



U.S. Merit Systems Protection Board

CASE REPORT

DATE: February 20, 2009

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BOARD DECISIONS

- **Appellant: Kenneth M. Pedeleose**
Agency: Department of Defense
Decision Number: [2009 MSPB 16](#)
Docket Number: AT-0752-06-0350-R-1
Issuance Date: February 12, 2009
Appeal Type: Adverse Action by Agency
Action Type: Suspension - More than 14 Days

Adverse Action Charges

- **Insubordination/Failure to Follow Instructions**
- **Whistleblower Protection Act**
- **Protected Disclosure**

The Director of OPM requested that the Board reconsider its previous decision, [2007 MSPB 248](#), 107 M.S.P.R. 191, which found that the agency did not prove its charges of misconduct, and that the appellant established that the 30-day suspension was taken in retaliation for protected whistleblowing disclosures. The suspension was based on charges of refusal to cooperate in an agency investigation, insubordination, and failure to follow instructions. There was no dispute that the appellant refused to meet with and answer the questions of the agency's investigator concerning rumors that certain employees were being targeted for termination from federal service. His justification was that the investigation was improper and would interfere with an investigation by the agency's Inspector General (IG) concerning safety problems with an aircraft and waste in the program developing it. In its previous decision, a majority of the Board acknowledged the usual rule that an employee may not disregard an order merely because there is substantial reason to believe the order is not proper, but must comply with the order and then challenge it through a complaint or grievance. In addition to previously recognized exceptions where complying would clearly place the employee in a dangerous situation or would cause him irreparable harm, it determined that the Board must consider whether an exception is warranted in other circumstances where the employee doubts the legality of the instruction, taking into account the

considerations it found to underlie the rule: the need to avoid harm to the agency and its mission from the employee's failure to comply and the fact that the employee may be mistaken in his belief. Applying these circumstances to the facts of this case, the Board concluded that an exception to the rule was warranted. Of particular importance was the Board's conclusion that the appellant made an effort to comply by seeking the advice of the IG and providing the IG the information sought, and that the agency's "disingenuous" failure to inform him of its coordination with the IG and of the IG's approval of its questions was significantly responsible for the appellant's failure to cooperate. The Board also found that the appellant established that his suspension was taken in retaliation for his whistleblowing.

In its petition for reconsideration, OPM contended that the Board erred in establishing an exception to the obey-now-grieve-later principle that vastly expanded the previously recognized exceptions, and argued that case law did not support the Board's finding that an employee's disobedience must be shown to have caused tangible harm to its mission or that legitimate concerns about the lawfulness of the agency's order can excuse the employee's non-cooperation. OPM also disputed the Board's finding of reprisal for whistleblowing.

Holdings: The Board granted OPM's petition for reconsideration, vacated its previous decision, and upheld the agency's action suspending the appellant:

1. The general obey-now-grieve-later rule reflects the fundamental management right to expect that its decisions will be obeyed and its instructions carried out. In expanding the circumstances in which an exception would be recognized, the Board broadened the exception in a way that threatened to make the exception the rule. Reexamining the pertinent facts, the Board concluded that it had erred in finding that the IG failed to give the appellant clear advice. The IG advised the appellant to cooperate and to refer any questions he felt would compromise the IG investigation to the IG. While the appellant was dissatisfied because the IG declined to address the lawfulness of the agency investigator's appointment, he knew that the IG did not tell him that a blanket refusal to answer any of the investigator's questions was necessary to protect the integrity of the IG's investigation. The Board accordingly concluded that the agency proved its charges of misconduct.

2. The Board concluded that the appellant did not establish reprisal for whistleblowing. While a disinterested observer who was aware of the information asserted could reasonably conclude that the agency official's threat was an abuse of authority, the appellant could not reasonably believe in the factual truth of his report of what occurred at a meeting which neither he nor his informant attended.

