U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for October 14, 2022

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BOARD DECISIONS

Appellant: Joseph Schmitt
Agency: Department of Veterans Affairs
Decision Number: 2022 MSPB 40
Docket Number: SF-0714-18-0121-I-1
Issuance Date: December 12, 2022
Appeal Type: Adverse Action – 38 U.S.C. § 714

VA Accountability Act
Interim Relief

The agency removed the appellant under the authority of 38 U.S.C. § 714, on a charge of absence without leave. On appeal, the appellant alleged that the agency denied him due process and retaliated against him for reporting potential fraud to the Inspector General (IG). Following a hearing, the administrative judge issued an initial decision, finding that the appellant had established both affirmative defenses. The administrative reversed the removal and ordered the agency to provide interim relief.

The agency filed a petition for review, and the appellant moved to dismiss the agency's petition for failure to provide the ordered interim relief. The Clerk of the Board issued an order instructing the agency to file a statement showing why its petition should not be dismissed

pursuant to 5 C.F.R. § 1201.116(e), and the agency failed to respond.

Holding: The Board denied the appellant's motion to dismiss, finding that the VA Accountability Act precludes an award of interim relief, and that the administrative judge therefore erred in ordering it. The Board otherwise affirmed the initial decision, finding no basis for disturbing the administrative judge's findings on the appellant's due process and whistleblowing claims.

1. In ordering interim relief, the administrative judge relied on 5 U.S.C. § 7701(b)(2)(A), which provides that if an employee is the prevailing party in an initial decision and either party files a petition for review, until the petition is resolved the employee "shall be granted the relief provided in the decision effective upon the making of the decision." Interim relief generally involves reinstatement, which in turn entails providing the employee with the pay and benefits of employment consistent with the position.
2. By contrast, the VA Accountability Act provides that until the U.S. Court of Appeals for the Federal Circuit issues a final decision on the appeal, the individual "may not receive any pay, awards, bonuses, incentives, allowances, differentials, student loan repayments, special payments, or benefits related to the employment of the individual by the [agency]." 38 U.S.C. § 714(d)(7). Because interim relief includes pay and other benefits of employment, 38 U.S.C. § 714(d)(7) conflicts with 5 U.S.C. § 7701(b)(2) regarding whether an employee removed under the VA Accountability Act may be afforded interim relief while a petition for review is pending.
3. In light of the conflict, the Board considered whether it was possible to give effect to both statutes. Looking to the plain language of 38 U.S.C. § 714(d)(7), the Board found that Congress expressly precluded an appellant who appealed a removal under § 714 from receiving pay or benefits of employment until the issuance of a final decision by the Federal Circuit—a timeframe which spans the time period during which interim relief would apply. The Board also reasoned that the specific language regarding payments by the Department of Veterans Affairs in removals taken under § 714 controls over the more general statutory provision applicable to other agencies. In sum, the Board found that 38 U.S.C. § 714(d)(7) precludes an award of interim relief.
4. Because 38 U.S.C. § 714(d)(7) precludes an award of interim

relief, the administrative judge's interim relief order was invalid. Accordingly, the Board denied the appellant's motion to dismiss the agency's petition.

5. Turning to the merits, the Board found that the agency's petition for review provided no basis for disturbing the administrative judge's findings of a due process violation and whistleblowing reprisal. The Board agreed that, because the agency failed to make diligent and reasonable efforts to serve the proposal notice on the appellant, he did not receive the proposal notice until after the deciding official decided to remove him, and was thus denied due process. The appellant also established a prima facie case of whistleblower retaliation by showing that his disclosure to the IG constituted protected activity under § 2302(b)(9)(C), and that the protected activity was a contributing factor in the removal under the knowledge/timing test. Finally, the Board agreed that the agency failed to demonstrate by clear and convincing evidence that it would have removed the appellant in the absence of his protected activity.

Appellant: Percy M. Ledbetter
Agency: Department of Veterans Affairs
Decision Number: 2022 MSPB 41
Docket Number: PH-0714-18-0119-I-1
Issuance Date: December 12, 2022
Appeal Type: Adverse Action – 38 U.S.C. § 714

VA Accountability Act
Timeliness

Effective November 8, 2017, the agency removed the appellant pursuant to 38 U.S.C. § 714. In its decision letter, the agency mistakenly advised the appellant that he could file an appeal with the Board no later than 30 calendar days after the date of the action or 30 days after his receipt of the decision. The appellant filed his appeal on December 22, 2017.

