



## U.S. Merit Systems Protection Board

CASE REPORT

DATE: October 17, 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: Jonathan F. Sink**  
**Agency: Department of Energy**  
**Decision Number: [2008 MSPB 231](#)**  
Docket Number: DE-0752-07-0333-I-1  
Issuance Date: October 9, 2008  
Appeal Type: Adverse Action by Agency  
Action Type: Constructive Adverse Action

#### **Interim Relief**

#### **Miscellaneous Topics**

#### **- Remedies – Status Quo Ante Relief**

The agency petitioned for review of an initial decision that found that the appellant's retirement was involuntary, and which ordered interim relief as well as reinstatement and back pay. Pursuant to a reorganization, the agency directed the appellant's reassignment from Colorado to Washington, D.C. After the appellant declined the reassignment "under duress and protest," the agency proposed his removal. Prior to a decision on the removal action, the appellant retired and he filed a timely appeal to the Board. After a hearing, the AJ found that: The agency's reorganization was bona fide and the agency therefore had a valid reason to direct the appellant's reassignment; because the directed reassignment was proper, the appellant failed to prove that the agency's removal action coerced his retirement decision; the appellant failed to prove his claim of age discrimination; and the retirement was involuntary because the agency incorrectly led him to believe that his FEHB health insurance would be cancelled if he was removed.

**Holdings:** The Board affirmed the AJ's finding that the appellant's retirement was involuntary because of agency misinformation regarding his health insurance coverage, but modified the decision as to both interim and final relief:

1. The purpose of interim relief under [5 U.S.C. § 7701\(b\)\(2\)\(A\)](#) is not to make the appellant whole at the interim relief stage of the proceedings, but rather to protect

him from hardship during the pendency of his appeal if he prevails. Here, the interim relief order required the agency to place the appellant in his former position, which had been abolished, and the appellant would not have suffered an undue hardship in waiting for the final order given that he was receiving a retirement annuity. Ordering the agency to provide interim relief under these circumstances was inappropriate.

2. When the Board orders an agency to cancel an action, the goal is to, as nearly as possible, place the appellant in the status quo ante, i.e., in the situation in which he would have been had the wrongful personnel action not occurred. The appellant is not entitled to be placed in a better position than he would have enjoyed had the adverse action not occurred. Here, the Board has determined that the agency's action directing the appellant's reassignment was proper, and it seems likely that the agency would have decided to remove him had he not retired. In that event, however, the appellant would have been entitled to a discontinued service retirement under [5 U.S.C. § 8336](#). Thus, even in the absence of the misinformation from the agency regarding his health insurance, the appellant likely would have been separated and retired shortly after he did so. Under these circumstances, the appropriate relief is to cancel the appellant's involuntary retirement, restore him with appropriate back pay and other benefits from the time of his retirement until the date he would have otherwise been separated from service, and adjust his retirement annuity accordingly, taking into account his entitlement to a discontinued service retirement.

- **Appellant: John W. Castellano**  
**Agency: Office of Personnel Management**  
**Decision Number: [2008 MSPB 232](#)**  
Docket Number: SF-831M-08-0492-I-1  
Issuance Date: October 16, 2008  
Appeal Type: CSRA - Overpayment of Annuity  
Action Type: Retirement/Benefit Matter

### **Jurisdiction**

#### **- Final Agency Decision**

The appellant petitioned for review of an initial decision that dismissed his appeal as withdrawn. OPM determined that the appellant had been overpaid \$9,425 because the Social Security offset was not applied at the time of his retirement. In a later, clarifying letter, OPM explained that its determination applied only to an overpayment relating to the Social Security offset, noting that there was a separate issue relating to the appellant's withdrawals from his Thrift Savings Plan (TSP) account, but there would be no attempt to collect any overpayment about the TSP matter until OPM reviewed the matter further and issued a new decision. On appeal to the Board, OPM informed the AJ that it was terminating collection of the overpayment and moved to dismiss the appeal. In light of OPM's action, the appellant withdrew his appeal, and the initial decision indicated that OPM had terminated collection of the total overpayment amount of \$21,962. In his PFR, the appellant argues that he would not have withdrawn his appeal had he known that only the \$9,245 overpayment amount was being waived.

**Holdings: The Board granted the appellant's PFR, vacated the initial decision, and dismissed the appeal for lack of jurisdiction:**

- 1. With exceptions not applicable here, the Board has no jurisdiction over a retirement matter until after OPM has issued a final or reconsideration decision adjudicating the matter.**
- 2. Since OPM has withdrawn its final determination regarding an overpayment for the Social Security offset, there is no final OPM decision for the Board to review as to that matter.**
- 3. Similarly, OPM has not issued a final decision with respect to any overpayment relating to the appellant's withdrawals from his TSP account.**