U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for July 15, 2022

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BOARD DECISIONS

Appellant: Gary L. Thurman
Agency: U.S. Postal Service
Decision Number: 2022 MSPB 21
Docket Numbers: AT-0752-17-0162-I-1

AFFIRMATIVE DEFENSE
RETALIATION

The appellant filed a Board appeal challenging his removal from his Laborer Custodial position based on a charge of improper conduct. On his appeal form, he also indicated that he was raising an affirmative defense of retaliation for prior protected activity, including the filing of a prior Board appeal challenging his placement on an emergency suspension for essentially the same conduct that formed the basis of the removal action. After holding a hearing, the administrative judge sustained the charge and the appellant's removal. In the initial decision, the administrative judge did not address the appellant's affirmative defense, which had not been listed as an issue to be decided in the prehearing conference summary. The appellant filed a petition for review disputing that he engaged in the alleged misconduct; but he did not address his affirmative defense or the administrative judge's handling of it.

Holding: The Board overruled *Wynn v. U.S. Postal Service*, 115 M.S.P.R. 146 (2010), and similar cases, to the extent they held that the Board must

always remand a case for consideration of an affirmative defense if an administrative judge has failed to comply with certain procedural requirements. Instead, in determining whether an administrative judge erred in not addressing an appellant's affirmative defenses such that remand is necessary, the Board will examine a number of factors that are instructive as to the ultimate question of whether an appellant demonstrated his intent to continue pursuing his affirmative defense, and whether he conveyed that intent after filing the initial appeal.

1. Among the relevant factors are the following: (1) the thoroughness and clarity with which the appellant raised an affirmative defense; (2) the degree to which the appellant continued to pursue the affirmative defense in the proceedings below after initially raising it; (3) whether the appellant objected to a summary of the issues to be decided that failed to include the potential affirmative defense when specifically afforded an opportunity to object and the consequences of the failure were made clear; (4) whether the appellant raised the affirmative defense or the administrative judge's processing of the affirmative defense claim in the petition for review; (5) whether the appellant was represented during the course of the appeal before the administrative judge and on petition for review, and if not, the level of knowledge of Board proceedings possessed by the appellant; and (6) the likelihood that the presumptive abandonment of the affirmative defense was the product of confusion, or misleading or incorrect information provided by the agency or the Board.

2. The above factors are not exhaustive, and none of the individual factors identified will be dispositive in determining whether a particular appellant will be deemed to have waived or abandoned a previously identified affirmative defense. Instead, the applicability and weight of each factor should be determined on a case-by-case basis.

3. Applying the factors, the Board held that the appellant abandoned his affirmative defense and there was no basis to remand the appeal for additional proceedings regarding the appellant's affirmative defense.

    A. Regarding factor 1, the appellant failed to provide a thorough and clear explanation of his affirmative defense, which supported a finding that he abandoned his claim. The only information the appellant provided was a statement on his appeal for that he was

raising "an affirmative defense of retaliation for [] prior protected activity," including, "filing of a Board appeal concerning his emergency placement suspension."

B. Regarding factor 2, the appellant did not reference his purported affirmative defense at any point after initially raising it, which suggested that he no longer wished to pursue the claim.

C. Regarding factor 3, the appellant's representative did not object to the administrative judge's prehearing conference summary that outlined the issues to be decided, which specifically indicated that the appellant was not raising any affirmative defenses. The appellant's failure to object to the order, despite being afforded an opportunity to do so, supported a finding that he abandoned his affirmative defense.

D. Regarding factor 4, the appellant's failure to address his affirmative defense in his petition for review, supported a finding that he intended to abandon the claim.

E. Regarding factor 5, the appellant was represented by a union representative at all stages of the proceeding from his initial filing, through the hearing and on petition for review before the Board. Thus, this factor supported a finding that the appellant intended to abandon his affirmative defense.

F. Regarding factor 6, there was no evidence that the appellant's representative was confused or misled by the agency or the administrative judge concerning the affirmative defense. Thus, this factor favored finding that the appellant intended to abandon his affirmative defense.