Following a hearing on the merits, the administrative judge issued a show cause order explaining that, under 38 U.S.C. § 714, the appellant had only 10 business days to file his appeal. She further noted that the appellant had filed his appeal 14 days after the incorrect deadline stated in the decision letter. After considering the parties' written responses, the administrative judge dismissed the appeal.

Holding: The Board affirmed the dismissal, finding no basis for waiving or tolling the 10-day filing deadline under 38 U.S.C. § 714. Because the appellant did not allege facts that would bring him within the doctrine of equitable tolling, the Board found that it was unnecessary to decide whether equitable tolling or equitable estoppel would be available in an appropriate case.

1. Under 38 U.S.C. § 714(c)(4)(B), the deadline for filing a Board appeal of an action taken under § 714 is 10 business days after the effective date of the action. Based on that deadline, the appeal was untimely filed by 28 calendar days.
2. The Board has identified three bases for waiving a filing deadline prescribed by statute or regulation: (1) the statute or regulation itself specifies circumstances in which the time limit will be waived; (2) an agency's affirmative misconduct precludes it from enforcing an otherwise applicable deadline under the doctrine of equitable estoppel; and (3) an agency's failure to provide a mandatory notice of election rights warrants the waiver of the time limit for making the election. In addition, the Board has recognized that equitable tolling may be available in some circumstances.
3. Here, the first and third bases for waiver do not apply, because the statute makes no provision for the acceptance of late filings, and does not require the agency to notify its employees of their election rights or any filing deadlines associated with those elections.
4. The Board next considered whether the statutory fling deadline could be subject to equitable estoppel (the second basis for waiver) or equitable tolling. Because the requirements for equitable estoppel are more stringent than the requirements for equitable tolling, the Board found it appropriate to first analyze whether the appellant meets the lower burden of establishing that equitable tolling is warranted.
5. The doctrine of equitable tolling does not extend to mere "excusable neglect," and generally requires a showing that the appellant has been pursuing his rights diligently and some extraordinary circumstances stood in his way. The appellant did not make such a showing. Thus, even if equitable relief is available under 38 U.S.C. § 714, the appellant would be ineligible to receive it.
6. The Board stated that it was "inclined to believe" that equitable tolling could potentially apply to appeals under 38 U.S.C. § 714. However, because the appellant alleged no facts that would bring

him within the doctrine of equitable tolling, the Board did not decide the question of whether equitable exceptions would be available in an appropriate case.

7. The Board noted that the administrative judge had erred in stating that the timeliness of an appeal is a jurisdictional issue. The Board further found that, while it was "unfortunate" that the administrative judge did not address the timeliness issue until after a hearing on the merits, she did not abuse her discretion.

Appellant: Anthony G. Salazar
Agency: Department of Veterans Affairs
Decision Number: 2022 MSPB 42
Docket Number: SF-1221-15-0660-W-1
Issuance Date: December 13, 2022
Appeal Type: Individual Right of Action Appeal

Whistleblower Protection – Protected Disclosures

The appellant, a Motor Vehicle Operator Supervisor, filed an IRA appeal alleging that the agency took personnel actions against him, beginning with delay of his training in May 2014, and ending with his removal in February 2015, in reprisal for two protected disclosures made in October 2013, concerning the program's failure to secure vehicle keys and fleet cards. Following a hearing, the administrative judge found that the appellant made his disclosures in the normal course of his duties, and that pursuant to 5 U.S.C. § 2302(f)(2) (2016), such disclosures are protected only if the employee proves by preponderant evidence that the agency took a given personnel action with an improper retaliatory motive. The administrative judge denied corrective action, finding that the appellant did not prove by preponderant evidence that the agency took the personnel actions with the actual purpose of retaliating.

Holding: The National Defense Authorization Act for Fiscal Year 2018 (2018 NDAA) modified § 2302(f)(2) to clarify that disclosures made in the normal course of duties are subject to a higher burden of proof only if the employee's principal job function is to regularly investigate and disclose wrongdoing. This clarification applies retroactively. Because the appellant's principal job function was not to regularly investigate and disclose wrongdoing, the administrative judge erred in applying § 2302(f)(2).

