



U.S. Merit Systems Protection Board

CASE REPORT

DATE: September 26, 2008

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

BOARD DECISIONS

- ▶ **Appellant: Royal L. Booker**
Agency: Department of Veterans Affairs
Decision Number: [2008 MSPB 216](#)
Docket Number: DC-0752-07-0911-I-1
Issuance Date: September 19, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Adverse Action Charges **- Sexual Misconduct/Harassment**

The appellant petitioned for review of an initial decision that sustained the agency's removal action based on a charge of sexual harassment of a co-worker. After a hearing, the AJ found the co-worker more credible than the appellant, determined that he created a hostile working environment violating the agency's policy on sexual harassment, and that removal was a reasonable penalty. On review, the appellant argued that his conduct did not create a hostile work environment under the agency policy, that the agency was required to prove a Title VII violation and that it did not meet that burden, and that the removal penalty was unreasonable.

Holdings: The Board granted the appellant's PFR and affirmed the initial decision as modified, still sustaining the agency's removal action:

- 1. The charge of sexual harassment required proof under the Title VII standard.**
 - a. When an agency charges an employee with violating its sexual harassment policy and that policy explicitly references the Title VII standard, the Title VII standard must be applied. The agency also bears this burden if its sexual harassment policy tracks Title VII regulations, even if it does not explicitly reference them.**

b. Here, the agency relied on a Memorandum entitled “Prevention of Sexual Harassment,” which explicitly references Title VII and tracks Title VII regulations regarding sexual harassment.

2. After examining the evidence of record, the Board concluded that the appellant’s conduct created a hostile work environment under Title VII.

3. The Board concurred with the AJ’s determination that removal was a reasonable penalty.

► **Appellant: Steven Kravitz**

Agency: Department of the Navy

Decision Number: [2008 MSPB 221](#)

Docket Number: SF-0353-04-0204-B-5

Issuance Date: September 19, 2008

Action Type: Restoration to Duty After Recovery from Compensable Injury

Miscellaneous Agency Actions

- Restoration to Duty

The appellant’s counsel (the appellant is deceased) petitioned for review of a remand initial decision that found that the appellant failed to timely file an appeal of the agency’s failure to restore him to duty following a compensable injury. This appeal has been before the Board twice previously, [98 M.S.P.R. 443](#) (2005), and [104 M.S.P.R. 483](#) (2007).

Holdings: The Board granted the PFR, denied the agency’s cross-PFR, reversed the remand initial decision, and remanded the case to the regional office for adjudication on the merits:

1. The AJ correctly found that the appellant’s applications for certain positions were pending during the restoration period. If a physically disqualified employee files an application for a vacant position during the year following the issuance of his OWCP award, his application will be construed as a timely request for restoration. Here, the appellant’s applications were pending at the time he became eligible for an OWCP award, and he continued to inquire about these positions during the year following the issuance of his OWCP award. Under these circumstances, the appellant timely requested restoration.

2. The AJ erred when he found that the appellant did not establish good cause for waiver of the Board’s time limit for filing the appeal. The proper standard is the one that requires an appellant to be diligent in discovering and exercising his restoration rights. The Board has rejected the AJ’s determination that the agency’s notification of appeal rights with respect to the appellant’s removal gave him adequate notice of his right to appeal the restoration action. Because the appellant established good cause for his untimely filing, the appeal must be decided on the merits.

- **Appellant: Stephen W. Gingery**
Agency: Department of the Treasury
Decision Number: [2008 MSPB 217](#)
Docket Number: CH-3443-08-0256-I-1
Issuance Date: September 19, 2008

Miscellaneous Topics

- USERRA/VEOA/Veterans' Rights

The appellant petitioned for review of an initial decision that dismissed his VEOA appeal for lack of jurisdiction. In his appeal, the appellant claimed that his veterans' preference rights were violated in connection with his application for a position with the IRS. During the Department of Labor's investigation, the agency admitted that it violated the appellant's rights and that he would be permitted to take the test used to assess whether candidates possess the requisite skills for the position. The appellant walked out of the test before completing it and questioned the validity of the test. The AJ dismissed the appeal for lack of jurisdiction, finding that the appellant failed to exhaust his remedy with DOL, that he lacks standing to file a Board appeal because DOL resolved his complaint, and that his appeal was untimely filed.

