



U.S. Merit Systems Protection Board

CASE REPORT

DATE: August 8, 2008

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BOARD DECISIONS

► **Appellants: Kent Mitchell, Steve Palmer, Kenneth Miller**

Agency: Department of Transportation

Decision Numbers: [2008 MSPB 187](#), [2008 MSPB 172](#), [2008 MSPB 180](#)

Docket Numbers: NY-0752-07-0171-I-1, DE-0752-07-0370-I-1, NY-0752-07-0195-I-1

Issuance Date: August 1, 2008

Appeal Type: Adverse Action by Agency

Action Type: Suspension - More than 14 Days

Jurisdiction

- Suspensions/Furloughs

These cases involve facts and issues similar to those in *Hart v. Department of Transportation*, [2008 MSPB 149](#), in that the appellants are Air Traffic Controllers (ATCs) with the FAA who were temporarily medically disqualified from performing their ATC duties, and who were denied requests for assignment to administrative duties, resulting in their having to use annual or sick leave, or be in a leave without pay status, for periods exceeding 14 days. Unlike the appellant in *Hart*, however, they were not “suspended” for more than 14 consecutive days. In each case, the administrative judge (AJ) determined that the appellant was subjected to an appealable suspension.

Holding: The Board dismissed each appeal for lack of jurisdiction:

1. There exists no precedent for combining non-consecutive suspensions of 14 days or less for purposes of finding Board jurisdiction. The precedents relied upon by the AJ establish, at most, that consecutive suspensions of 14 days or less may be combined when they are based on the same reason, and there is evidence that the agency attempted to circumvent Board regulations by imposing multiple suspensions of 14 days or less. There is no evidence that the agency attempted to circumvent Board regulations in this manner.

2. The appellants were not subjected to a furlough within the Board’s jurisdiction, i.e., the temporary placement of an employee in a non-duty, non-pay status because

of lack of work or funds, or other non-disciplinary reasons. Here, the agency's action was a disciplinary action in the broad sense of this term.

► **Appellants: John Giannetto, Ronald Stanton**

Agency: Department of Transportation

Decision Number: [2008 MSPB 182](#), [2008 MSPB 186](#)

Docket NumberS: AT-0752-07-0661-I-1, DC-0752-07-0525-I-1

Issuance Date: August 1, 2008

Appeal Type: Adverse Action by Agency

Action Type: Suspension – More than 14 Days

Jurisdiction

- Suspensions/Furloughs

These cases involve facts and issues similar to those in *Hart v. Department of Transportation*, [2008 MSPB 149](#), in that the appellants are Air Traffic Controllers with the FAA who were temporarily medically disqualified from performing their ATC duties, and who were denied requests for assignment to administrative duties, resulting in their having to use annual or sick leave, or be in a leave without pay status, for periods exceeding 14 days.

Holdings:

1. As in *Hart*, the Board held that the appellants were subjected to appealable suspensions, but that the agency was not required to follow the procedures of [5 U.S.C. § 7513\(b\)](#) because the FAA is not covered by chapter 5 of the United States Code, and remand was necessary to determine whether the agency committed harmful procedural error under its own rules. Also as in *Hart*, the Board found that the Back Pay Act does not apply to the FAA.

2. As in *Mitchell*, [2008 MSPB 187](#), et al., the Board held that there is no basis for combining non-consecutive “suspensions” of 14 days or less for purposes of finding Board jurisdiction. Nor were the appellants subjected to an appealable furlough.

► **Appellant: Thomas M. Burch**

Agency: Department of Homeland Security

Decision Number: [2008 MSPB 185](#)

Docket Number: DE-0752-06-0538-A-1

Issuance Date: August 1, 2008

Action Type: Attorney Fee Request

Attorney Fees

- Authority to Award

Holdings: The Board affirmed the initial decision as modified, granting the appellant's motion for attorney fees:

1. Attorney fees can be awarded in the interest of justice under [5 U.S.C. § 7701\(g\)\(1\)](#) when the appellant is the prevailing party and the agency is found to have retaliated against him for filing an age discrimination claim.

