- 4. After reviewing the deciding official's testimony, the Board concluded that, although he said he considered the *Douglas* factors, he nevertheless believed that he had no discretion to act on any consideration of them. Underlying his selection of the removal penalty was his belief that the appellant's misconduct was a violation of the RRA and that, because the Commissioner did not mitigate the penalty under the RRA procedures, he had no option but to effect the appellant's removal. The Board therefore found that the agency failed to demonstrate that the deciding official considered any specific, relevant, mitigating factors before deciding upon a penalty.**
- 5. After considering the relevant factors, and comparing the facts of this case to those in *Jenkins v. Department of the Treasury*, [2007 MSPB 4](#), 104 M.S.P.R. 345, the Board concluded that the AJ did not err in finding that, under the circumstances of this case, the removal penalty exceeded the bounds of reasonableness and that the maximum reasonable penalty was a demotion.**