



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for February 27, 2015

BOARD DECISIONS

Appellant: John W. Morrison
Agency: Department of the Navy
Decision Number: [2015 MSPB 15](#)
MSPB Docket No.: PH-0752-14-0669-I-1
Issuance Date: February 23, 2015
Appeal Type: Adverse Action
Action Type: Involuntary Retirement/Removal

Involuntary Retirement Based on Misleading Information

Before issuance of a decision letter effectuating the appellant's removal from his position as a Firefighter based on a charge of denial of eligibility to access noncritical sensitive areas, the agency called the appellant into a meeting for the purpose of delivering the decision letter. During that meeting, agency officials advised the appellant that the decision to remove him had been made and that he would lose "all [his] benefits and...retirement" if he did not resign or retire. The appellant opted to retire rather than having the agency effectuate the removal. In an initial decision, the administrative judge dismissed the appeal for lack of jurisdiction based on a finding that the appellant failed to make a nonfrivolous allegation that his retirement was involuntary, or that the action otherwise amounted to a constructive removal. The appellant filed a petition for review alleging, *inter alia*, that his retirement was involuntary because it was based on agency misinformation.

Holding: The Board granted the appellant's petition for review, vacated the initial decision, and remanded the appeal for further adjudication.

1. The AJ erred by not addressing whether the appellant made a nonfrivolous allegation that his retirement was involuntary because he materially relied on misleading information provided by the agency, or whether the agency had reason to know the appellant was relying on misleading information, but failed to correct it. The Board remanded the appeal for further adjudication of the appellant's allegation that an agency manager told him that he would lose his retirement benefits if he were removed.

Appellant: Anthony Caros

Agency: Department of Homeland Security

Decision Number: [2015 MSPB 16](#)

MSPB Docket No.: PH-0752-12-0402-A-2

Issuance Date: February 23, 2015

Appeal Type: Adverse Action

Action Type: Motion for Attorney Fees

Mixed Case Appeal Rights in Addendum Decision

Following the reversal of the appellant's removal, the appellant filed a motion for attorney fees for 268 hours of legal services at a rate of \$510.00 per hour. The AJ granted the motion after finding that \$250.00, rather than \$510.00, was the reasonable billing rate.

Holding: The Board denied the petition for review and cross petition for review and affirmed the addendum initial decision.

1. Addendum proceedings for attorney fees stemming from a mixed case will receive notice of mixed-case appeal rights.

Appellant: Clyde W. Beal

Agency: Office of Personnel Management

Decision Number: [2015 MSPB 17](#)

MSPB Docket No.: SF-0831-14-0582-I-1

Issuance Date: February 23, 2015

Appeal Type: Retirement

Action Type: Post 1956 Military Service Credit

Retirement Credit Post 1956 Military Credit

Authority of Board to Review Accuracy of IRR

The appellant accrued a combination of civil service and post-1956 military service when he retired in in 2003 under the Civil Service Retirement System (CSRS). OPM initially found that the appellant was required to make a post-1956 military service deposit before separating from federal service, and that because he had failed to do so, his military service could not be included in the computation of his annuity. OPM later rescinded that decision and offered the appellant an opportunity to make the deposit. The appellant asserted that he should not only be credited with his post 1956 military service, but that he should not have had to pay a deposit at all because his effective date of commencing his civil service position was before October 1, 1982. The appellant offered evidence showing that he commenced his employment on September 30, 1982, and was therefore not required to make a deposit in order to have his military service included in the computation of his annuity. The AJ reversed the OPM decision, based on documentary evidence in the appellant's Individual Retirement Record (IRR) certified by the agency to OPM, and a credibility finding supporting the appellant's position that he commenced his employment on September 30, 1982. OPM filed a petition for review contending that the AJ exceeded her authority in reviewing the appellant's certified IRR and supplemental records and erred in relying on the appellant's testimony.

Holding: The Board denied OPM's petition for review and affirmed the initial decision.

1. If an employee challenges a determination of the employing agency as reflected in his IRR, OPM and the Board have authority to entertain challenges to the accuracy and completeness of the IRR. Here, the documentary evidence contained in the IRR, along with the AJ's affirmative credibility determination, was of sufficient weight to support the appellant's claim that he started work prior to October 1, 1982.