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 appellant did exhaust his remedy with DOL, and DOL's "resolution" of his complaint did not deprive the Board of jurisdiction. Just as the Federal Circuit held in *Kirkendall v. Department of the Army*, [479 F.3d 830](#) (Fed. Cir. 2007), that Congress did not intend for DOL to have the final word in determining the timeliness of VEOA complaints, the Board found that Congress did not intend for DOL to have the final word as to what constitutes an appropriate remedy for a violation of veterans' preference rights.**
- 2. Here, as in *Heckman v. Department of the Interior*, [2008 MSPB 128](#), 109 M.S.P.R. 133, the agency violated the appellant's veterans' preference rights by denying him the right to compete for a particular position under a vacancy announcement.**
- 3. The appellant's VEOA appeal was filed beyond the statutory time limit, but may be subject to equitable tolling under *Kirkendall*. The appeal must be remanded for the AJ to provide the parties an opportunity to address whether equitable tolling is appropriate. If the time limit is tolled, the appeal must be adjudicated on the merits.**

- **Appellant: Raymond Marshall**
Agency: Department of Health and Human Services
Decision Number: [2008 MSPB 215](#)
Docket Number: AT-3443-06-0811-X-1
Issuance Date: September 19, 2008

Compliance

This case was before the Board based on the AJ's Recommendation finding the agency in conformance with a final Board order, which found that the agency violated the appellant's veterans' preference rights under VEOA, and ordered corrective action. The AJ found that the agency had failed to reconstruct the selection process as ordered by the Board.

Holdings: The Board found that the agency remains in noncompliance:

1. As in *Endres v. Department of Veterans Affairs*, [2007 MSPB 301](#), 107 M.S.P.R. 455, a proper reconstruction of the selection process required the agency to: (1) remove the non-preference eligible selectee from the position in question; (2) reconstruct the certificate of eligibles; and (3) if the agency wished to select an applicant who was a non-preference eligible over the appellant, submit evidence that the agency obtained OPM's approval for a passover under [5 U.S.C. § 3318\(b\)\(1\)](#).

2. Here, the agency has provided no evidence that it removed the selected individual, nor that it has reconstructed the selection process in accordance with the law.

- **Appellant: Patrick D. Easterling**
Agency: United States Postal Service
Decision Number: [2008 MSPB 214](#)
Docket Number: AT-0752-08-0292-I-1
Issuance Date: September 19, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Jurisdiction

Settlement

- Last-Chance Agreement

The appellant petitioned for review of an initial decision that dismissed his removal appeal, which was based on the appellant's alleged violation of a last-chance settlement agreement (LCA), for lack of a nonfrivolous allegation of jurisdiction.

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

1. An appellant must receive explicit information on what is required to establish an appealable jurisdictional issue. Here, the AJ failed to provide the appellant with a proper jurisdictional notice.

2. To establish that a waiver of appeal rights in a LCA should not be enforced, an appellant must show one of the following: (1) He complied with the LCA; (2) the agency materially breached the LCA or acted in bad faith; (3) he did not voluntarily enter into the LCA; or (4) the LCA resulted from fraud or mutual mistake. Here, the appellant made a nonfrivolous allegation that he did not violate the LCA.

- ▶ **Appellant: Agnes C. Smith**
Agency: Department of the Army
Decision Number: [2008 MSPB 220](#)
Docket Number: DC-0752-06-0775-I-1
Issuance Date: September 19, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Timeliness - PFR

The appellant petitioned for review of an initial decision that dismissed her appeal as untimely filed. She filed her PFR 15 months after the deadline for timely filing.

Holding: The Board dismissed the PFR as untimely filed without good cause for the delay, rejecting the appellant's arguments that the delay was caused by her attorney's negligence or by medical impairments.