Appellant: Murray A. Johnson
Agency: Office of Personnel Management
Decision Number: 2022 MSPB 19
Docket Number: DE-0831-16-0461-I-2

RETIREMENT
FORMER SPOUSE ANNUITY

The appellant and his former spouse, the intervenor, were married from October 31, 1986, until they divorced on November 14, 1997. Thereafter, on August 27, 1998, the presiding court issued an "Amended Order Dividing Civil

Service Retirement System Benefits," which was forwarded to OPM for processing. OPM accepted the order as a qualifying court order assigning a portion of the appellant's retirement benefits to the intervenor. Following the appellant's retirement, effective February 1, 2015, OPM notified him that it had processed the intervenor's claim for an apportionment of his annuity benefit. The appellant requested reconsideration, asserting that OPM had improperly calculated the amount of the intervenor's benefit. OPM issued a final decision, correcting the length of the appellant and the intervenor's marriage, but otherwise affirming the apportionment calculation. The appellant filed a Board appeal, asserting that his unused sick leave was incorrectly counted as "creditable service" and added to his actual service in OPM's apportionment calculation. After holding a hearing, the administrative judge issued an initial decision affirming OPM's reconsideration decision. The appellant filed a petition for review reiterating his argument regrading unused sick leave.

Holding: Whether and how unused sick leave is included in the division of an annuity between a Federal employee and a former spouse is determined by resolving whether: (1) the court order apportions the annuity based on the former spouse's share of the employee's "service performed," or uses similar language denoting an award based on the actual service, in which case unused sick leave is not included; or (2) the court order contemplates an apportionment of the annuity based on "creditable service," in which case unused sick leave is included.

1. The relevant order at issue here stated that the intervenor "is entitled to a share of [the appellant's CSRS retirement] benefits (including any credits under the CSRS for military service)." It also stated that the intervenor's share is 50% of the appellant's gross monthly annuity "that accrued between October 31, 1986 and November 14, 1997 under the CSRS."

2. The language awarding "credits" for types of service other than actual Federal service performed—i.e. "military service"—plainly contemplated an expansive definition of the service to be included in the intervenor's share calculation.

    A. Under 5 C.F.R. § 838.623(c)(2), when a court order contains a formula for dividing an employee's annuity that requires a computation of "creditable service" (or some other phrase using "credit" or its equivalent) as of a date prior to retirement, unused sick leave will be included in the

computation.

B. Because the court order did not specify the amount of unused sick leave to be apportioned, the former spouse's share is calculated pursuant to the formula identified in 5 C.F.R. § 838.623(c)(2)(ii).

C. OPM's calculation of the intervenor's share of the appellant's annuity under 5 C.F.R. § 838.623(c)(2)(ii) was therefore correct.

Appellant: Gary K. Davis
Agency: Department of Defense
Decision Number: 2022 MSPB 20
Docket Number: DE-3330-14-0097-I-1

VETERANS' PREFERENCE RIGHTS

In June 2013, the appellant applied for a Safety and Occupational Health Specialist (Intern) position at the Defense Contract Management Agency. The vacancy announcement stated that the position was an "acquisition position" and that the agency would use "the Expedited Hiring Authority to recruit and attract exceptional individuals into the Federal Workforce." The appellant was placed on a certificate of eligibles, but the agency did not select him. He filed a complaint under the Veterans Employment Opportunities Act of 1998 (VEOA) with the Department of Labor (DOL), and DOL notified him that it did not find evidence that the agency violated his rights.