Appellant: Ronald G. Bowman

Agency: Small Business Administration

Decision Number: [2015 MSPB 18](#)

MSPB Docket No.: AT-0752-13-0538-I-1

Issuance Date: February 23, 2015

Appeal Type: Adverse Action
Action Type: Removal

**Mitigation of Penalty
Consideration of Subsequent Medical Documentation Relevant to
Prior Condition as Mitigating Factor**

The appellant was removed from his Supervisory Construction Analyst position based on charges of excessive unauthorized leave and failure to follow proper leave request procedures. Following numerous requests for documentation to support his absences, the appellant submitted FMLA paperwork documenting that he had been diagnosed with Major Depressive Disorder and that he was hospitalized and otherwise incapacitated by this condition for certain dates, but not earlier dates identified as a basis for the agency's removal action. The AJ sustained the charged misconduct but mitigated the penalty to a 30 day suspension based, in part, on evidence of the appellant's mental impairment.

Holding: The Board denied the agency's petition for review and affirmed the initial decision.

1. While a mitigating factor based on an appellant's medical condition will be considered only if the evidence is made known to the agency before the adverse action was effected, evidence that an employee's medical condition or mental impairment played a part in the charged conduct is ordinarily entitled to considerable weight as a mitigating factor, if the agency knows about it before taking the action at issue. Here, evidence that the appellant's mental impairment played a part in the charged conduct was entitled to considerable weight along with the appellant's more than 20 years of successful service.

2. In a dissenting opinion, Member Robbins would have sustained the penalty of removal because the appellant did not provide any explanation or medical evidence to support any of his absences at issue in his removal, the appellant expressed no remorse for his actions, the appellant's work and disciplinary record reflected that he had a demonstrated problem in complying with the agency's leave and attendance policies, and the appellant's status as a supervisor required that he be held to a higher standard.

Appellant: Stephen Edward Moss
Agency: Office of Personnel Management
Decision Number: [2015 MSPB 19](#)

MSPB Docket No.: DC-0843-14-0621-I-1

Issuance Date: February 24, 2015

Appeal Type: Retirement

Action Type: Spousal Survivor Annuity

Waiver of Survivor Annuity

The appellant and his former spouse divorced in 1997, and the divorce decree awarded the appellant an apportionment of the retirement annuity and a former spouse survivor annuity, with the cost of the survivor annuity to be deducted from his share of the retirement annuity. After the appellant's former spouse retired in 2013, the appellant contacted OPM to implement the court order, at which point OPM notified the appellant of the cost of his survivor annuity. The appellant requested that OPM waive his future entitlement to his former spouse survivor annuity so that he could receive an unreduced share of the retirement annuity. OPM denied the request, and then denied it again after the appellant requested reconsideration. The appellant appealed the decision to the Board, arguing that he had a statutory right to waive his survivor annuity, and the administrative judge affirmed OPM's denial.

Holding: The Board denied the petition for review.

1. The appellant was not entitled to waive his survivor annuity because he was awarded the annuity in the divorce decree without an election right.
2. 5 U.S.C. § 8345(d) does not permit a waiver of entitlement to former spousal survivor annuity to increase the current share of a retirement benefit. The statute only allows an individual entitled to an annuity to decline to accept payment of the annuity.

Appellant: Nicole D. Wilson

Agency: Department of Homeland Security

Decision Number: [2015 MSPB 20](#)

MSPB Docket No.: SF-0752-14-0314-I-1

Issuance Date: February 24, 2015

Appeal Type: Interlocutory Appeal

Action Type: Demotion

TSA Position Classification

The appellant was a Supervisory Coordination Center Officer (SCCO) for the Transportation Security Administration (TSA). In February 2014, the agency demoted her to the position of Transportation Security Officer (TSO). The appellant appealed her demotion to the Board, and the agency moved to dismiss the appeal for lack of jurisdiction. The agency argued that the SCCO position was a “screener” position exempted from Board jurisdiction pursuant to 49 U.S.C. § 44935. The administrative judge held that the appellant did not occupy a “screener” position and could appeal the demotion to the Board, and then certified her ruling for interlocutory review by the Board.

