



U.S. Merit Systems Protection Board

CASE REPORT

DATE: February 13, 2009

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BOARD DECISIONS

- **Appellant: Peter J. Lizzio**
Agency: Department of the Army
Decision Number: [2009 MSPB 10](#)
Docket Number: SF-0752-06-0546-M-1
Issuance Date: February 10, 2009
Appeal Type: Adverse Action
Action Type: Removal

Jurisdiction

Settlement

- **Waiver of Rights**
- **Last-Chance Settlement Agreement**

This case was before the Board pursuant to the decision of the U.S. Court of Appeals for the Federal Circuit, [534 F.3d 1376](#), which vacated and remanded the Board's previous decision, [2007 MSPB 89](#), 105 M.S.P.R. 322. At issue was whether the appellant violated the terms of a last-chance agreement (LCA), which included a waiver of appeal rights in the event of his breach. The agency alleged that he breached his agreement to "[a]void any misconduct" when he came to a private facility to interview a witness in a procurement investigation, and attempted to gain access without authorization and acted in an unprofessional manner. The agency's notice of breach stated that the appellant failed "to maintain the standards of personal conduct and professionalism required by AR [Army Regulation] 195-3 and CIDR [CID Regulation] 195-1". After conducting a hearing, the administrative judge (AJ) found that the appellant's conduct was "rude and obnoxious," but that the agency failed to prove that his behavior was embarrassing to the government as required by AR 195-3. The AJ therefore concluded that the appellant did not breach the LCA, and that the removal must be reversed. On petition for review (PFR), the Board declined to determine whether the appellant engaged in conduct embarrassing to the agency, but found that he nevertheless committed misconduct in breach of the LCA, based on the AJ's finding that he had been rude and obnoxious, and dismissed the appeal for lack of

jurisdiction. The court held that the Board erred in relying on a basis for finding a breach of LCA different from the one found by the AJ to have been asserted by the agency in the notice of breach, and vacated the case for the Board to consider the arguments made in the agency's PFR that were previously unaddressed by the Board.

Holdings: The Board reversed the initial decision, finding that the appellant breached the last-chance agreement, and dismissed the appeal for lack of jurisdiction:

1. The AJ erred in finding that the agency's sole ground for asserting breach of the LCA was conduct embarrassing to the agency under AR 195-3. The agency alleged breach under both AR-195-3 and CIDR 195-1.

2. The appellant breached the LCA by engaging in conduct that violated AR 195-3 and CIDR 195-1.

a. Establishing a violation of AR 195-3 did require consideration of whether the appellant's conduct caused embarrassment to the government.

b. That rude and obnoxious behavior toward private citizens by a federal agent in the course of carrying out his investigative responsibilities was an embarrassment to his agency and the government is obvious and does not require detailed explanation.

c. It is also clear that rude and discourteous behavior is not what is expected of a CID agent and that the appellant's conduct was thus "substandard" under CIDR 195-1.

- **Appellant: Bohdan Senyszyn**
- Agency: Department of the Treasury**
- Decision Number: [2009 MSPB 11](#)**
- Docket Number: PH-0752-05-0403-C-4**
- Issuance Date: February 10, 2009**
- Appeal Type: Adverse Action by Agency**
- Action Type: Suspension - Indefinite**

Compliance

Board Procedures/Authorities

- Close of the Record

The appellant petitioned for review of an initial decision that denied his petition for enforcement.

Holdings: The Board denied the PFR but reopened on its own motion to affirm the initial decision as modified:

1. It is error for an AJ to issue an order or initial decision prior to the expiration of the time allowed for a party's response. Here, the appellant's response to the AJ's order was postmarked one day before the record closed, and therefore should have been considered. Accordingly, the Board considered the pleading which had not been considered below.

2. The appellant has shown no error in the AJ's determination that nothing in the Board's final order could be construed as a directive to the agency "to provide any monetary relief, or any other relief for that matter, to the appellant." Accordingly, the appellant has failed to establish that the agency is in noncompliance with the Board's final decision.

