U.S. Merit Systems Protection Board

CASE REPORT DATE: March 20, 2009

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BOARD DECISIONS

- **Appellant: Jeanell M. Brown**
  Agency: Department of Defense
  Decision Number: 2009 MSPB 32
  Docket Number: CH-0752-08-0415-I-1
  Issuance Date: March 12, 2009
  Appeal Type: Adverse Action by Agency
  Action Type: Removal

  Split-Vote Decisions

  The appellant petitioned for review of an initial decision that affirmed her removal.

  Holding: Because the two Board members could not agree on a disposition, the initial decision became the Board's final decision. The issue in the case was whether the *Egan* rule limiting the scope of Board review of a removal decision based on the revocation of a security clearance also applies to a removal from a "non-critical sensitive" position due to the employee's having been "denied eligibility for access to classified information and/or occupancy to a sensitive position." Chairman McPhie issued an opinion explaining why he would answer that question in the affirmative. Vice Chairman Rose issued an opinion explaining why she would have found that the Board has the authority to review the merits of the agency determination on which the appellant's removal was based.

- **Appellant: Dom Wadhwa**
  Agency: Department of Veterans Affairs
  Decision Number: 2009 MSPB 33
  Docket Number: PH-1221-08-0019-W-1
  Issuance Date: March 13, 2009
  Appeal Type: Individual Right of Action (IRA)

  Whistleblower Protection Act
  - Protected Disclosure

- Contributing Factor
- Clear and Convincing Evidence

The appellant petitioned for review of an initial decision that denied his request for corrective action. The appellant is a physician at a Veterans Administration Medical Center (VAMC). In his IRA appeal, he claimed that he was reassigned in retaliation for having disclosed safety violation at the VAMC. Although the administrative judge (AJ) found that the Board had jurisdiction over the appeal, she denied the appellant's request for corrective action on the merits, finding that: he failed to show that he made protected disclosures; even if he had made protected disclosures, he failed to establish that they were a contributing factor in his reassignment; and that, even if the disclosures were a contributing factor, the agency showed by clear and convincing evidence that would have reassigned the appellant anyway.

Holdings: The Board denied the appellant's petition for review (PFR), but reopened on its own motion to affirm the initial decision as modified, still denying the request for corrective action:

1. The AJ erred in finding that the appellant's disclosures were not protected.

a. Although the AJ correctly found that the appellant raised a specific threat to public health and safety, she erred in concluding that the disclosures were not protected under *Meuwissen v. Department of the Interior*, 234 F.3d 9 (Fed. Cir. 2000), on the ground that a disclosure of something that is already publicly known is not protected under the WPA. An employee's decision to go outside the chain of command to correct a problem that local management has failed to address is protected under the WPA.

b. The AJ also erred on the facts in relying on *Meuwissen* when she stated that "many of the safety devices or strategies, or lack thereof, would have been apparent to anyone would walked into the hospital." The appellant did more than merely restate observable facts. As a physician practicing at the facility, he provided a perspective not discernable to members of the visiting public by recognizing the potential threat to medical providers' safety that the lack of security caused.

c. The AJ erred in interpreting the "publicly known" test too restrictively. In its decisions in *Meuwissen*, *Huffman*, and *Horton*, the Court of Appeals for the Federal Circuit examined whether the statutory purpose of affording a remedy for alleged government wrongdoing would be served in determining that the subject statements were not "disclosures" within the meaning of the WPA. In contrast, the remedial purpose of the WPA is furthered by encouraging employees to bring attention to alleged threats to safety that are ignored by local management, and based upon facts which, even if known to the public, do not necessarily indicate a safety threat without also considering additional information not publicly known.

2. The AJ erred in concluding that the appellant failed to establish that his protected disclosure was a contributing factor in his reassignment. Under the "knowledge/timing test," an appellant can prove the contributing factor element through evidence that the official taking the personnel action knew of the

whistleblowing disclosure and took the action within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor. Here, the reassignment took place within 6 months of the protected disclosure, well within the range of time from which an inference of causation arises.