- **Appellant: Alvern C. Weed**
Agency: Social Security Administration
Decision Number: [2009 MSPB 17](#)
Docket Number: DE-3443-05-0248-X-1
Issuance Date: February 12, 2009

Compliance

USERRA/VEOA/Veterans' Rights

This case was before the Board on the AJ's Recommendation finding the agency in noncompliance with a final Board order, [2007 MSPB 259](#), 107 M.S.P.R. 142. In that Opinion and Order, the Board found that the agency violated the appellant's veterans' preference rights under VEOA when it filled two positions using the Outstanding Scholar Program authority instead of competitively filling the positions. The Board ordered the agency to reconstruct the hiring process for the two positions and make selections in accordance with law. After holding a hearing on the compliance issue, the administrative judge (AJ) issued a compliance recommendation finding that the agency's reconstruction action was not *bona fide*, and referred the matter to the Board for enforcement.

Holdings: The Board found that the agency is not in compliance with its previous Opinion and Order, and ordered the agency to take corrective action:

- 1. To reconstruct the selection process consistent with law and regulation, the appointing authority must consider at least 3 names for appointment to each vacancy in the competitive service from a certified list obtained from the appointing authority from the top of the appropriate register, and the appointing authority must make a selection for each vacancy from the highest 3 names on the certificate. Reconstructing the selection process also requires removing from the position any individual improperly appointed to the position at issue.**
- 2. The agency did not actually reconstruct the hiring process, but instead engaged in a "hypothetical" hiring process in which it did not make real selections for the two positions in question. In addition, one of the two individuals who had been improperly appointed remains in the position.**
- 3. The Board rejected the agency's argument that the Board lacks the authority to review the merits of the agency's reconstruction action. While the cases relied on by the agency express limitations on the Board's authority under VEOA, including the authority to order an individual's appointment, they specifically hold that the Board has the authority to determine whether an agency has violated a statutory or regulatory provision relating to veterans' preference and to order an agency to comply with applicable laws and regulations when making selections.**
- 4. The Board also rejected the agency's contention that removing other employees who were appointed in violation of law and regulation would violate due process and the provision of [5 U.S.C. § 7513](#) that an adverse action may only be taken for "such cause as will promote the efficiency of the service." The Board has repeatedly held that, as part of the reconstruction process, an agency must remove an improperly appointed incumbent from the position. Contrary to the agency's**

assertion, the agency need not remove the individual from the federal service; it need only remove the individual from the position he or she holds as the result of the improper appointment.

5. The Board again ordered the agency to reconstruct the selection process for the two positions in question and gave the agency specific instructions for doing so.

- **Appellant: Sam B. Tawadrous**
Agency: Department of the Treasury
Decision Number: [2009 MSPB 18](#)
Docket Number: DA-0752-08-0227-I-1
Issuance Date: February 13, 2009
Appeal Type: Adverse Action by Agency
Action Type: Removal

New Evidence

The appellant petitioned for review of an initial decision that affirmed his removal. The agency removed the appellant from his position as a Tax Specialist with the IRS on charges that he failed to properly file his 2001 and 2002 personal federal income tax returns, and that he failed to timely pay his personal income taxes for those years. After conducting a hearing, the AJ sustained both charges, but not the specification that the appellant's failure to properly file his returns was willful, and determined that the removal penalty was reasonable. On petition for review, the appellant submitted evidence that, following the issuance of the initial decision, the U.S. Tax Court issued a decision that casts doubt on both of the sustained charges.

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

- 1. The Board will consider new evidence when it was previously unavailable despite a party's due diligence and is material, i.e., of sufficient weight to warrant an outcome different from that of the initial decision.**
- 2. The October 6, 2008 decision of the U.S. Tax Court meets these criteria. It was not available until after the issuance of the initial decision, and it undercuts the evidence supporting both charges. That decision reflects that the appellant and the agency stipulated that he does not have any tax deficiency or penalty due for taxable year 2001. And while the Tax Court's decision does indicate a deficiency for 2002, that deficiency is significantly less than the deficiency charged by the agency in its removal action.**
- 3. In light of the new and material evidence, the initial decision must be vacated and the appeal remanded to allow the AJ to consider the additional evidence and issue a new decision.**