- a. The agency based its argument that such claims of retaliation cannot support an award of attorney fees on a First Circuit decision that held that the Age Discrimination in Employment Act (ADEA) does not cover claims of retaliation filed by federal employees. The Supreme Court reversed the First Circuit's ruling in *Gomez-Perez v. Potter*, [128 S. Ct. 1931](#) (2008).
- b. More importantly, the Board has a separate statutory basis than the ADEA for awarding attorney fees for reprisal claims of this sort. Under § 7701(g)(1), an award is warranted in the interest of justice in "any case in which a prohibited personnel practice was engaged in by the agency." Retaliation for filing an age discrimination claim is a prohibited personnel practice under [5 U.S.C. § 2302\(b\)\(9\)](#), which prohibits any personnel action taken against an employee because of the exercise of any complaint right granted by any law, rule, or regulation. A federal employee's filing of a complaint of employee discrimination based on age clearly constitutes the exercise of a complaint right granted by law and regulation.

2. The Board agreed with the AJ's determination that an award of attorney fees is appropriate in the interest of justice in this case.

3. The Board declined to determine whether it was appropriate to calculate the amount of the award under [5 U.S.C. § 7701\(g\)\(1\)](#), or under the more expansive provisions of § 7701(g)(2), as the appellant did not seek to recover any expenses that would be recoverable under (g)(2), but not under (g)(1).

4. The Board affirmed the reasonableness of the amount of fees awarded, \$72,585.

- **Appellant: Lynn M. Vaughn**
Agency: United States Postal Service
Decision Number: [2008 MSPB 178](#)
Docket Number: AT-0752-07-0971-I-1
Issuance Date: August 1, 2008
Appeal Type: Adverse Action by Agency
Action Type: Reduction in Grade/Rank/Pay

Evidence

- Hearsay

The agency petitioned for review of an initial decision that reversed the appellant's reduction in grade and pay. The agency demoted the appellant from the position of EAS-20 Manager, to the position of EAS-17 Supervisor, based on a charge of failure to perform her duties in an effective manner. The appeal was decided based on the written record. The AJ found that the findings in the arbitration decisions that were the agency's primary evidence were conclusory in nature and did not set forth specific factual findings to support the charge. He therefore ordered the agency to cancel the personnel action.

Holdings: The Board granted the agency's petition for review (PFR), reversed the initial decision, and sustained the appellant's reduction in grade and pay:

1. After analyzing the hearsay statements upon which the agency relied under the factors set forth in *Borninkhof v. Department of Justice*, [5 M.S.P.R. 77](#) (1981), the Board concluded that the agency's evidence was sufficient to establish the charge by preponderant evidence. Moreover, it concluded that the appellant "basically did not refute the charge; rather, she responded that the penalty was unreasonable or that her failures were justified."

2. The penalty was within the bounds of reasonableness.

► **Appellant: Gary A. Hunter**

Agency: Office of Personnel Management

Decision Number: [2008 MSPB 183](#)

Docket Number: DE-0845-08-0073-I-1

Issuance Date: August 1, 2008

Appeal Type: FERS - Collection of Overpayment

Action Type: Retirement/Benefit Matter

Retirement

- Annuity Overpayment

The appellant petitioned for review of an initial decision that affirmed OPM's determination that he received an overpayment in the amount of \$11,969.96 and was not entitled to a waiver of recovery of the overpayment. The overpayment resulted from the appellant being placed in the wrong retirement system when he retired in 2005. The AJ found that the existence and amount of the overpayment was correct and that the appellant was without fault in causing the overpayment. She further found, however, that the appellant failed to prove that recovery of the overpayment would be against equity and good conscience.

Holdings: The Board granted the appellant's PFR, affirmed the initial decision as to the existence and amount of the overpayment, but reversed it as to the appellant's entitlement to a waiver, and ordered OPM to refund the appellant's payment for the overpayment amount:

1. Recovery of an overpayment is against equity and good conscience when the recipient can show that, due to the notice that such payment would be made, or because of the incorrect payment, he either has relinquished a valuable right or has changed positions for the worse.

2. The appellant met these criteria in this case. Had the appellant been enrolled in the correct system (CSRS Offset), he would have known that he was not yet eligible to retire in July 2005. His decision to apply for immediate retirement was directly caused by the erroneous notice that he was eligible to receive a FERS retirement annuity. This decision was detrimental to him because he would have earned him additional salary and retirement benefits, and it was material.