3. After considering the pertinent evidence, the Board agreed with the AJ's conclusion that the agency established by clear and convincing evidence that it would have reassigned the appellant in the absence of his protected disclosures.

- **Appellant: Dom Wadhwa**
  Agency: Department of Veterans Affairs
  Decision Number: 2009 MSPB 34
  Docket Number: PH-1221-08-0502-W-1
  Issuance Date: March 13, 2009
  Appeal Type: Individual Right of Action (IRA)

  Whistleblower Protection Act
  - Personnel Actions

  The appellant petitioned for review of an initial decision that dismissed his IRA appeal for lack of jurisdiction. In this appeal, the appellant alleged that the agency took 3 personnel actions in retaliation for the same whistleblowing disclosures described in the appeal described above.

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

  1. The AJ erred in finding that the doctrine of collateral estoppel precluded the appellant from relitigating whether his disclosure was protected. The doctrine does not apply to a jurisdictional dismissal because the legal issues involved are not identical. Moreover, there was no final judgment in the earlier-litigated appeal.

  2. For the reasons described in the Board' decision in 2009 MSPB 34, the AJ erred in finding that the appellant's disclosure was not protected.

  3. The appellant failed to make a non-frivolous allegation of Board jurisdiction over his IRA appeal because none of the alleged personnel actions—reading him his Miranda rights and advising him that he was under investigation for alleged threat; staging an incident in an attempt to arrest him; or subjecting him to an unreasonable search and seizure—are covered personnel actions under the WPA, 5 U.S.C. § 2302(a)(2)(A).

- **Appellant: Michael J. Axsom**
  Agency: Department of Veterans Affairs
  Decision Number: 2009 MSPB 35
  Docket Number: DC-0752-08-0669-I-1
  Issuance Date: March 13, 2009
  Appeal Type: Adverse Action by Agency
  Action Type: Constructive Adverse Action

Jurisdiction – Resignation
USERRA/VEOA

The appellant petitioned for review of an initial decision that dismissed his appeal of an allegedly involuntary resignation for lack of jurisdiction. Although stationed in Washington, D.C., the appellant was spending much of his time in North Carolina to care for his father, who suffers from a serious medical condition. Although the agency allowed the appellant to work a compressed schedule and granted leave under the Family Medical Leave Act, it instructed the appellant to return to work in Washington by September 1, unless he provided medical documentation to support a new FMLA leave request. The appellant did not receive this instruction until August 28, and asked for an extension the same day. In a follow-up e-mail the next day, he said he would resign if the extension was denied. On August 30, not having received a response to his request, the appellant faxed his resignation, effective September 1. After filing a formal EEO complaint and receiving a final agency decision, the appellant filed an appeal with the Board alleging that his resignation was involuntary. The AJ dismissed the appeal for lack of jurisdiction, finding that the appellant failed to present non-frivolous allegations that his resignation was involuntary.

Holdings: The Board denied the appellant's PFR, but reopened on its own motion to affirm the initial decision as modified, still dismissing the appeal for lack of jurisdiction:

1. An involuntary resignation is equivalent to a forced removal and is a matter within the Board's jurisdiction.

2. The appellant clearly and repeatedly asserted that he did not want a hearing. Accordingly, the issue was not whether he raised a non-frivolous allegation of jurisdiction, but whether he established jurisdiction by a preponderance of the evidence.

3. After considering the pertinent evidence, the Board concluded that the appellant failed to establish that resignation was involuntary. The AJ's error was therefore harmless.