- **Appellant: Sergio I. Torres**
Agency: Department of Homeland Security
Decision Number: [2009 MSPB 19](#)
Docket Number: DA-0752-07-0066-C-1
Issuance Date: February 13, 2009
Appeal Type: Adverse Action by Agency
Action Type: Removal

Compliance

- Settlement-Related

The appellant petitioned for review of a compliance initial decision that denied his petition for enforcement (PFE). On appeal from the agency's action removing the appellant from his position as a Border Patrol Agent, the parties entered into a settlement agreement under which the appellant agreed to withdraw his appeal and submit his resignation, and the agency agreed to replace the SF-50 to reflect the resignation and to remove all documentation of his removal from his Official Personnel File. In his PFE, the appellant alleged that, in connection with his application for employment with a private company, former agency supervisors or co-workers told company investigators that he had resigned in lieu of removal, which resulted in his not being cleared for the position. The AJ denied the PFE on the grounds that the agreement did not contain either a confidentiality clause that would preclude agency employees from providing any information to an investigator, or a provision to preclude those the appellant identified as references from providing information.

Holdings: The Board granted the appellant's PFR, vacated the initial decision, and remanded the case for further adjudication:

- 1. Relying on our reviewing court's decisions in *Pagan v. Department of Veterans Affairs*, [170 F.3d 1368](#) (Fed. Cir. 1999), and *Conant v. Office of Personnel Management*, [255 F.3d 1371](#) (Fed. Cir. 2001), the Board has held that a settlement calling for rescission of a removal and issuance of an SF-50 showing resignation also requires the agency to expunge removal-related documents from the employee's personnel file and not to disclose such documents to third parties, even when the settlement does not explicitly set forth these requirements. The key concern in such cases is that the Board "see to it that the parties receive that for which they bargained."**
- 2. The agreement in this case must be construed as requiring that the agency's communications with third parties reflect what the replacement SF-50 shows, i.e., that he resigned, and that it not disclose the circumstances of the removal. The agency is required to act as if the appellant had a clean record.**
- 3. At this time, the record does not establish whether the agency breached the agreement. The appellant's allegations are contained in an unsworn statement, and the agency has not met its obligation to provide relevant evidence responding to the allegation of breach. Accordingly, the appeal must be remanded to the AJ, who will provide the parties with an opportunity to provide evidence and argument as to whether a breach occurred.**

4. Prior to adjudicating the merits of the petition for enforcement, the AJ should first address whether the petition was timely filed. Such a petition must be filed within a reasonable time after the petitioner becomes aware of a breach.

- **Appellant: Robert O. Jones**
Agency: United States Postal Service
Decision Number: [2009 MSPB 21](#)
 Docket Number: AT-0752-08-0558-I-1
 Issuance Date: February 17, 2009
 Appeal Type: Adverse Action by Agency

**Arbitration/Collective Bargaining-Related Issues
 Jurisdiction**

The appellant petitioned for review of an initial decision that dismissed for lack of Board jurisdiction his appeal alleging that he was constructively suspended. The appellant was removed from his position in February 2007. He grieved that action, the arbitrator issued a decision converting the removal to a suspension without pay, and he was reinstated to employment in March 2008. On May 9, 2008, the agency issued a new proposal to remove that referenced a long-term suspension, dated December 20, 2006, apparently resulting from the arbitrator's award. In the initial decision, the AJ found that, as a preference-eligible postal employee, the appellant was entitled to pursue both a grievance and a Board appeal with respect to his removal, but that the appellant stated that he was not interested in relitigating his February 2007 removal, but was seeking review of the arbitrator's award. The AJ found, however, that the Board has no authority to review the arbitrator's award because [5 U.S.C. § 7121](#) does not apply to the Postal Service.

On PFR, the appellant contends that the AJ never addressed his allegation that he is appealing a new suspension, arguing that the arbitrator did not mitigate the removal action, but instead imposed a new 15-month suspension.