- **Appellant: Tiffany J. Levy**
Agency: Department of Homeland Security
Decision Number: [2008 MSPB 174](#)
Docket Number: AT-0752-08-0048-I-1
Issuance Date: August 1, 2008
Action Type: Constructive Adverse Action

Jurisdiction

- Resignation/Retirement/Separation

The appellant petitioned for review of an initial decision that dismissed her appeal of an allegedly involuntary resignation for lack of a nonfrivolous allegation of jurisdiction. The appellant and her husband were both employed in law enforcement positions in Houston, Texas. They asked for a joint transfer to Mobile, Alabama. The husband was transferred to Mobile, but not the appellant. The appellant was given the option of remaining in Houston or resigning, and she chose the latter.

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

- 1. An employee-initiated action such as a resignation is presumed to be voluntary, and thus outside the Board's jurisdiction as an adverse action, but this presumption can be overcome. The touchstone of the voluntariness analysis is whether, considering the totality of the circumstances, factors operated on the employee's decision-making process that deprived her of freedom of choice. When an appellant raises allegations of discrimination in connection with an involuntariness claim, evidence of discrimination may be considered only in terms of the standard for voluntariness, not whether such evidence meets the test for proof of discrimination or reprisal under Title VII.**
- 2. The appellant made a nonfrivolous allegation of jurisdiction when she asserted that: (1) The agency told her she could remain at Houston or resign from the agency to move with her husband; (2) the agency assured her that, if she elected to resign, it would assign her to any vacancies that arose in Mobile before her resignation became effective; and (3) her resignation was involuntary because the agency deliberately failed to inform her of, and assign her to, a vacancy which arose in Mobile prior to the effective date of her resignation.**
- 3. The appellant made an additional nonfrivolous allegation of involuntariness in that she asserted that the agency denied her request to revoke her resignation letter before its effective date and that the agency actively discouraged her from pursuing alternatives to resigning.**

- **Appellant: Benzena M. Brown**
Agency: Department of Defense
Decision Number: [2008 MSPB 177](#)
Docket Number: SF-0752-07-0771-I-1
Issuance Date: August 1, 2008
Action Type: Constructive Adverse Action

Jurisdiction

- Resignation/Retirement/Separation

The appellant petitioned for review of an initial decision that dismissed her appeal of an allegedly involuntary retirement for lack of a nonfrivolous allegation of jurisdiction. She had applied for and received a disability retirement annuity. In her appeal, she contended that her disability retirement was involuntary due to “non-accommodation” by her agency. The AJ dismissed the appeal without conducting a hearing.

Holdings: The Board denied the appellant’s PFR, reopened the appeal on its own motion, vacated the initial decision, and remanded the appeal to the regional office for further adjudication:

1. To invoke the Board’s jurisdiction over an involuntary disability retirement appeal, the appellant must raise nonfrivolous allegations that, if proven, would show that an accommodation was available between the time the appellant’ medical condition arose and the date of her separation that would have allowed her to continue her employment, that the appellant communicated to the agency her desire to continue working but that her medical limitations required a modification of her working conditions or duties, and that the agency failed to provide the appellant that accommodation.

2. Although the AJ’s jurisdictional order provided the appellant with accurate information concerning the Board’s jurisdiction over involuntary retirement appeals generally, it did not provide the appellant with notice concerning the specific jurisdictional requirements applicable to allegedly involuntary disability retirement appeals. A remand for further adjudication is therefore necessary.

- **Appellant: Dennis Belmont**
Agency: United States Postal Service
Decision Number: [2008 MSPB 184](#)
Docket Number: PH-0752-07-0265-X-1
Issuance Date: August 1, 2008

Compliance

This case was before the Board on the AJ’s Recommendation finding that the agency was in noncompliance with the parties’ settlement agreement.

Holdings: The agency has now provided evidence that it has provided attorney fees and other relief in question. The Board found that the agency is now in compliance and dismissed the petition for enforcement as moot.