1. Section § 2302(f)(2) was first introduced by the Whistleblower Protection Enhancement Act of 2012 (WPEA). In enacting

§ 2302(f)(2), Congress sought to clarify that, contrary to recent case law such as *Wills v. Department of Agriculture*, 141 F.3d 1139 (Fed. Cir. 1998), disclosures may be protected under § 2302(b)(8) even if they were made in the course of the employee's regular job duties. In its original form, § 2302(f)(2) provided that "[i]f a disclosure is made during the normal course of duties of an employee, the disclosure shall not be excluded from [§ 2302(b)(8)] if [the agency takes a personnel action] with respect to that employee in reprisal for the disclosure." The Senate report explains that, while such disclosures may be protected, the employee must show that "actual reprisal occurred," i.e., that "the agency took the action with an improper, retaliatory motive." Thus § 2302(f)(2) imposes an "extra proof requirement" or "slightly higher burden" for proving the disclosures was protected.

2. The 2018 NDAA modified § 2302(f)(2) to provide that "[i]f a disclosure is made during the normal course of duties of an employee, *the principal job function of whom is to regularly investigate and disclose wrongdoing*, the disclosure shall not be excluded from [§ 2302(b)(8)] if [the agency takes a personnel action] with respect to that employee in reprisal for the disclosure." Thus, the Board found, the current version of § 2302(f)(2) expressly applies only to employees whose principal job functions are to regularly investigate and disclose wrongdoing.
3. The Board next considered whether the new version of the statute should be given retroactive effect under the framework set out in *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994). Examining the legislative history, the Board concluded that the 2018 amendment to § 2302(f)(2) would not have impermissible retroactive effect, as it was intended to clarify existing law and resolve ambiguity in the original version of the statute.
4. Because the appellant's principal job functions did not include investigating and reporting wrongdoing, the Board found that the administrative judge erred in applying § 2302(f)(2). The Board went on to find that the appellant had made a prima facie case of whistleblower retaliation, and remanded the case for the administrative judge to determine whether the agency showed by clear and convincing evidence that would have taken the same personnel actions in the absence of the appellant's disclosures.

Appellant: Nathalie Stroud
Agency: Department of Veterans Affairs
Decision Number: 2022 MSPB 43

Docket Number: CH-0714-19-0348-I-1
Issuance Date: December 13, 2022
Appeal Type: Adverse Action – 38 U.S.C. § 714

VA Accountability Act
Jurisdiction – Election of Remedies

Under the authority of 38 U.S.C. § 714, the agency issued a decision letter suspending the appellant for 15 days, effective April 28, 2019. The letter informed the appellant that she could seek review of the action by appealing to the Board, seeking corrective action from the Office of Special Counsel, filing a grievance under the negotiated grievance procedure, or pursuing a discrimination complaint.

On March 29, 2019, before the effective date of her suspension, the appellant filed a grievance challenging the action. In an April 22, 2019 memorandum addressing the grievance, the office director sustained the suspension as amended by spreading the effective dates over two pay periods. The grievance did not proceed to arbitration.

On May 6, 2019, the appellant filed a Board appeal contesting her suspension. The agency moved to dismiss the appeal, arguing that the appellant had previously elected to file a grievance, which precluded a Board appeal under 5 U.S.C. § 7121(e)(1). The administrative judge issued a show-cause order on jurisdiction, and the appellant responded. Based on the written record, the administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant had knowingly elected to file a grievance before filing her Board appeal.

Holding: The Board affirmed the initial decision and provided supplementary analysis explaining why the election of remedy procedures under 5 U.S.C. § 7121(e)(1) apply to actions taken under 38 U.S.C. § 714.

1. Title 38 U.S.C. § 714 does not directly address whether a timely election to grieve an action taken under that section affects the employee's right to subsequently challenge the action in a different forum. However, the Board found that the election provisions of 5 U.S.C. § 7121(e)(1) were applicable.
2. Section 7121(e)(1) provides that matters covered under 5 U.S.C. § 4303 and § 7512 which also fall within the coverage of the negotiated grievance procedure may be raised under 5 U.S.C. § 7701 or the negotiated grievance procedure, but not both. The

section further states: "Similar matters which arise under other personnel systems applicable to employees covered by [5 U.S.C. chapter 71] may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any applicable to those matters, or under the negotiated grievance procedure, but not both."

