



U.S. Merit Systems Protection Board

CASE REPORT

DATE: January 30, 2009

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BOARD DECISIONS

➤ **Appellant:** Eric D. Cunningham
Agency: Office of Personnel Management
Decision Number: [2009 MSPB 5](#)
Docket Number: NY-315H-05-0133-X-1
Issuance Date: January 23, 2009
Action Type: Probationary Termination

Compliance

This case was before the Board pursuant to the AJ's Recommendation, which found that the agency had breached the settlement agreement provision that required the agency to keep the terms of the agreement confidential.

Holdings: The Board granted the petition for enforcement, vacated the initial decision, and forwarded the case to the field office to provide the appellant the option of rescinding the settlement agreement and reinstating his appeal:

1. The Board did not consider the agency's argument that the appellant waived the confidentiality provision of the settlement agreement because this argument was not raised below.
2. Under the facts of this case, the public interest in allowing OPM to conduct thorough background and suitability determinations does not outweigh the appellant's interest in enforcing the terms of the parties' settlement agreement. The Board distinguished this case from the holding in *Gizzarelli v. Department of the Army*, [90 M.S.P.R. 269](#) (2001), which is limited to situations in which an agency discloses police or criminal information to OPM for purposes of a background check or suitability determination where OPM and the employing agency determine that such records are needed to assess an applicant's suitability for federal employment.
3. The Board agreed with the AJ's determination that the agency materially breached the settlement agreement.

4. The Board forwarded the case to the AJ to provide the appellant the option of rescinding the settlement agreement and reinstating his appeal. If he chooses that option, he must reimburse the agency for any payments he received in connection with the settlement agreement.

➤ **Appellant: James Galatis**

Agency: United States Postal Service

Decision Number: [2009 MSPB 6](#)

Docket Number: PH-0752-07-0298-X-1

Issuance Date: January 27, 2009

Appeal Type: Adverse Action by Agency

Action Type: Reduction in Grade/Rank/Pay

Compliance

This case was before the Board concerning the agency's compliance with the settlement agreement that resolved the appellant's appeal of a demotion. In a previous decision, the Board resolved an issue about the computation of the appellant's back pay. [2008 MSPB 201](#), 109 M.S.P.R. 651.

Holdings: The Board found that the agency is for the most part in compliance with the agreement, but that in one respect it must take additional action to be in full compliance:

1. Since the appellant is not a preference eligible employee covered by the Back Pay Act, the agency's obligations are governed by the agency's Employee and Labor Relations Manual.
2. The appellant was not entitled to additional night differential pay as part of his back pay.
3. The appellant was not entitled to bonuses as part of his back pay. An agency may be required to include pay for performance as part of an appellant's back pay, but only if some provision of law mandates the payment or the agency clearly establishes that he would in fact have received such an award. Here, the appellant has not established entitlement under either criterion.
4. The agency has not disputed the appellant's claims that he is entitled to restoration of certain leave he took during the back pay period. Accordingly, the Board found that he is entitled to restoration of this leave.
5. The Board found that the agency is in compliance with the provision of the agreement waiving collection of Sunday premium pay.

COURT DECISIONS

➤ **Petitioner: Mario A. Gonzalez**
Respondent: Department of Transportation
Court: U.S. Court of Appeals for the Federal Circuit
Docket Number: [2007-3309](#)
Issuance Date: January 8, 2009

Back Pay Jurisdiction

At issue was whether the Board has the authority to order back pay awards to employees of the Federal Aviation Administration (FAA).

Holdings:

1. The Board correctly concluded that [49 U.S.C. § 40122](#) does not grant jurisdiction for back pay awards to FAA employees.
 - a. Section [40122](#) provides that the “provisions of Title 5 shall not apply to the new personnel system developed and implemented” by the FAA. While this section lists 8 exceptions to the FAA’s exemption from Title 5, none includes the Back Pay Act, [5 U.S.C. § 5596](#), under which Gonzalez sought relief.
 - b. Because Gonzalez’s claim invokes the Back Pay Act, which involves a waiver of the government’s sovereign immunity, the court must strictly construe the relevant provisions of [§ 40122](#) in favor of the government.
 - c. The Ford Act, which restored the Board’s jurisdiction over appeals by FAA employees, did not alter the requirement that the provisions of Title 5 do not apply to the new personnel management system developed for FAA employees.
 - d. [Section 1204](#) of Title 5 is not an independent source of authority for the Board to award back pay where it would otherwise lack it.
2. The Board’s determination that it lacked jurisdiction to award back pay to FAA employee’s did not constitute an improper collateral attack on its earlier judgment that it possessed such jurisdiction. In most circumstances, a party may not collaterally attach a final judgment on the ground that subject matter jurisdiction was lacking in the original action, even if the issue of subject matter jurisdiction was not litigated before, but a notable exception to this general rule arises where the issuing court’s lack of jurisdiction directly implicates issues of sovereign immunity. That exception applies in this case.

➤ **Petitioner: James Ramos, Jr.**
Respondent: Department of Justice
Court: U.S. Court of Appeals for the Federal Circuit
Docket Number: [2008-3093](#)
Issuance Date: January 12, 2009

Attorney Fees

- **Authority to Award**
- **Equal Access to Justice Act**

At issue was whether the Board has the authority to award attorney fees for work performed before the Federal Circuit prior to the Board's judgment ordering the agency to rescind its removal action and restore Ramos to employment.

Holdings:

- 1. The Board correctly determined that the court's decision in *Phillips v. General Services Administration*, [924 F.2d 1577](#) (Fed. Cir. 1991), prohibits the Board from making such an award.**
- 2. If the court were writing on a blank slate, it might make sense for attorney fees applications for work done on appeal from Board decisions to be authorized only by the Back Pay Act and not by the Equal Access to Justice Act (EAJA), and to be filed in the first instance before the Board, but the court is bound by its *en banc* decision in *Gavette v. Office of Personnel Management*, [808 F.2d 1456](#) (Fed. Cir. 1986), which held that a prevailing party-employee may seek attorney fees before the court under both the Back Pay Act and EAJA.**
- 3. The court found it appropriate to waive the requirements of its Rule 47.7, which could require the filing of an application for attorney fees with the court within 30 days after the Board decision creating the possible fee entitlement.**