- **Appellant: Thomas Tubesing**
Agency: Department of Health and Human Services
Decision Number: [2008 MSPB 179](#)
Docket Number: DA-315H-08-0168-I-1
Issuance Date: August 1, 2008
Action Type: Probationary Termination

Jurisdiction
- Probationers

The appellant petitioned for review of an initial decision that dismissed his appeal as premature. The agency notified the appellant that it was terminating his employment as a GS-13 Public Health Advisor before the completion of his one-year probationary period. On appeal to the Board, the appellant claimed that he had completed his probationary period. He also asserted that his termination constituted reprisal for whistleblowing. In the initial decision, the AJ found that the appellant had established that he had completed his probationary period prior to his termination and therefore was an “employee” under [5 U.S.C. § 7511](#), and that the Board had jurisdiction over the appeal as a removal under [5 U.S.C. §§ 7511-7513](#). The AJ dismissed the appeal as premature to allow the appellant the opportunity to seek corrective action from OSC.

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

- 1. When an employee raises a claim of reprisal based on whistleblowing and the personnel action giving rise to the claim is an otherwise appealable action, the employee may elect to seek corrective action from OSC before appealing to the Board or he may file the appeal directly with the Board. If an appellant indicates during a Board proceeding that he filed a complaint with OSC on the same matter prior to filing his Board appeal, it is proper for the AJ to dismiss the appeal if the appellant has not yet exhausted his remedy before OSC.**
- 2. Here, the appellant’s submissions do not indicate that he filed a complaint with OSC prior to filing his Board appeal or that he requested that his Board appeal be dismissed so that he could seek corrective action before OSC. He unambiguously requested that the AJ adjudicate on the record the issue of whether the Board has jurisdiction over his appeal as a removal and, if so, whether the agency failed to provide him with his procedural rights in effecting his removal. Accordingly, a remand for such adjudication is appropriate.**

- **Appellant: Louis A. Lodge**
Agency: Department of the Treasury
Decision Number: [2008 MSPB 175](#)
Docket Number: AT-0330-07-0116-X-1
Issuance Date: August 1, 2008

Compliance
Miscellaneous Topics
- USERRA/VEOA/Veterans’ Rights

This case was before the Board pursuant to the AJ's Recommendation finding the agency to be in violation of a final Board order. In a previous Opinion and Order, [2007 MSPB 223](#), the Board found that the agency violated the appellant's veterans' preference rights in connection with his application for a revenue officer position with the IRS, and ordered the agency to reconstruct the hiring position for that position. That decision noted that OPM had twice turned down the agency's request to pass over the appellant and select another individual under [5 U.S.C. § 3318\(b\)](#). Subsequent to this earlier decision, OPM granted the agency's third request to pass over the appellant in favor of a non-preference-eligible applicant. In her Recommendation, the AJ found that the agency could not consider OPM's pass-over decision.

Holding: The Board found that the agency was in compliance with its final order, and dismissed the matter as moot. Consistent with *Endres v. Department of Veterans Affairs*, [2007 MSPB 301](#), 107 M.S.P.R. 455, an agency that has been ordered to reconstruct its hiring process may seek pass-over authority to avoid selecting a preference eligible candidate. While the appellant attacks OPM's pass-over decision, he cites nothing establishing Board jurisdiction to review such a determination, and the Board found no basis on which to do so.

- ▶ **Appellant: Denise M. Prioleau**
Agency: Department of Veterans Affairs
Decision Number: [2008 MSPB 181](#)
Docket Number: PH-0752-07-0054-X-1
Issuance Date: August 1, 2008

Compliance

This case was before the Board on the AJ's Recommendation finding that the agency materially breached a negotiated settlement agreement. Specifically, the AJ found that the agency compromised the intent of the agreement, which was to facilitate a successful application for disability retirement, by failing to change the appellant's SF-50 to change the reason for the appellant's removal to read "Physical inability to perform the essential functions of her position."

Holding: The agency has submitted evidence that it corrected the SF-50, and has made numerous unsuccessful attempts to notify the appellant of its intention to assist her in filing a petition for reconsideration with OPM. As the appellant has not responded to those attempts, or to the Board's order on the matter, the Board found that the agency is now in compliance and dismissed the petition for enforcement as moot.

