

On petition for review, the Board issued an Opinion and Order sustaining the AJ's findings. [2006 MSPB 279](#), 103 M.S.P.R. 375. On appeal to the Federal Circuit, the court affirmed the Board's decision as to the merits of the charges and the reasonableness of the penalty, but found that the Board had applied an incorrect standard in evaluating the appellant's claim of reprisal for her alleged disclosures of risks to public safety. It therefore affirmed the Board's decision in part, vacated it in part, and remanded for application of the correct legal standard. On remand, the appellant filed a motion asking the Board to reopen and reconsider the merits of the sustained charges based on evidence developed in a civil action she filed in U.S. district court under the Privacy Act and the Freedom of Information Act.

Holdings: The two Board members do not agree on the issue of whether the appellant's alleged disclosures are in fact protected under [5 U.S.C. § 2302\(b\)\(8\)](#). For reasons described in their separate concurring opinions, they have agreed on the disposition of these appeals—sustaining the appellant's removal and denying her request for corrective action. While Chairman McPhie would find that the appellant made some protected disclosures, he also would find that the agency presented clear and convincing evidence that it would have taken the same actions against the appellant in the absence of those disclosures. Vice Chairman Rose would find that the appellant made no protected disclosures, and she therefore would not reach the issue of whether the agency would have taken its actions in the absence of the appellant's allegedly protected statements. Both Board members agreed that the appellant's motion asking to reopen and reconsider the merits of the sustained charges must be denied.

- **Appellant:** Adrian H. Garcia
Agency: Department of Agriculture
Decision Number: [2009 MSPB 1](#)
Docket Number: SF-3443-08-0129-I-1
Issuance Date: January 6, 2009

Jurisdiction

Miscellaneous Topics

- **USERRA/VEOA/Veterans' Rights**

Defenses and Miscellaneous Claims

- **Equitable Tolling**

The appellant petitioned for review of an initial decision that dismissed his appeal under the Veterans Employment Opportunities Act of 1998 (VEOA) for lack of jurisdiction. The basis for dismissal was that the appellant did not file a complaint with the Secretary of Labor within 60 days of the alleged violation, as required by [5 U.S.C. § 3330a\(a\)\(2\)\(A\)](#). The AJ further found that the appellant failed to show a basis for applying equitable tolling to excuse the untimely filing.

Holdings: The Board denied the appellant's PFR, but reopened the appeal on its own motion to clarify the jurisdictional requirements for VEOA appeals, denying the appellant's request for corrective action:

1. In *Kirkendall v. Department of the Army*, [479 F.3d 830](#) (Fed. Cir. 2007) (en banc), the court ruled that the 60-day time limit for filing a complaint with the Secretary of Labor is not jurisdictional, and is subject to equitable tolling. Decisions of the U.S. Court of Appeals for the Federal Circuit are controlling authority for the Board.

2. While the AJ correctly found that the appellant untimely filed his complaint with the Secretary of Labor and that he did not satisfy the requirements for equitable tolling, the case should not be dismissed for lack of jurisdiction on the appellant's failure to exhaust his administrative remedy. Instead, his request for corrective action under VEOA should be denied because he has failed to meet the time limit of [§ 3330a\(a\)\(2\)\(A\)](#).

- **Appellant: Verlyn A. Brown, Jr.**
Agency: United States Postal Service
Decision Number: [2009 MSPB 4](#)
 Docket Number: CH-3443-08-0260-I-1
 Issuance Date: January 8, 2009

Jurisdiction

Miscellaneous Topics

- USERRA/VEOA/Veterans' Rights

Defenses and Miscellaneous Claims

- Equitable Tolling

The appellant petitioned for review of an initial decision that dismissed his appeal under the VEOA for lack of jurisdiction. The basis for dismissal was that the appellant did not file a complaint with the Secretary of Labor within 60 days of the alleged violation, as required by [5 U.S.C. § 3330a\(a\)\(2\)\(A\)](#). The AJ further found that the appellant failed to show a basis for applying equitable tolling to excuse the untimely filing.

Holdings: As in *Garcia*, the Board denied the appellant's PFR, but reopened on its own motion to clarify that failure to file a timely complaint with the Secretary of Labor is not a jurisdictional requirement in a VEOA appeal. The Board concurred with the AJ's finding that the requirements for equitable tolling had not been met. Accordingly, the Board denied the appellant's request for corrective action.

- **Appellant: Norman Wright**
Agency: Department of Commerce
Decision Number: [2008 MSPB 251](#)
 Docket Number: CB-7121-08-0020-V-1
 Issuance Date: December 23, 2008
 Appeal Type: Arbitration Appeals/Grievances

Arbitration/Collective Bargaining-Related Issues

The appellant requested review of an arbitrator's decision sustaining his removal for unacceptable performance.

Holding: The Board granted the appellant's request for review and sustained the arbitrator's decision:

1. The Board has jurisdiction over the appellant's request for review, as the subject matter of the grievance (a removal) is one over which the Board has jurisdiction, the appellant alleged discrimination in connection with the underlying action, and a final decision has been issued.
2. The appellant has not met the Board's criteria for review of an arbitrator's decision under [5 C.F.R. § 1201.154](#)(d), which requires a statement of the grounds on which review is requested, references to evidence of record or rulings related to the issues before the Board, and arguments in support of the stated grounds that refer specifically to relevant documents, and that include relevant citations to authority. Although the appellant has stated in general terms the ground on which review is requested, e.g., that the arbitrator's decision exceeded his authority, he has not provided references to evidence of record or rulings related to the issues before the Board, nor provided arguments in support of his stated grounds. In effect, he is requesting *de novo* review of the arbitrator's decision, which is beyond the scope of the Board's role in such cases.