Holdings: The Board granted the appellant's PFR, and affirmed the initial decision as modified, still dismissing the appeal for lack of jurisdiction:

- 1. A reasonable reading of the arbitration award is that it imposed a mitigated penalty of a time-served suspension, and that the agency did not take a new action against the appellant, but merely implemented the arbitration award.**
- 2. Because this cases involves a "time-served" suspension, the Board considered the impact of *Milligan v. U.S. Postal Service*, [106 M.S.P.R. 414](#) (2007), which held that when an arbitrator imposes a time-served suspension, the proper course is to apply collateral estoppel to the arbitration decision with respect to the charged misconduct, and to then apply the *Douglas* factors to determine the appropriate penalty. This raises the possibility that the removal action originally imposed by the agency could be upheld.**
- 3. Apparently aware that he would be taking the risk that the Board could re-impose the removal penalty if he chose to appeal that action, the appellant**

specifically chose not to do so. Accordingly, there is no basis for the Board to exercise jurisdiction.

- **Appellant: Paul M. Page**
Agency: Department of Transportation
Decision Number: [2009 MSPB 20](#)
Docket Number: SF-3443-08-0622-I-1
Issuance Date: February 17, 2009

Board Procedures/Authorities
- Withdrawal of Appeal

The appellant sought review of an initial decision that dismissed his appeal as withdrawn. The appellant filed two appeal forms with the Board's regional office: one on July 28, 2008, in which he appealed a letter of reprimand; and one on July 31, 2008, in which he filed what appears to be an individual right of action (IRA) appeal challenging the denial of his grievance of the reprimand letter. Both claims were docketed as a single appeal, and the AJ notified the appellant that the Board does not have jurisdiction over the direct appeal of a letter of reprimand and that the Board would only have jurisdiction over a whistleblower claim after he exhausted his remedies with the Office of Special Counsel. On August 5, the appellant filed a letter stating that he "would like to delete, dismiss, or cancel an appeal I filed on July 28, 2008, # 200801987." On August 12, the AJ issued a decision dismissing the entire appeal. The next day, the appellant filed a letter with the Board stating that he wanted to withdraw his July 31 appeal "without prejudice."

Holdings: The Board granted the appellant's petition, vacated the initial decision, affirmed the portion of the initial decision that dismissed the letter of reprimand claim as withdrawn, and remanded the denial of a grievance claim to the regional office for further adjudication:

- 1. An appellant's withdrawal of an appeal is an act of finality, but a voluntary withdrawal must be clear, decisive, and unequivocal.**
- 2. Contrary to the implication in the initial decision, the appellant did not clearly withdraw his entire appeal. He did clearly withdraw his July 28 appeal of the letter of reprimand, but he did not clearly withdraw his July 31 appeal of the denial of his grievance. Accordingly, the Board remanded the latter claim to the regional office for further adjudication.**

- **Appellant: Albert White**
Agency: United States Postal Service
Decision Number: [2009 MSPB 15](#)
Docket Number: SF-0353-07-0285-X-1
Issuance Date: February 12, 2009

Compliance

This case was before the Board on the AJ's Recommendation finding the agency in noncompliance with the terms of a settlement agreement that resolved an appeal

regarding the appellant's restoration to duty after partial recovery from a compensable injury. The agreement provided that the agency place the appellant into a temporary job assignment not to exceed 6 months. It further provided that, if the appellant was unable to work a full 8-hour workday after job expired, or became unable to complete the essential functions of the temporary job assignment during the 6-month period, the appellant agreed to resign or retire and not appeal his separation. While working in the temporary position, the appellant was diagnosed with a work-related injury for which he received compensation. At the conclusion of the 6-month period, the agency issued the appellant a memorandum stating that it was processing his resignation that date pursuant to the terms of the settlement agreement. On petition for enforcement, the AJ found that the agency was not in compliance with its obligations and referred the matter to the full Board for compliance.

Holdings: The agency has provided evidence that it has returned the appellant to work in accordance with the terms of the settlement agreement, and the appellant has not responded to the agency's evidence of compliance. The Board found that the agency is now in compliance and dismissed the petition for enforcement as moot.