- ▶ **Appellant: Caulton D. Allen**
Agency: Department of Veterans Affairs
Decision Number: [2008 MSPB 173](#)
Docket Number: DC-0752-07-0694-X-1
Issuance Date: August 1, 2008

Compliance

This case was before the Board on the AJ's Recommendation finding the appellant to be in violation of the parties' settlement agreement. The agreement provided, inter alia, that the appellant would waive and withdraw any civil actions and EEO complaints. In this compliance proceeding initiated by the agency, the AJ found that the appellant was in violation because he continued to maintain actions in a U.S. District Court and before the EEOC that he was required by the agreement to withdraw.

Holding: The appellant is violating the settlement agreement by maintaining his actions in court and before the EEOC. The Board ordered the appellant to comply with the terms of the agreement.

- ▶ **Appellant: Travis Davis**
- Agency: Office of Personnel Management**
- Decision Number: [2008 MSPB 176](#)**
- Docket Number: SF-0843-07-0835-I-1
- Issuance Date: August 1, 2008
- Appeal Type: FERS - Death & Survivor Benefits
- Action Type: Retirement/Benefit Matter

Retirement
- Lump Sums

OPM petitioned for review of an initial decision that reversed its decision denying the appellant's application for a lump-sum death benefit under FERS in connection with the death of his mother, who was a Postal employee at the time of her death. OPM based its denial on its determination that the decedent's estranged husband was her widower and, as such, entitled to a survivor annuity in precedence to any lump-sum payment to the decedent's surviving children.

Holdings: The Board granted OPM's PFR, reversed the initial decision, and affirmed as modified OPM's reconsideration decision denying the appellant a lump-sum benefit:

- 1. Under FERS, [5 U.S.C. § 8424\(d\)](#), lump-sum benefits will be paid if an employee dies "(1) without a survivor, or (2) with a survivor or survivors and the right of all survivors under subchapter IV terminates before a claim for survivor annuity under such subchapter is filed." As a separated but not divorced spouse, the estranged husband falls within the definition of a current spouse under FERS, and is considered the decedent's widower and survivor under Subchapter IV, and is entitled to a one-time payment and a survivor annuity based upon his wife's federal service. Unless his right as a survivor has terminated, no lump-sum credit can be paid to the appellant.**
- 2. Although the decedent and her husband entered into a Marital Settlement Agreement in which both parties waived all of their rights to any survivor benefits, this agreement did not qualify as an effective waiver because it does not state that it is irrevocable and because it was not filed with OPM.**
- 3. Even if the husband had irrevocably waived his right to a survivor annuity, the appellant would still not be entitled to the lump-sum benefit he seeks. Under**

FERS, when an employee dies without a survivor, a lump-sum benefit will be paid in accordance with the statutory order of precedence, in which the widower has precedence over any children.

- ▶ **Appellant: Dan C. Boechler**
- Agency: Department of the Interior**
- Decision Number: [2008 MSPB 188](#)**
- Docket Number: DE-1221-04-0394-W-4**
- Issuance Date: August 4, 2008**
- Appeal Type: Individual Right of Action (IRA)**
- Action Type: IRA "1221" Non-appealable Action**

Whistleblower Protection Act

- **Exhaustion of Remedy**
- **Protected Disclosure**

The appellant petitioned for review of an initial decision that dismissed his IRA appeal for lack of jurisdiction. The appellant was a full-time seasonal employee with the agency's Bureau of Land Management. In his IRA appeal, he contended that he was prematurely put in a non-pay, non-duty status in October 2003, before the end of the fire season, and then not returned to a pay and duty status in March 2004, in reprisal for alleged whistleblowing disclosures. In dismissing the appeal, the AJ found that: (1) The appellant had failed to exhaust his administrative remedy with OSC with respect to his claim that the agency failed to return him to duty status in March 2004; (2) with respect to the other personnel action, the appellant failed to make a nonfrivolous allegation that he made a protected disclosure and failed to show that his alleged disclosures were a contributing factor in the decision to place him in a seasonal non-duty status.

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 AJ's determination that the appellant failed to exhaust his OSC remedy with respect to the March 2004 personnel action was correct based on the record before the AJ. Although the appellant has now produced evidence that he did bring this matter to OSC's attention, this evidence is not properly before the Board because he has made no showing that this evidence was previously unavailable despite his due diligence.