- **Appellant: Edward D. Fry**
  Agency: Office of Personnel Management
  Decision Number: 2009 MSPB 36
  Docket Number: AT-0842-08-0453-I-1
  Issuance Date: March 13, 2009
  Appeal Type: FERS - Regular Retirement Benefits
  Action Type: Retirement/Benefit Matter

Split-Vote Decisions
Retirement – Service Credit

OPM petitioned for review of an initial decision that reversed its decision denying the appellant's application for immediate retirement. That decision turned on whether the appellant would receive service credit for service from 1985 to 1989 for which he had applied for and received a refund for his FERS retirement contributions. Although that fact would ordinarily preclude an individual from getting service credit, the AJ

determined that OPM must give effect to the determination of the Chief Administrative Officer of the appellant's former employer that the appellant had been provided with incomplete and incorrect advice regarding the refund, and that the appellant should be deemed to have been on leave without pay for the period in question. The employing agency provided OPM with an amended individual retirement record (IRR) that reflected the additional period of creditable service. OPM declined to honor the amended IRR, finding that it constituted "an artifice to circumvent the substantive requirements of the retirement law."

Holding: Because the two Board members could not agree on a disposition, the initial decision became the Board's final decision. Chairman McPhie issued an opinion explaining why he would have granted OPM's petition for review. Vice Chairman Rose issued a separate opinion explaining why she believed the AJ reached the correct result.

- **Appellant: Fernando S. Eagleheart**
  Agency: United States Postal Service
  Decision Number: 2009 MSPB 37
  Docket Number: SF-0752-06-0167-C-1
  Issuance Date: March 13, 2009
  Appeal Type: Adverse Action by Agency
  Action Type: Removal

Compliance - Settlement Related

The appellant petitioned for review of an initial decision that denied his petition for enforcement of a settlement agreement that resolved his removal appeal. Under the agreement, the appellant agreed to withdraw his appeal; in exchange, the agency agreed to rescind the removal and allow the appellant to resign for personal reasons. Six days after the settlement was reached, the agency issued a PS-50 documenting the appellant's separation as a resignation, but the "Remarks" section stated: "Last Day In Pay Status Pending Inspection Service Case . . . ." More than 3 months later, the agency issued a corrected PS-50 with a notation stating, "Resignation—Voluntary for Personal Reasons." At some point after the settlement was reached, the appellant applied for a job with and was hired by the Department of Veterans Affairs (VA). The VA proposed his removal based on his failure to disclose that he had resigned from the agency by mutual agreement because of specific problems. The appellant and the VA thereafter entered into a last chance agreement in which the removal was held in abeyance. The appellant thereafter filed a petition for enforcement with the Board in which he alleged that the agency breached the agreement by issuing a PS-50 indicating that he resigned pending an inspection service case, and failing to issue a correct PS-50 for more than 3 months. The AJ denied the PFE, finding that the appellant failed to establish that the agency materially breached the settlement agreement.

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

1. Although the settlement agreement did not specifically address the agency's obligation to issue an updated PS-50 documenting the appellant's voluntary resignation, such action was required because the clear intent of the agreement was

to eliminate negative information associated with the rescinded removal which would adversely affect future employment with the government or elsewhere.

2. Under the circumstances, the agency's delay of more than 3 months in issuing a corrected PS-50 was unreasonably long, and was a breach of the agency's obligations.

3. The AJ erred in finding that the agency's delay did not constitute a material breach of the agreement on the basis that the delay did not have a material effect on the appellant's ability to secure employment with the DVA. The agency's breach was material because it relates to a matter of vital importance and goes to the essence of the contract. The appellant was not required to establish that the breach had an effect on his ability to apply for or obtain other employment.

4. Notwithstanding the above finding, there was a preliminary matter not addressed below that must be considered on remand—the timeliness of the petition for enforcement. A PFE must be filed within a reasonable time after the petitioner becomes aware of the breach. It is unclear from the current record when the appellant became aware of the alleged breach.

5. If the AJ finds that the enforcement petition was timely filed, and that the agency materially breached the settlement agreement, the appellant must be permitted to make an informed choice between rescinding and enforcing the agreement. If the appellant chooses to rescind the agreement, the removal appeal must be adjudicated on its merits.