- **Appellant:** Jacquen Lee
Agency: Department of Labor
Decision Number: [2008 MSPB 252](#)
Docket Number: CB-7121-08-0022-V-1
Issuance Date: December 23, 2008
Appeal Type: Arbitration Appeals/Grievances

Arbitration/Collective Bargaining-Related Issues

The appellant requested review of an arbitrator's decision sustaining her removal for unacceptable performance.

Holding: The Board granted the appellant's request for review and sustained the arbitrator's decision:

1. The Board has jurisdiction over the appellant's request for review, as the subject matter of the grievance (a removal) is one over which the Board has jurisdiction, the appellant alleged discrimination in connection with the underlying action, and a final decision has been issued.
2. The standard of the Board's review of an arbitrator's award is limited; the award will only be modified or set aside when the arbitrator has erred as a matter of law in interpreting civil service law, rule, or regulation. Absent legal error, the Board cannot substitute its conclusions for those of the arbitrator. Here, the appellant has not established that the arbitrator erred as a matter of law.
3. The appellant did not establish her claims of discrimination in connection with the underlying action.

- **Appellant: Denise Shannon**
Agency: Department of Veterans Affairs
Decision Number: [2009 MSPB 2](#)
 Docket Number: CH-0351-05-0233-I-1
 Issuance Date: January 7, 2009
 Appeal Type: Reduction In Force
 Action Type: Demotion

Board Procedures/Authorities

- Withdrawal of Appeal

Timeliness - PFR

The appellant petitioned for review of a February 2005 initial decision that dismissed her appeal as withdrawn.

Holdings: The Board denied the appellant's request, whether considered as an untimely filed PFR, or as a request to reopen the appeal.

COURT DECISIONS

- **Petitioner: Stephen W. Gingery**
Respondent: Department of Defense
Court: U.S. Court of Appeals for the Federal Circuit
 Docket Number: [2007-3292](#)
 Issuance Date: December 24, 2008

Miscellaneous Topics

- USERRA/VEOA/Veterans' Affairs

The petitioner sought review of the Board's decision, [2007 MSPB 138](#), 105 M.S.P.R. 671, which held that the agency did not violate his rights under the Veterans Employment Opportunities Act of 1998 when it hired two non-preference eligible individuals under the Federal Career Intern Program (FCIP) and did not hire him. The Board relied on OPM's regulation at [5 C.F.R. § 302.401](#), which provides that, when an agency passes over a preference eligible and selects a non-preference eligible in the excepted service, it need only record its reasons for doing so and furnish a copy of those reasons to the preference eligible on request. These requirements are much less stringent than the pass-over provisions that apply to the competitive service under [5 U.S.C. § 3318\(b\)\(1\)](#).

Holding: The court reversed the Board's decision and invalidated OPM's regulation at [5 C.F.R. § 302.401\(b\)](#). The court held that, when an agency passes over a preference eligible having a compensable service-connected disability of 30% or more and selects a non-preference eligible for a position in the excepted service, it must comply with the procedures of [5 U.S.C. § 3318\(b\)\(1\)](#). The court found that the issue was controlled by [5 U.S.C. § 3320](#), which provides that selection into the excepted service in the executive branch shall be conducted "in

the same manner and under the same conditions required for the competitive service by [5 U.S.C. §§] 3308-3318.”

In a concurring opinion, Judge Newman explained why she believed the court should have addressed Mr. Gingery's argument that it was improper to hire GS-0511 auditors in the excepted service under the Federal Career Internship Program, in that there had been no showing of necessity for hiring outside of the competitive service.

- **Petitioner: Demetrius W. Palmer**
Respondent: Merit Systems Protection Board
Intervenor: United States Postal Service
Court: U.S. Court of Appeals for the Federal Circuit
Docket Number: [2008-3001](#)
Issuance Date: December 31, 2008

Jurisdiction

Miscellaneous Agency Actions

- Restoration to Duty

The petitioner sought review of the Board’s final decision that dismissed his appeal for lack of jurisdiction. The petitioner, a mail processing clerk with the Postal Service, suffered an on-the-job injury in 1998 and received workers’ compensation benefits. He accepted an offer of a modified job assignment and returned to work in 2005. In 2007, he filed an appeal with the Board claiming he was entitled to, but did not accrue annual and sick leave during the time he was on leave without pay status.

Holdings: The court affirmed the Board’s decision. Jurisdiction over appeals by employees who are partially recovered from a compensable injury is governed by [5 C.F.R. § 353.204](#), which provides for Board review of claims that an agency acted arbitrarily and capriciously in denying restoration, and claims that an agency failed to credit time spent on compensation for purposes of rights and benefits based upon length of service. Palmer was not denied restoration, and he has not alleged that the Postal Service failed to credit his time for purposes of a right or benefit based on length of service.