2. With respect to 3 of the 4 alleged disclosures, the AJ correctly determined that the appellant failed to make a nonfrivolous allegation of a protected disclosure. With respect to the fourth disclosure, the Board found that the AJ erred in finding that this matter was barred under the doctrine of collateral estoppel, because the issue in the prior Board appeal was not identical to the issue in the present appeal. Nevertheless, the Board found that the appellant had not made a nonfrivolous allegation of a protected disclosure because he did not explain what violations of law and regulation, gross mismanagement, abuse of authority, or substantial and specific dangers to public health or safety were involved.

3. The appellant failed to establish his allegations of procedural error and bias on the AJ's part.

- ▶ **Appellant: Dan C. Boechler**
Agency: Department of the Interior
Decision Number: [2008 MSPB 189](#)
Docket Number: DE-1221-08-0048-W-1
Issuance Date: August 4, 2008
Appeal Type: Individual Right of Action (IRA)

Whistleblower Protection Act
- Exhaustion of Remedy

The appellant petitioned for review of an initial decision that dismissed his IRA appeal for lack of jurisdiction. The appellant alleged that the agency refused to put him on a list of individuals eligible for post-retirement administratively determined work in reprisal for his whistleblowing. The AJ dismissed the appeal on several grounds: lack of exhaustion of the OSC administrative remedy; failure to make a nonfrivolous allegation of a protected disclosure; and failure to make a nonfrivolous allegation that the agency managers responsible for the alleged personnel action had actual or constructive knowledge of his alleged whistleblowing.

Holdings: The Board reopened the appeal because it found it more appropriate to dismiss the appeal for lack of jurisdiction on the ground that he failed to show that he exhausted his administrative remedies before OSC. The Board also addressed the appellant's contention that the AJ should have granted his motion to recuse herself from the appeal, finding this contention to be without merit.

- ▶ **Appellant: Dan C. Boechler**
Agency: Department of the Interior
Decision Number: [2008 MSPB 190](#)
Docket Number: DE-1221-05-0283-W-4
Issuance Date: August 4, 2008
Appeal Type: Individual Right of Action (IRA)

Whistleblower Protection Act

In this IRA appeal, the appellant contended that the agency terminated his health and life insurance in reprisal for his alleged whistleblowing. The AJ dismissed the appeal for lack of jurisdiction, finding that the appellant failed to make a nonfrivolous allegation that he made a protected disclosure, and that he failed to show that his disclosures were a contributing factor in the decision to terminate his health and life insurance benefits.

Holdings: The AJ correctly found that the appellant failed to make a nonfrivolous allegation that his disclosures were protected. The Board also found that the appellant failed to establish his allegations of procedural error and bias on the AJ's part.

- ▶ **Appellant: Donald L. Anderson**
Agency: United States Postal Service
Decision Number: [2008 MSPB 193](#)
Docket Number: CB-7121-08-0011-V-1
Issuance Date: August 4, 2008
Appeal Type: Arbitration Appeals/Grievances

Arbitration/Collective Bargaining-Related Issues

The appellant filed an appeal contesting his removal. This case was docketed as a request to review an arbitration decision referenced in the appeal.

Holdings: Although the Board typically has jurisdiction to review an arbitration decision where the subject matter of the grievance is within the Board's jurisdiction, the appellant has alleged discrimination in connection with the matter, and a final decision has been issued, Postal employees do not have a right of Board review of an arbitration decision because [5 U.S.C. § 7121](#) does not apply to the Postal Service. The case was forwarded to the regional office for docketing as an adverse action appeal.

- ▶ **Appellant: Ronel C. Tacujan**
Agency: United States Postal Service
Decision Number: [2008 MSPB 192](#)
Docket Number: SF-0752-08-0241-I-1
Issuance Date: August 4, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Board Procedures

- Withdrawal of Appeal/PFR

The appellant filed a PFR of an initial decision that dismissed his appeal as withdrawn. The initial decision notified the appellant that it become the Board's final decision unless a PFR was filed by April 3, 2008. The appellant filed his PFR on May 16.

Holding: The Board treats a PFR of an appellant-initiated dismissal of a petition for appeal (PFA) as a late-filed PFA or as a request to reopen and reinstate the prior appeal. The Board dismissed the PFA as untimely filed without good cause shown and denied the request to reopen.