Holding: The Board affirmed the ruling as modified, vacated the order staying further processing of the appeal, and returned the case to the regional office for further adjudication.

1. Employees holding the SCCO position within TSA are not “screeners” for purposes of 49 U.S.C. § 44935. Accordingly, qualified employees in the SCCO position have Board appeal rights.

Appellant: Jeffrey L. Bostwick

Agency: Department of Agriculture

Decision Number: [2015 MSPB 21](#)

MSPB Docket No.: SF-4324-11-0854-I-3

Issuance Date: February 25, 2015

Appeal Type: USERRA

Action Type: Reemployment Rights Following Military Service

USERRA Right to Reemployment

The appellant was in active duty with the U.S. Army Reserve during the time he was employed as a Supervisory Forestry Technician. Shortly after returning from active duty, the appellant requested and obtained a transfer to another federal agency. After transferring to the new position at the other federal agency, the appellant was advised that he did not qualify for special retirement eligibility coverage that was available in his prior position. The appellant then filed a USERRA employment restoration claim with the objective of returning to his previous position so he could have the special retirement eligibility coverage. In denying the request for corrective action, the AJ found that the appellant failed to make a request for reemployment with the agency. The AJ also found that the appellant was eligible to request reemployment with the agency after it effected his transfer to his new position because the USERRA regulations do not specifically address the issue of whether an employee can be reemployed multiple times during the timeframe

for requesting, provided that the successive requests for reemployment are made within the applicable timeframe.

Holding: The Board denied the petition for review and affirmed the initial decision as modified by providing a different rationale for the denial of corrective action.

1. Under the express language and purpose of USERRA's reemployment guarantee, it is clear that the absence from a position of employment must be necessitated by reason of service in the uniformed service, not by employment with another federal agency, and that a person's notification of intent to return must happen upon completion of a period of service in the uniformed service, not upon completion of such service and additional service with another federal agency. Here, the agency satisfied its statutory obligation to reemploy the appellant following his military service when it returned him to duty but before he was transferred to his new position with another employer.

The U.S. Court of Appeals for the Federal Circuit issued the following precedential decision this week:

Petitioner: Edward P. Kerner

Respondent: Department of the Interior

Tribunal: U.S. Court of Appeals for the Federal Circuit

Case Number: [2014-3012](#)

MSPB Docket No. CH-3330-11-0394-I-1

Issuance Date: February 20, 2015

Merit Promotion Experience Under VEOA

The petitioner was a preference-eligible GS-5 Evidence Custodian with the respondent's Fish and Wildlife Service. He applied for GS-9/11 and GS-11/11 vacancies, which were both merit-promotion vacancies. Both vacancies required federal employee applicants to meet a time-in-grade requirement and have one year of specialized experience equivalent to the GS-7 and GS-9 level, respectively. The petitioner did not have federal civil service at the GS-7 or GS-9 levels, and therefore was determined to not be qualified for either vacancy. The petitioner appealed his non-selection to the Board, alleging that he was denied the opportunity to compete for the vacancies under the

Veterans Employment Opportunity Act (VEOA) because the respondent did not consider his non-federal civil service experience, and the Board affirmed the respondent's decision.

Holding: The Court affirmed the Board's decision.

1. Agencies are not required to consider non-federal civil service experience when determining whether a veteran employed in the federal civil service meets time-in-grade or specialized experience requirements for purposes of merit promotions. The purpose of VEOA was to help veterans gain access to federal employment, not provide preferential treatment in promotion decisions.

The U.S. Court of Appeals for the Federal Circuit issued the following nonprecedential decision this week:

Petitioner: Clifford W. Jones, Sr.

Respondent: Department of Health and Human Services

Tribunal: U.S. Court of Appeals for the Federal Circuit

Case Number: [2014-3205](#)

MSPB Docket No. CH-1221-10-1030-C-1

Issuance Date: February 24, 2015

Holding: The Court affirmed the Board's denial of the petitioner's petition for enforcement of a settlement agreement based on its findings that the respondent complied with the terms of the settlement agreement and that the petitioner did not show good cause for his untimely filing.