U.S. Merit Systems Protection Board

CASE REPORT DATE: November 17, 2008

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BOARD DECISIONS

- **Appellant: Mary J. Metallo**
  Agency: Department of Defense
  Decision Number: 2008 MSPB 239
  Docket Number: SF-3443-06-0830-I-1
  Issuance Date: November 7, 2008

  Timeliness – PFR
  Defenses and Miscellaneous Claims
  - Collateral Estoppel
  Board Procedures/Authorities
  - Reopening and Reconsideration

  The Board considered the appellant's June 1, 2008 pleading as both a petition for review (PFR) of a 2006 initial decision regarding a 2004 performance appraisal, and as a new appeal raising other claims.

  Holdings:

  1. The Board denied the appellant's PFR as untimely filed without good cause shown for the 19 month delay in filing.

  2. The appellant's claim that the agency failed to restore her to duty during the period from October 2003 until August 2004 is barred under the doctrine of collateral estoppel (issue preclusion), as the Board litigated that claim in an earlier proceeding.

  3. Because the appellant's claim of an involuntary retirement has not previously be considered, it was forwarded to the regional office for docketing as a new appeal.

  4. The Board denied the appellant's request to reopen her 2004 restoration appeal and to join it with other Board appeals.

- **Appellant: Katherine J. Harris**
  Agency: Office of Personnel Management
  Decision Number: 2008 MSPB 240
  Docket Number: CH-844E-08-0308-I-1
  Issuance Date: November 13, 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 an OPM reconsideration decision denying her application for disability retirement.

  Holdings: The Board denied the appellant's PFR, reopened the appeal on its own motion, and affirmed the initial decision as modified, still affirming OPM's reconsideration decision:

  1. Under *Bruner v. Office of Personnel Management*, 996 F.2d 290, 294 (Fed. Cir. 1993), an appellant's removal for physical inability to perform the essential duties of her position constitutes prima facie evidence that she is entitled to disability retirement benefits. When an appellant has been removed for inability to perform the duties of her position, the AJ must inform the parties of their respective burdens under *Bruner*. Although the AJ here did not inform the parties of their respective burdens under *Bruner*, neither party was prejudiced by the AJ's error, and a remand is unnecessary.

  2. Here, the appellant was removed for inability to maintain a regular work schedule, not physical inability to perform the duties of her position. The record is unclear whether the employing agency perceived the appellant to be unable to perform the duties of her position because of a medical condition, but the Board stated that it need not resolve this question because, even if the appellant was removed for physical inability to perform and was entitled to the *Bruner* presumption, she has not met her burden of showing that she is incapable, due to disease or injury, of providing useful and efficient service in her position. At best, her medical evidence shows that she has hypertension that is difficult to control, but none of her evidence explains how this condition prevents her from performing the duties of her position.

- **Appellant: Pamela C. Edwards**
  Agency: Department of Homeland Security
  Decision Number: 2008 MSPB 241
  Docket Number: CH-0432-08-0314-I-1
  Issuance Date: November 13, 2008
  Appeal Type: Performance
  Action Type: Removal

  Miscellaneous Topics
  - Statutory Construction

  The appellant filed a petition for review of an initial decision that affirmed her removal from her position as an Aviation Security Inspector with the Transportation Security Administration for unsatisfactory performance. The AJ found that: (1) The Board has jurisdiction under TSA Management Directive 1100.75-3 and 49 U.S.C. § 40122(g)(2); (2) the agency proved both specifications of its charge of unsatisfactory performance; (3) the appellant failed to demonstrate harmful procedural error in the application of the agency's procedures and failed to prove her affirmative defenses of discrimination; (4) the appellant did not establish that the removal was based on a prohibited personnel practice under 5 U.S.C. § 2302(b); (5) the appellant failed to prove that the agency violated 5 U.S.C. § 2301(b)(7), a merit system principle, by failing to train her; and (6) the removal action was taken "for such cause as promotes the efficiency of the service," and the removal penalty was reasonable.

  Holdings: The Board denied the appellant's PFR, but reopened the appeal on its own motion to find that the AJ erred in considering the appellant's claim under 5 U.S.C. § 2301(b)(7):

  1. The TSA, established by Pub. L. No. 107-71 (2001), is governed by the personnel management system established by the FAA Administrator, which is codified at 49 U.S.C. § 40122(g).