- ▶ **Appellant: Valerie L. Scott**
Agency: Social Security Administration
Decision Number: [2008 MSPB 219](#)
Docket Number: PH-0752-07-0506-I-2
Issuance Date: September 19, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Timeliness – PFR

Discrimination

- Mixed Case Procedures

The appellant petitioned for review of an initial decision that affirmed the agency's removal action.

Holding: The Board dismissed the PFR as untimely filed without good cause shown. It reopened the appeal on its own motion for the limited purpose of providing the appellant with mixed-case appeal rights.

- **Appellant: Caulton D. Allen**
Agency: Department of Veterans Affairs
Decision Number: [2008 MSPB 218](#)
Docket Number: DC-0752-07-0694-X-1
Issuance Date: September 19, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Compliance
Mootness

This case was before the Board following a previous Opinion and Order, [2008 MSPB 173](#), which found the appellant in breach of the parties' settlement agreement for not dismissing EEOC and federal court proceedings.

Holdings: Because the EEOC has dismissed the appellant's discrimination complaint, and the U.S. District Court has dismissed the appellant's pending civil action, the agency's petition for enforcement is now moot.

- **Appellant: Omar E. Rivera**
Agency: Department of the Air Force
Decision Number: [2008 MSPB 223](#)
Docket Number: AT-3443-08-0301-I-1
Issuance Date: September 23, 2008

Board Procedures/Authorities
- Dismissals – With/Without Prejudice

The appellant petitioned for review of an initial decision that dismissed his USERRA appeal for lack of jurisdiction. The AJ's determination was based on the Board's decision in *Russell v. Equal Employment Opportunity Commission*, [107 M.S.P.R. 171](#) (2007), which is currently on appeal to the Court of Appeals for the Federal Circuit.

Holdings: The Board has requested the Federal Circuit to remand the case for reconsideration and a new decision. Because the outcome of the *Russell* appeal will directly impact the outcome of the present appeal, the Board found it appropriate to dismiss the appeal without prejudice to its automatic refiling when the Federal Circuit remands *Russell* back to the Board.

- ▶ **Appellant: Mark H. Brigham**
Agency: Office of Personnel Management
Decision Number: [2008 MSPB 222](#)
Docket Number: NY-0845-07-0337-I-1
Issuance Date: September 19, 2008
Appeal Type: FERS - Collection of Overpayment
Action Type: Retirement/Benefit Matter

Board Procedures/Authorities
- Dismissals – With/Without Prejudice

OPM petitioned for review of an initial decision that reduced the amount of the overpayment it had determined was due. The appellant died during the processing of the appeal, and the Clerk of the Board informed his sister that a representative of the appellant's estate has the right to be substituted as a party to the appeal. The sister has informed the Board that the appellant's estate is in litigation and that a personal representative for the estate has not yet been determined.

Holding: Under these circumstances, the Board determined that the appropriate action was to dismiss the appeal without prejudice, subject to refiling within 60 days.

- ▶ **Appellant: William J. Parks**
Agency: United States Postal Service
Decision Number: [2008 MSPB 213](#)
Docket Number: AT-0752-06-0167-E-1; AT-0752-06-0166-E-1
Issuance Date: September 18, 2008
Appeal Type: Adverse Action by Agency
Action Type: Constructive Adverse Action

Discrimination
- Mixed Case Procedures

The EEOC referred this case to the Board for further consideration under [5 U.S.C. § 7702\(b\)\(5\)\(B\)](#) because it disagreed with the Board's final orders in these appeals.

Holding: The Board concurred in and adopted the EEOC's finding that the agency engaged in disability discrimination against the appellant, and ordered the agency to provide appropriate relief. The Board must defer to the EEOC on a discrimination issue unless the EEOC decision depends upon civil service law for its support or is so unreasonable that it amounts to a violation of civil service law. Here, the EEOC decision rests solely upon an interpretation of discrimination law, and there is no basis to conclude that the EEOC decision is so unreasonable that it amounts to a violation of civil service law.