► **Appellant: Tony Henderson**

Agency: Office of Personnel Management

Decision Number: [2008 MSPB 191](#)

Docket Number: AT-844E-08-0071-I-1

Issuance Date: August 4, 2008

Appeal Type: FERS - Employee Filed Disability Retirement

Action Type: Retirement/Benefit Matter

Retirement

- Disability Retirement

The appellant petitioned for review of an initial decision that affirmed OPM's determination that he was not entitled to disability retirement. The appellant was a Border Patrol Agent. In June 2006, he was arrested in the workplace and charged with distribution of marijuana. In July, he was placed on indefinite suspension; he was ultimately convicted via a guilty plea and removed from federal service effective January 5, 2008. The appellant filed an application for disability retirement during his suspension, alleging that he was unable to perform his job duties due to a back injury and psychological problems. Following a hearing in which the appellant, his physician, and his former supervisor testified, the AJ affirmed OPM's determination that the appellant failed to prove his entitlement to disability retirement.

Holdings: The Board granted the appellant's PFR, reversed the initial decision, and ordered OPM to award the appellant disability retirement:

- 1. Removal for misconduct does not preclude an individual's receipt of disability retirement benefits if he can show that he was disabled from performing useful and efficient service in his position prior to the effective date of his removal. An appellant's application for disability retirement in the face of an impending removal may cast doubt upon the veracity of his application.**
- 2. The AJ erred in relying heavily on the testimony of the appellant's former supervisor, who testified that the appellant never exhibited any performance, attendance, or conduct deficiencies prior to his arrest, and that the appellant's arrest was unlikely to have caused his alleged disability. The appellant claimed that his disability began after his arrest, while he was still employed but was no longer in duty status. The relevant question, therefore, is whether the appellant's medical condition is incompatible with either useful and efficient service or retention in his former position. The testimony of the appellant's former supervisor is largely immaterial to resolving that question.**
- 3. After considering the evidence of record, the Board concluded that the appellant's medical condition is incompatible with either useful and efficient service or retention in his former position.**

- **Appellant: Larry M. Dow**
Agency: Department of Homeland Security
Decision Number: [2008 MSPB 194](#)
Docket Number: NY-3443-08-0027-I-1
Issuance Date: August 4, 2008

Timeliness - PFR

The initial decision informed the appellant that it would become final on March 26, 2008, unless a PFR was filed. The appellant filed a PFR more than 5 weeks later, on May 5.

Holding: The Board dismissed the PFR as untimely filed without good cause shown. Although the appellant asserted that he had obtained new evidence, neither the evidence (a statement) nor the appellant's pleading was in the form of an affidavit or declaration made under penalty of perjury. Moreover, there was no showing that this statement could not have been obtained before the deadline for filing a timely PFR.

- **Appellant: David Q. Tat**
Agency: United States Postal Service
Decision Number: 2008 MSPB 195
Docket Number: DA-0353-08-0174-I-1
Issuance Date: August 5, 2008
Appeal Type: Restoration to Duty

Miscellaneous Agency Actions
- Restoration to Duty

The appellant petitioned for review of an initial decision that dismissed his restoration appeal for lack of jurisdiction. In September 2004, the appellant filed a Notice of Traumatic Injury that alleged that he injured his lower back while on the job. He has not worked since December 2004. The agency removed the appellant, effective January 2008, for inability to perform the duties of his position. In his appeal to the Board, the appellant asserted that he was partially recovered and that the agency denied his request to restore him to a position within his medical restrictions. After considering the parties' responses to a show-cause order, the AJ dismissed the appeal for lack of jurisdiction without holding the hearing requested by the appellant. He found that, because OWCP disallowed the appellant's requests for compensation benefits for his alleged work injuries, he is not entitled to restoration rights.

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

1. The AJ erred in finding that the appellant did not suffer a compensable injury.
 - a. To be entitled to any restoration rights under [5 C.F.R. part 353](#), an employee must have been separated or furloughed from an appointment without time limitation as a result of a compensable injury. A compensable injury is a medical condition accepted by OWCP to be job-related and for which

medical or monetary benefits are payable from the Employees' Compensation Fund.

b. The record indicates that OWCP accepted and paid medical benefits for the appellant's September 2004 back injury.