3. A 15-day suspension arising under 38 U.S.C. § 714 is a "similar matter" to a 15-day suspension covered under 5 U.S.C. § 7512, as both are appealable to the Board. Thus, while the appellant's suspension was not taken under 5 U.S.C. § 7512, it counts as a similar matter arising under another personnel system. Furthermore, the appellant is an employee covered by 5 U.S.C. chapter 71, of which 5 U.S.C. § 7121(a) is a part. For purposes of chapter 71, an "employee" means an individual "employed in an agency." 5 U.S.C. § 7103(a)(2)(A). An "agency," in turn, means an Executive agency, with certain listed exclusions. 5 U.S.C. § 7103(a)(3). The listed exceptions do not include the Department of Veterans Affairs.
4. The Board drew an analogy with *Wilson v. Department of Veterans Affairs*, 2022 MSPB 7, in which it found that the filing deadlines for mixed-case appeals, as set forth in 5 U.S.C. § 7702(e)(2), apply to mixed-case appeals of actions taken under 38 U.S.C. § 714. In reaching that conclusion, the Board reasoned that there was no "clear and manifest" intention by Congress to repeal the applicability of 5 U.S.C. § 7702 to mixed-case appeals arising under 38 U.S.C. § 714, and that § 7702(e)(2) was the more specific statute with regard to the procedures and time limits for mixed-case appeals. For the same reasons, the Board concluded that 5 U.S.C. § 7121(e)(1) controls the appellant's election of forum, given the absence of an overriding provision in the VA Accountability Act.
5. Applying 5 U.S.C. § 7121(e)(1), the Board found that the appellant made a binding election to pursue a grievance before filing with the Board. Thus, the administrative judge correctly dismissed the appeal for lack of jurisdiction.

Appellant: George DeGrella
Agency: Department of the Air Force
Decision Number: 2022 MSPB 44
Docket Number: SF-1221-19-0566-W-1
Issuance Date: December 14, 2022
Appeal Type: Individual Right of Action

Whistleblower Protection
Jurisdiction

The appellant worked for the agency as a nonappropriated fund (NAF) employee. In September 2018, the agency proposed the appellant's removal for alleged off-duty misconduct, and ultimately suspended him for 28 days in lieu of removal. The appellant filed a complaint with the Office of Special Counsel (OSC) alleging that the proposed removal and 28-day suspension were in retaliation for protected disclosures. Subsequently, OSC closed its investigation and the appellant filed an individual right of action (IRA) appeal with the Board. Based on the written record, the administrative judge dismissed the appeal, finding that the Board lacked jurisdiction because the appellant was an NAF employee.

Holding: The Board clarified that it lacks jurisdiction over an IRA appeal filed by an NAF employee.

1. Title 5 U.S.C. § 2105(c)(1), which generally defines "employee" for purposes of Title 5, an individual paid from nonappropriated funds of the various military exchanges and certain other instrumentalities of the armed forces is, with exceptions not applicable here, not an "employee" for purposes of laws administered by the Office of Personnel Management (OPM).
2. In *Clark v. Army & Air Force Exchange Service*, 57 M.S.P.R. 43 (1993) (*AAEFES*), the Board considered an IRA appeal filed by an NAF employee. The employee argued that for purposes of the IRA appeal, he was an employee under 5 U.S.C. § 2105, because OPM does not enforce or administer 5 U.S.C. § 2302(8). The Board disagreed, finding that the language of the statutory provisions allowing for IRA appeals makes them applicable to "employees" and does not modify the definition of "employee" at § 2105. The Board further found nothing in the Whistleblower Protection Act of 1989 or its legislative history to suggest that Congress intended to limit OPM's role to the extent that §§ 1221(a) and 2302 would no longer qualify as laws administered by OPM. The Board found no jurisdiction, and the U.S. Court of Appeals for the Federal Circuit affirmed its decision in *Clark v. Merit Systems Protection Board*, 361 F.3d 647, 651 (Fed. Cir. 2004).
3. Because much time has passed since *AAFES* and *Clark* were issued, and the Whistleblower Protection Act has been amended several times, most notably by the Whistleblower Protection Enhancement

Act (WPEA), the Board found it appropriate to revisit the issue of whether an IRA appeal may be brought by an NAF employee.

