



U.S. Merit Systems Protection Board

CASE REPORT

DATE: February 6, 2009

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BOARD DECISIONS

- **Appellant: Steven A. Deida**
Agency: Department of the Navy
Decision Number: [2009 MSPB 8](#)
Docket Number: DC-0752-08-0598-I-1
Issuance Date: January 30, 2009
Appeal Type: Adverse Action by Agency
Action Type: Reduction in Grade/Rank/Pay

Jurisdiction

- Reduction in Pay/Grade

The appellant petitioned for review of an initial decision that dismissed his appeal for lack of jurisdiction. The appellant, who had been a Firefighter, GS-07, Step 8, applied for and was selected for the position of Fire Protection Inspector, GS-08. Under applicable General Schedule rules, he was placed at the GS-08 Step 7 level, and his basic pay was increased from \$39,146 to \$42,183. The agency later determined that the new position was covered by the National Security Personnel System (NSPS), and that under the NSPS, both the appellant's new position and the position he previously occupied were both assigned to the same pay band. The agency concluded that the appellant's change in position was not a promotion, and reduced his rate of basic pay to \$41,104. The appellant alleged that the agency improperly cancelled his promotion and reduced his pay. The agency contended that its action had been a correction of an administrative error in setting the appellant's pay at a rate that was contrary to law and regulation. The administrative judge (AJ) found that the appellant failed to meet his burden of showing that the agency was not "merely correcting an error" when it cancelled the promotion, and dismissed the appeal for lack of jurisdiction.

Holdings: The Board granted the appellant's petition for review (PFR), vacated the initial decision, and remanded the appeal for further adjudication:

1. To establish Board jurisdiction in an appeal from the cancellation of a promotion or an appointment, the Board has found that the appellant must show

that: (1) the promotion or appointment actually occurred; (2) the appellant took some action denoting acceptance of the promotion or appointment; and (3) the promotion or appointment was not revoked before the appellant actually performed in the position.

2. In addition to the above requirements, the Board has also indicated in some decisions that an appellant must also show that, in cancelling the promotion or appointment, the agency was not correcting an error. The Board overruled these decisions, holding that, once an appellant has made a prima facie case of jurisdiction by showing that he was appointed to a position by an authorized official, that he took some action to denote acceptance of the promotion, and that he actually performed in the position, the burden of production shifts to the agency to show that the promotion was an error contrary to law or regulation. Here, the burden was wrongly placed on the appellant, and the case must be remanded to the regional office for a jurisdictional hearing.

- **Appellant: Willie L. Lamb**
Agency: Office of Personnel Management
Decision Number: [2009 MSPB 9](#)
Docket Number: CH-0831-08-0716-I-1
Issuance Date: February 3, 2009
Action Type: Retirement/Benefit Matter

Timeliness - PFA

The appellant petitioned for review of an initial decision that dismissed his appeal as untimely filed with no good cause shown. OPM issued a decision on June 24, 2008, recomputing the appellant's retirement annuity to exclude credit for his post-1956 military service when he became eligible for Social Security benefits at age 62. The appellant filed an appeal with the Board on August 13, two weeks after the July 30 deadline for timely filing. In response to the AJ's order on timeliness, the appellant stated that he thought he had filed an appeal on July 23 using the Board online system, but when he did not hear anything from the Board in what he considered a reasonable amount of time, he called "to find out what was going on," and spoke to a staff member in the Office of the Clerk of the Board, and that the staff member advised him to refile his appeal, which he did. The appellant also submitted a copy of an August 20 email from the same staff member, who advised that the Board's Appeal Event Log substantiated that the appellant started an appeal on July 23, which was still in an "in process" status in the Board's e-filing system, and that the Log showed that he started and completed a new appeal on August 13, which was the appeal that was received for adjudication. The AJ found that the appellant did not show good cause for his untimeliness because he could have submitted documentation by non-electronic means.

Holding: The Board reversed the initial decision and remanded the appeal for adjudication on the merits:

1. On July 23, 7 days before the filing deadline, the appellant was assigned an appeal number and completed all the questions on the on-line form on the Board's website. After doing so, one is able to exit the website without a clear warning that

one's appeal has not been filed. As the appellant asserted on appeal, and reiterates on PFR, he thought he had filed his appeal on July 23.

2. As in *Rodgers v. U.S. Postal Service*, [105 M.S.P.R. 297](#) (2007), the Board found that the appellant reasonably believed he had filed his appeal in a timely way and established good cause for the untimely filing. Accordingly the appeal must be remanded for adjudication.

- **Appellant: Ernest C. Rawlings**
Agency: United States Postal Service
Decision Number: [2009 MSPB 7](#)
Docket Number: DC-0752-08-0449-X-1
Issuance Date: January 29, 2009
Appeal Type: Adverse Action by Agency
Action Type: Suspension - More than 14 Days

Compliance

This case was before the Board on the AJ's Recommendation finding that the agency was not in compliance with its duties under a final Board decision. Specifically, the AJ found that the agency had not provided evidence that it paid the appellant all the overtime, night differential, and Sunday premium pay to which he was entitled for a two-week period. Before the full Board, the agency submitted evidence that it had reviewed the data from similarly situated employees, determined that the appellant was owed an additional \$1,857.14, and had processed the paperwork to pay the appellant that amount.

Holding: The Board found that the agency had provided sufficient evidence of compliance and dismissed the appellant's petition for enforcement. Although the appellant objected to the sufficiency of the agency's evidence, his pleading was untimely and failed to address or rebut the agency's explanation of its calculations.