- **Appellant: Sean D. Henson**
  Agency: United States Postal Service
  Decision Number: 2009 MSPB 38
  Docket Number: DA-0752-08-0230-I-1
  Issuance Date: March 13, 2009
  Appeal Type: Adverse Action by Agency
  Action Type: Removal

  Discrimination – Disability
  USERRA/VEOA

  The appellant petitioned for review of an initial decision that affirmed his removal on a charge of "Failure to Maintain Regular Attendance/Absence Without Permission (AWOL)." The appellant contended that, because he was hired as a disabled veteran and his medical problems resulted from his military service, the agency discriminated against him on the basis of his service-connected disability. The AJ found that the agency proved its charge, that the appellant failed to establish that the agency discriminated against him on the basis of disability, and that the removal penalty was reasonable and promoted the efficiency of the service.

  Holdings: The Board granted the appellant's PFR, affirmed the initial decision in part, and remanded the case to the regional office for further adjudication:

  1. The Board affirmed the AJ's findings with respect to the affirmative defense of disability discrimination. The appellant did not establish that he is a "qualified individual with a disability," as he never identified or requested any

accommodation that would have allowed him to meet the requirements of his position and maintain regular attendance.

2. Turning to the appellant's apparent attempt to raise a USERRA claim on PFR, when an appellant raises a claim of disability discrimination based on an injury incurred during military service, the fact that the injury was incurred during military service is incidental to the claim of disability discrimination and does not make the appellant's claim a USERRA claim.

3. Regarding the appellant's other USERRA and VEOA claims, these must be remanded for further adjudication because the AJ did not provide an adequate *Burgess* notice regarding what is required to establish jurisdiction.

- **Appellant: Lavera Ellison**
  Agency: Office of Personnel Management
  Decision Number: 2009 MSPB 39
  Docket Number: DC-831M-08-0479-I-1
  Issuance Date: March 13, 2009
  Appeal Type: CSRA - Overpayment of Annuity
  Action Type: Retirement/Benefit Matter

  Retirement
  - Survivor Annuity
  - Annuity Overpayment - Waiver

  OPM petitioned for review of an initial decision that reversed its reconsideration decision and ordered OPM to refund the $11,207 it had withheld from the appellant's survivor annuity payments. In a previous Board proceeding, it was determined that the appellant was entitled to a survivor annuity even though the decedent had not elected one for the appellant as a former spouse, because OPM had not provided the decedent with notices required by law that would have informed him of his right to elect a reduced annuity to provide for a survivor annuity, and the decedent's conduct was consistent with his having made a post-divorce election to provide a survivor annuity to the appellant. OPM then notified the appellant that the survivor annuity payments to which she was entitled under the Board's decision had accrued to $15,908, but that the cost of the survivor annuity benefit, i.e., the amount by which the decedent's annuity should have been reduced to cover the benefit was $11,207, and that it would pay her only the remaining $4,701. On appeal to the Board, the AJ found that there had been an overpayment of $11,207, but that the recovery of this overpayment was subject to waiver under OPM's regulations, and that the appellant had shown that she was entitled to such a waiver.

  On PFR, OPM contends that the money at issue is not subject to the waiver provisions on which the AJ relied, and that payment of this amount is necessary to establish entitlement to the survivor annuity.

  Holdings: The Board granted OPM's PFR and affirmed the initial decision as modified, still reversing OPM's reconsideration decision and finding that the appellant is entitled to the relief ordered by the AJ:

1. After reviewing the text and legislative history of both the Civil Service Spouse Equity Act of 1984, the 1993 amendments to that law, and OPM's implementing regulations for both, the Board concluded that a retiree who elects to provide a survivor annuity for his former spouse is subject to two separate reductions: one is the actuarial reduction that reflects the cost of providing the survivor annuity up to the time of the election; the other is the "regular survivor reduction" that reflects the subsequent cost of providing the annuity. In effect, the AJ found that the entire amount in controversy was attributable to the "regular survivor reduction," and the Board saw no error in that finding.

2. Recovery of an overpayment resulting from a failure to make the "regular survivor reduction" is subject to waiver provisions of 5 C.F.R. Part 831, Subpart N. OPM has shown no error in the AJ's determination that waiver of the entire amount of the overpayment is warranted.