4. In enacting the WPEA, Congress can be presumed to have known of the Board's and the Federal Circuit's interpretations of the existing statute. The legislative history of the WPEA specifically identifies three court decisions that Congress wished to overrule, but makes no mention of *AAFES* and *Clark*. Thus, although the WPEA expanded the scope of whistleblower protection in other ways, there is nothing to suggest that it altered the longstanding interpretation that NAF employees have no right to file an IRA appeal with the Board.
5. The Board considered other subsequent amendments to the WPA, but found that none of them addressed the definition of an "employee" for purposes of determining who can file an IRA appeal. Accordingly, the Board concluded that the holdings of *AAFES* and *Clark* remain valid.
6. The Board considered and rejected the appellant's new argument that 10 U.S.C. § 1587, which protects NAF employees from retaliation for whistleblowing, provides for an appeal right to the Board. The statute provides that the Secretary of Defense is responsible for prohibiting whistleblower reprisal against NAF employees and correcting any such acts of reprisal, but nothing in the statute or the Secretary's implementing regulations provides for Board appeal rights.

Appellant: Willie Davis
Agency: Department of Veterans Affairs
Decision Number: 2022 MSPB 45
Docket Number: DC-0714-20-0417-I-1
Issuance Date: December 14, 2022
Appeal Type: Adverse Action – 38 U.S.C. § 714

VA Accountability Act
Timeliness

Effective January 31, 2020, the agency removed the appellant pursuant to 38 U.S.C. § 714. On March 2, 2020 (a Monday), the appellant filed a Board appeal alleging, among other things, that his removal was the result of race discrimination, retaliation for equal employment opportunity (EEO) activity, and reprisal for whistleblowing. The administrative judge informed the appellant that the appeal appeared to be untimely filed under the 10-business-day deadline contained in

38 U.S.C. § 714(c)(4)(B), and directed him to file evidence and argument on the timeliness issue. In response, the appellant argued that he had filed his appeal under the mixed-case procedures governed by 5 U.S.C. § 7702, and that it was timely under the deadline for mixed cases set forth at the Board's regulations at 5 C.F.R. § 1201.154. The administrative judge found that the 10-day deadline governed, and dismissed the appeal as untimely filed without a showing of good case for the delay.

Holding: The Board expanded on the holding of *Wilson v. Department of Veterans Affairs*, 2022 MSPB 7, concluding that the procedures of 5 U.S.C. § 7702 and the Board's implementing regulations apply to mixed-case appeals of adverse actions under the VA Accountability Act, regardless of whether the appellant pursued a formal discrimination complaint before proceeding to the Board.

1. A mixed case arises when an appellant has been subject to an action that is appealable to the Board, and the appellant alleges that the action was effected, in whole or in part, because of discrimination. Pursuant to 5 U.S.C. § 7702(a), an appellant has two options when filing a mixed-case appeal: (1) filing a mixed-case EEO complaint with the employing agency followed by an appeal to the Board; or (2) filing a mixed-case appeal directly with the Board. The regulation addressing the filing of mixed cases with the Board is 5 C.F.R. § 1201.154, which provides that an appellant may file a Board appeal of an adverse action alleging discrimination or retaliation for EEO activity within 30 days of the effective date of the action, or 30 days from the appellant's receipt of the agency's decision on an EEO complaint, whichever is later.
2. In *Wilson*, 2022 MSPB 7, the Board held that when an individual covered by 38 U.S.C. § 714 files a mixed-case appeal after filing a formal discrimination complaint with the agency, the appeal is governed by the procedures set forth in 5 U.S.C. § 7702 and the Board's implementing regulations. However, the Board did not address whether the same is true when an appellant does not file a formal discrimination with the agency, but instead raises discrimination and EEO reprisal claims for the first time before the Board.
3. The Board summarized its reasoning in *Wilson* and found that for the same reasons identified in that case—the silence of the VA Accountability Act regarding its relationship to the mixed-case procedures set forth in the Civil Service Reform Act, the strong

preference against repeal of a statute by implication, and the fact that the two statutes can coexist—the procedures of 5 U.S.C. § 7702(a)(1) continue to govern mixed-case appeals filed directly with the Board.

4. Because the appellant in this case filed a mixed-case appeal, the procedures contained within U.S.C. § 7702 and the Board's implementing regulations apply. Because the appellant met the 30-day deadline under 5 C.F.R. § 1201.154(a), the Board found his appeal timely filed and remanded the case for further adjudication.