2. The appellant has made sufficient nonfrivolous allegations of fact to establish Board jurisdiction over his restoration appeal as a partially recovered employee, in that he alleged that: (1) He was absent from his position due to a compensable injury; (2) he recovered sufficiently to return to duty on a part-time basis, or to return to work in a position with less demanding requirements; (3) the agency denied his request for restoration; and (4) the denial was "arbitrary and capricious."

► **Appellant: Linda D. Edwards**
Agency: Department of Transportation
Decision Number: 2008 MSPB 197
 Docket Number: SF-0752-08-0062-I-1
 Issuance Date: August 6, 2008
 Appeal Type: Adverse Action by Agency
 Action Type: Removal

Adverse Action Charges

- **Absence Related**
- **Physical Inability to Perform**

The appellant petitioned for review of an initial decision that sustained her removal based on a charge of being unavailable for duty. After being appointed as an air traffic control specialist on October 2, 2005, the appellant injured herself at work 4 days later. She was able to perform administrative duties for about 4 months, but from February 2006 through her removal in late 2007, she was unable to work as a result of medical problems. Following a hearing, the AJ found that the agency proved its charge, and that the appellant failed to substantiate her claims of disability discrimination, disparate treatment, and harmful procedural error.

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

1. The AJ erred in relying on *Cook v. Department of the Army*, [18 M.S.P.R. 610](#) (1984), in finding that this case falls within an exception to the general rule that adverse actions cannot be based on an employee's use of approved leave. The *Cook* exception applies only to "unscheduled" absences, and applies only to absences on leave without pay, and not to absence on sick leave.

2. The Board concluded that the actual basis for the appellant's removal was its determination that the appellant was not physically able to perform the duties of her regular position. In finding removal warranted based on employees' unavailability for duty to their incapacitation, the Board has relied on there being no foreseeable end to the employees' unavailability.

3. Although it was undisputed that the appellant remained incapacitated at the time her removal was proposed, before that action was effected her physician stated that the appellant was expected to recover sufficiently to perform the duties of her regular position as of January 2, 2008, just over 2½ months after the scheduled date of her removal. Under these circumstances, it cannot be said that there was no foreseeable end to her absence from work, and the agency did not establish that it could not have waited an additional 2½ months for her to recover.

- **Appellant: Robert M. Baggan**
Agency: Department of State
Decision Number: 2008 MSPB 196
Docket Number: DC-315H-08-0275-I-1
Issuance Date: August 6, 2008
Appeal Type: Termination of Probationers

Jurisdiction

- Probationers

Whistleblower Protection Act

- Exhaustion of Remedy

The appellant petitioned for review of an initial decision that dismissed his appeal for lack of jurisdiction. The appellant was appointed to his position as a Program Analyst on April 15, 2007, and was terminated in January 2008 due to unacceptable conduct. On appeal to the Board, the appellant asserted various affirmative defenses, including retaliation for whistleblowing. The AJ dismissed the appeal for lack of jurisdiction, finding that the appellant was a probationer at the time of his termination. The AJ further found that the Board lacked jurisdiction to review the appellant's whistleblowing allegations because he had not yet exhausted his remedies with OSC.

On PFR, the appellant asserts that he is an "employee" with adverse action appeal rights, not a probationer.

Holdings: The Board affirmed the initial decision regarding the appealability of the appellant's termination, but vacated it regarding the appellant's IRA appeal, which was now ripe for adjudication:

1. The appellant' appointment was subject to a 1-year probationary period. A probationer only has appeal rights if he alleges that he was terminated for partisan political reasons or because of his marital status, and the appellant made no such allegation.
2. The appellant cannot tack on his prior service with another agency. His reliance on [5 C.F.R. § 315.802\(c\)](#) is misplaced; it applies only enable an employee who had begun a probationary period, and who was subsequently absent from his position for specified reasons, to have part or all of the period of absence counted towards the probationary period already begun at the time of the absence.
3. The appellant cannot count his time as a disability retiree toward the completion of his probationary period.

4. While the Board did not have jurisdiction over the appellant's IRA appeal at the time the initial decision was issued, because 120 days had not yet elapsed after he filed a complain with OSC, that appeal is now ripe for adjudication.