- **Appellant: William S. Chapman**
Agency: Office of Personnel Management
Decision Number: [2009 MSPB 12](#)
Docket Number: SF-844E-08-0431-I-1
Issuance Date: February 10, 2009
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 OPM's final decision denying his application for disability retirement as untimely filed. The appellant resigned from his federal position in January 2004, and filed an application for disability retirement in June 2007. OPM denied the application on the basis that it was filed more than one year after the appellant's separation from service, and the appellant had made no showing that he was mentally incompetent during the one-year filing period. On appeal to the Board's regional office, the AJ affirmed on the same basis.

Holding: The Board affirmed the initial decision as modified. The AJ incorrectly stated that the appellant's application was covered by the Federal Employees' Retirement System (FERS), when it was in fact covered by the Civil Service Retirement System (CSRS). Nevertheless, the substantive timeliness requirements are the same under both systems.

- **Appellant: Debra J. Lubert**
Agency: United States Postal Service
Decision Number: [2009 MSPB 13](#)
Docket Number: PH-4324-08-0454-I-1
Issuance Date: February 10, 2009
Appeal Type: Uniformed Services Employment and Reemployment Rights Act

Jurisdiction – USERRA

Board Procedures/Authorities

- Dismissal for Failure to Prosecute

The appellant petitioned for review of an initial decision that dismissed her USERRA appeal for failure to state a claim upon which relief can be granted. In a show-cause order, the AJ acknowledged that the appellant might be asserting, in connection with her service in the Army Reserves, that the agency charged her military leave on days when she was not scheduled to work. The AJ noted that the appellant had not identified any specific dates of lost leave, and ordered her to provide such

information. When the appellant did not respond to the show-cause order by the specified deadline, the AJ issued the decision dismissing the appeal.

Holdings: The Board denied the appellant's PFR, but reopened the appeal on its own motion, vacating the initial decision and remanding the case to the regional office for further adjudication:

1. The appellant established jurisdiction by alleging that: (1) She performed duty in a uniformed service of the United States; (2) the agency denied her a benefit of employment; and (3) the denial was due to the performance of duty or obligation to perform duty in the uniformed service.
2. An appellant is entitled to a hearing in a USERRA appeal once she establishes jurisdiction. The appellant was therefore entitled to the hearing she requested before the AJ issued a decision adjudicating the appeal.
3. Even in an appeal over which the Board has jurisdiction, an AJ may dismiss an appeal for failure to prosecute if the appellant fails to respond to his orders. Here, however, the AJ issued only one order directing the appellant to provide specifics regarding her claim, and there is no indication that the appellant exhibited bad faith or intended to abandon her appeal. The appeal must therefore be remanded for further adjudication.

- **Appellant: Eric Williams**
Agency: Department of the Air Force
Decision Number: [2009 MSPB 14](#)
 Docket Number: AT-3443-06-0118-C-1
 Issuance Date: February 11, 2009

Compliance
USERRA/VEOA/Veterans' Rights

The appellant petitioned for review of an initial decision that found the agency in compliance with the Board's Opinion and Order, [2008 MSPB 91](#), 108 M.S.P.R. 567, which concluded that the agency had violated his rights under the Veterans Employment Opportunities Act of 1998 when it selected non-preference eligibles using the Outstanding Scholar Program (OSP) instead of him for several GS-7 Contract Specialist positions, and ordered the agency to reconstruct the selection process. After reconstructing the selection process, the agency again did not select the appellant for a Contract Specialist position.

Holdings: The Board granted the appellant's PFR and reversed the initial decision, finding that the agency was not in compliance with the Board's Opinion and Order:

1. The Board's previous Opinion and Order was based in part on the agency's stipulations that the appellant would have been hired as a GS-7 Contract Specialist in 2005 but for the agency's use of the Outstanding Scholar Program, and that he was entitled to back pay and benefits as a result of the improper hiring process.

- 2. The agency's reconstructed selection process was incomplete. Based on its description of the process, the agency stopped considering candidates after the 9th round of consideration, and it did not in fact fill all 13 positions competitively in the reconstructed process. In the absence of a complete process, the Board was left to speculate about how the agency filled the remaining vacancies and whether some of the original OSP candidates remained in the Contract Specialist positions in violation of [5 U.S.C. § 3304](#)(b) and the Board's Opinion and Order.**
- 3. The Board ordered the agency to again reconstruct the selection process, but this time gave the agency 7 specific instructions so that there would be no misunderstanding as to what was required.**