Thereafter, the appellant filed a Board appeal. The administrative judge found that the appellant exhausted his remedies before DOL and made a nonfrivolous allegation that the agency violated his rights under a statute or regulation relating to veterans' preference. The parties were afforded an opportunity to develop the record and the administrative judge issued an initial decision. The administrative judge found that the appellant failed to state a claim upon which relief could be granted because the position was not subject to veterans' preference laws due to the agency's use of the expedited hiring authority under 10 U.S.C. § 1705. Alternatively, the administrative judge denied the appellant's request for corrective action because he found that, even if veterans' preference laws were applicable, the appellant did not establish a genuine issue of material fact regarding whether the agency violated his veterans' preference rights. The appellant filed a petition for

review in which he asserted that the agency did not properly use the expedited hiring authority to fill the position because the agency did not give notice of its use of the expedited hiring authority found at 10 U.S.C. § 1705(f), nor did OPM make any of the requisite determinations pursuant to 5 U.S.C. § 3304(a)(3).

Holding: The Board denied the appellant's request for corrective action because the appellant failed to prove by preponderant evidence that the agency violated a statute or regulation related to veterans' preference when the agency properly utilized the expedited hiring authority found at 10 U.S.C. § 1705(f) to fill the vacancy, which meant that the position was not subject to the veterans' preference statutes that the appellant claimed were violated.

1. The agency properly utilized the expedited hiring authority at 10 U.S.C. § 1705(f), which allowed it to recruit and appoint individuals to categories of positions in the acquisition workforce that the Secretary of Defense has designated as having a shortage of candidates or a critical hiring need without regard to the veterans' preference rights.

    A. The agency's posting of the vacancy announcement on USAJOBS, coupled with its announcing that it would use the expedited hiring authority to fill the position and designating the position as an acquisition position constituted sufficient public notice required pursuant to 5 U.S.C. § 3304(a)(3).

    B. The authority to delegate positions in the acquisition workforce was properly delegated by the Secretary of Defense to Department of Defense Component Heads.

    C. The position in question was in the acquisition workforce as defined in 10 U.S.C. § 1705(g) based on the position description and the job announcement as well as the DCMA Director's sworn statement.

    D. The agency determined that there was a critical need and a shortage of candidates for the position based on the declaration of the Director of DCMA Contract Safety Group that the position required a specific set of skills with a background in aviation ground safety, munitions and explosives, and industrial safety, and those skills were difficult to find in Utah, the geographic area where the agency was filling the position

i. OPM need not determine if there exists a shortage of candidates or a critical hiring need pursuant to 5 U.S.C. § 3304(a)(3) before the Secretary of Defense can use the expedited hiring authority at 10 U.S.C. § 1705(f) to recruit and appoint persons to fill certain positions in the acquisition workforce for which there exists a shortage of candidates or a critical hiring need.

ii. The Board presumed that when Congress enacted 10 U.S.C. § 1705(f) it was aware of 5 U.S.C. § 3304(a)(3) and intended to depart from its general requirements

2. The administrative judge should have denied corrective action, instead of dismissing the appeal for failure to state a claim upon which relief could be granted.

COURT DECISIONS

NONPRECEDENTIAL:

***Haynes v. Merit Systems Protection Board*, No. 2022-1262 (Fed. Cir. July 11, 2022) (DE-3443-22-0009-I-1):**

The Board erred in dismissing the appeal based on the doctrine of collateral estoppel because there was insufficient information in the record to conclude that Mr. Haynes' 2014 and 2021 appeals involved the same underlying cause of action. Nonetheless, the Board correctly dismissed the appeal because Mr. Haynes did not establish jurisdiction over the appeal. He did not identify a specific agency action he sought to correct or cite any law, rule, or regulation that would give the Board jurisdiction over an appeal of a Railroad Retirement Board decision regarding the retirement annuity of a private employee.

Pritchard v. Merit Systems Protection Board, No. 2021-1261 (Fed. Cir. July 8, 2022) (AT-844E-20-0551-I-1):

The court affirmed the Board's decision dismissing the appellant's retirement appeal as untimely filed without good cause. Substantial evidence supported the Board's findings regarding the date Mr. Pritchard received the challenged retirement decision and that the Board appeal was untimely filed by 8 days. Mr. Pritchard did not argue on appeal to the court that there was good cause for the untimeliness, and nothing in the record showed that the

Board erred in finding a lack of good cause.