  2. Section 40122(g) provides that title 5 of the United States Code does not apply to TSA's personnel management system except for 8 specific chapters and sections. Neither § 2301(b)(7) nor § 2302(b)(12) are among the exceptions. Accordingly, they do not apply to the TSA personnel management system.

- **Petitioner: National Treasury Employees Union**
  Agencies: Office of Personnel Management and Department of Homeland Security
  Decision Number: 2008 MSPB 242
  Docket Number: CB-1205-08-0013-U-1
  Issuance Date: November 13, 2008
  Appeal Type: Request for Regulation Review

  Miscellaneous Agency Actions
  - Employment Practices

  The petitioner requested that the Board review the alleged implementation of 5 C.F.R. §§ 300.101 and .103 by the U.S. Customs and Border Protection, regarding the

implementation of the agency's Personal Appearance Standards (PAS) for all of its uniformed officers. The petitioner filed two grievances. In the first, the NTEU alleged that the agency violated the parties' collective bargaining agreement by implementing the PAS prior to completing bargaining. An arbitrator agreed with the petitioner and ordered a status quo ante remedy. The agency appealed the decision to the FLRA, which denied the agency's exceptions to the arbitrator's award. The agency did not comply with the status quo ante remedy, however. In the second grievance, the NTEU alleged that the PAS are an "employment practice" within the meaning of 5 C.F.R. § 300.101 and that the PAS violated regulations governing employment practices issued by OPM. The arbitrator issued an opinion and award in the petitioner's favor, finding that the PAS constitute an "employment practice" under 5 C.F.R. § 300.101 and that the agency failed to perform a job analysis, demonstrate a rational relationship between the PAS and successful performance on the job, or professionally develop the PAS as required by 5 C.F.R. § 300.103(b). The arbitrator issued a cease and desist order directing the agency to end the use of the PAS. The agency has appealed the arbitrator's opinion and award to the FLRA, but has not complied with it. The petitioner then filed the instant request for regulation review with the Board.

Holdings: The Board denied the petitioner's request for regulation review:

1. The Board has original jurisdiction under 5 U.S.C. § 1204(f) to review rules and regulations promulgated by OPM. The Board has the authority to determine that an OPM regulation has been invalidly implemented by an agency, if the Board determines that such provision, as implemented, has required any employee to violate a prohibited personnel practice.

2. In determining whether to exercise its regulation review authority, the Board considers, among other things, the likelihood that the issue will be timely reached through ordinary channels of appeal, the availability of other equivalent remedies, the extent of the regulation's application, and the strength of the arguments against the validity of its implementation.

3. Here, there is not merely a likelihood that the issue will be timely reached through ordinary channels of appeal; the issue has been reached by an arbitrator and is now pending before the FLRA. Although the petitioner alleges that the matter is unlikely to be resolved in a timely manner, it has already received an arbitrator's award in its favor and it has not shown that any delay it faces before the FLRA will prevent it from ultimately prevailing on its claim. A request for regulation review is not a mechanism for enforcing arbitrators' decisions or orders of the FLRA.

COURT DECISIONS

- **Petitioner: David Dean**
  Respondent: Consumer Product Safety Commission
  Court: U.S. Court of Appeals for the Federal Circuit
  Docket Number: 2008-3142
  Issuance Date: October 31, 2008

  Miscellaneous Agency Actions
  - USERRA/VEOA/Veterans' Rights

  The petitioner sought review of a final MSPB decision denying his request for corrective action under USERRA and VEOA in connection with his non-selection for the position of Products Safety Investigator. The vacancy announcement stated that those who wished to be considered for the position under both merit promotion or special hiring authorities and competitive procedures must submit two complete applications, and that if only one application was received, the individual would only be considered under the special hiring authority or merit promotion procedures. The petitioner's cover letter was accompanied by only one application, and he was listed only on the merit promotion certificate. In denying corrective action, the AJ found that the agency's practice of requiring the filing of two complete applications applied equally to veterans and non-veterans, and that the impact of filing a single application would fall equally on all applicants regardless of their military status.

  Holding: The court affirmed the decision of the Board, stating that substantial evidence supports the Board's determination that the agency required both veterans and non-veterans to submit a separate application under each hiring authority and that any applicant, veteran or non-veteran, who submitted a single application would have been considered under only one hiring authority.