



U.S. Merit Systems Protection Board

CASE REPORT

DATE: October 24, 2008

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BOARD DECISIONS

- ▶ **Appellant: James R. Beeler**
Agency: Department of the Air Force
Decision Number: [2008 MSPB 233](#)
Docket Number: DA-3443-05-0090-M-1
Issuance Date: October 21, 2008

Board Procedures/Authorities **- Withdrawal of Appeal**

The appellant petitioned for review of an initial decision that dismissed his appeal as withdrawn. After a hearing date had been set, the appellant's attorney submitted a Motion to Withdraw that contained a single sentence: "Appellant hereby withdraws the above captioned appeal." This pleading was signed by the attorney but not by the appellant. On PFR, the appellant states, in a declaration made under penalty of perjury, that his attorney withdrew his appeal without his consent.

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's relinquishment of his right to appeal to the Board must be by clear, unequivocal, and decisive action. Absent unusual circumstances, the Board will not reinstate an appeal once it has been withdrawn.**
- 2. This case is quite similar to *Caracciolo v. Office of Personnel Management*, [86 M.S.P.R. 601](#) (2000), in which the Board remanded the case for a determination whether the withdrawal of the appeal is voluntary. As in *Caracciolo*, the appellant's declaration raises a genuine question of fact whether the appellant acted in a clear, unequivocal, and decisive way to relinquish his Board appeal rights.**

► **Appellant: Karyn Thomas**
Agency: Department of Transportation
Decision Number: [2008 MSPB 234](#)
Docket Number: SF-0752-07-0403-I-2
Issuance Date: October 22, 2008
Appeal Type: Adverse Action by Agency
Action Type: Removal

Adverse Action Charges

Back Pay

Penalty

The agency petitioned for review of an initial decision that reversed the appellant's removal from her position as an Air Traffic Control Specialist. The removal was based on a charge of "negligent or careless work performance that results in injury or danger of injury to either the individual involved or others." There were four specifications, the last relating to an incident during which the appellant allegedly failed to observe display data regarding an aircraft's departure from San Diego, failed to ensure that aircraft's separation from adjacent airspace, failed to comply with rules regarding handoff altitudes with the neighboring Pt. Magu Approach Control, and failed to recognize an adverse situation and take corrective action.

Following a hearing, the AJ reversed the removal, finding that, under the terms of the collective bargaining agreement, the agency's first three specifications were untimely and could only be considered in relation to a penalty determination. The AJ found that the agency failed to prove the fourth specification on the basis that the "minimum acceptable separation was not lost and the agency did not charge the appellant with an Operational Error reflecting such loss." The AJ also found that the appellant failed to prove her affirmative defenses. The AJ ordered the agency to cancel the removal and restore her retroactively with the appropriate amount of back pay.

Holdings: The Board granted the agency's PFR, reversed the initial decision's finding that the agency failed to prove its charge, affirmed the initial decision's findings regarding the appellant's affirmative defenses, and sustained the removal action:

- 1. The Board denied the appellant's motion to dismiss the agency's petition based upon its refusal to provide the ordered back pay. The agency correctly argued that it is not subject to the Back Pay Act, and that the AJ erred in ordering back pay.**
- 2. The AJ's analysis erroneously found an Operational Error to be synonymous with the offense of "negligent or careless work performance that results in injury or danger of injury to others." To prove negligence, an agency must show a failure to exercise the degree of care required under the particular circumstances which a person of ordinary prudence in the same situation and with equal experience would not omit. After considering the evidence of record, the Board concluded that the agency proved such negligence by a preponderance of the evidence.**
- 3. The removal penalty was reasonable under the circumstances.**