U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for May 17, 2024

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COURT DECISIONS

PRECEDENTIAL:

Petitioner: Anthony W. Perry
Respondent: Gina Raimondo, United States Secretary of Commerce
Tribunal: U.S. Court of Appeals for the District of Columbia Circuit
Case Number: 22-5319
MSPB Docket Numbers: DC-0752-12-0486-B-1, DC-0752-12-0487-B-1
Issuance Date: May 14, 2024

JURISDICTION
INVOLUNTARY RETIREMENT
MIXED CASE APPEALS

The petitioner entered into a settlement agreement before the Equal Employment Opportunity Commission (EEOC) wherein he agreed to serve a 30-day suspension in lieu of a removal action, voluntarily resign or retire following the suspension, and waive his Board appeal rights with respect to the two actions. He subsequently filed a mixed case appeal with the Board alleging that the actions were involuntary and raising discrimination claims. The Board dismissed his suspension and involuntary retirement appeals for lack of jurisdiction and, therefore,

found no authority to consider his affirmative defenses. The petitioner sought review from the U.S. Court of Appeals for the D.C. Circuit, which transferred the petition for review to the U.S. Court of Appeals for the Federal Circuit. The U.S. Supreme Court granted certiorari and held that the proper review forum when the Board dismisses a mixed case on jurisdictional grounds is district court. *Perry v. Merit Systems Protection Board*, 582 U.S. 420 (2017). Thus, the court reversed and remanded to the D.C. Circuit, which transferred the case to the U.S. District Court for the District of Columbia. The district court entered summary judgment in favor of the agency and affirmed the Board's decision dismissing the petitioner's claims for lack of jurisdiction.

The petitioner appealed to the D.C. Circuit, arguing that the district court erred by failing to consider his discrimination claims de novo and by affirming the Board's dismissal for lack of jurisdiction.

Holding: The Board properly dismissed the petitioner's mixed case for lack of jurisdiction. However, the district court erred by not allowing the petitioner to litigate the merits of his discrimination claims as required by statute.

1. Federal employees are protected from unlawful employment actions by two different – but overlapping – statutory regimes: (1) various federal anti-discrimination laws; and (2) the Civil Service Reform Act (CSRA), which establishes a framework for evaluation personnel actions taken against Federal employees. A Federal employee alleging both unlawful discrimination and a serious adverse employment action may proceed by bringing a standard claim under Title VII by exhausting administrative remedies and then filing a case in the district court. Or, instead, the employee may bring the case before the Board as a "mixed case"—either by first filing an EEO complaint with the agency and appealing an unfavorable outcome to the Board or, alternatively, by appealing the adverse action directly to the Board. If the employee chooses to proceed in a mixed case before the Board, as was the case here, the employee may seek review by the district court.
2. The district court was required to consider the petitioner's discrimination claims de novo even if the Board did not address those claims. The provision of the CSRA that addresses judicial review of Board decisions states that "in the case of discrimination . . . the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court." 5 U.S.C. § 7703(c). The Supreme Court has held that the

"reviewing court" identified in the statute is the federal district court and, thus, mixed cases shall be "reviewed" in district court, 5 U.S.C. § 7703(c), regardless of whether the Board decided it on the merits, on procedural grounds, or on jurisdictional grounds. *Perry*, 582 U.S. at 429; *Kloeckner v. Solis*, 568 U.S. 41, 56 (2012). The district court was thus required to provide a "trial de novo" on the petitioner's claims of discrimination. 5 U.S.C. § 7703(c).

    a. The court noted that this framework raises the question of whether an employee is required to pursue an EEO complaint before the agency—thereby exhausting his administrative remedies—before litigating the discrimination part of his mixed case in the district court. Because it was undisputed that the petitioner exhausted his administrative remedies—albeit after he filed his Board appeal, the court reserved the issue for another day.

3. The Board's underlying jurisdictional determination concerning the petitioner's involuntary retirement claim was not arbitrary or capricious. The petitioner contended that his retirement was involuntary because the agency lacked reasonable grounds for threatening to terminate his employment based on unauthorized absences from work. Specifically, he argued that he had an unofficial accommodation for osteoarthritis that allowed him to be absent as necessary. However, the appellant did not attribute all his absences to the alleged accommodation, and the undisputedly unexcused absences provided reasonable grounds for his termination. Thus, he did not make nonfrivolous allegations that his retirement was involuntary.
4. The petitioner's argument that the court should apply the *Douglas* factors to determine that his termination would not have been justified was unavailing because a *Douglas* analysis would not render arbitrary or capricious the Board's conclusion that the agency had reasonable grounds for his termination. *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305–06 (1981) (identifying 12 non-exhaustive factors relevant to evaluating the lawfulness of an agency's employment action).

NONPRECEDENTIAL:

Mulligan v. Merit Systems Protection Board, No. 2023-2405 (Fed. Cir. May 16, 2024) (MSPB Docket No. SF-0752-16-0093-I-2) (per curiam). The court affirmed the Board's decision, which dismissed the petitioner's petition for review as untimely filed after he failed to respond to the

Board's notice to show cause for his one-day delay. The court noted that the Board previously considered the arguments raised by the petitioner on appeal when it granted the appellant an extension of time to file his petition for review. The court stated that perhaps it would not have exercised its discretion in the same manner as the Board but nevertheless concluded that the Board did not abuse its discretion.

Etzel v. Environmental Protection Agency, No. 2022-2050, 2022-2051 (Fed. Cir. May 16, 2024) (MSPB Docket Nos. DC-1221-19-0827-W-2, DC-3443-21-0391-I-1). The court affirmed the Board's decisions, which found the following: (1) the petitioner failed to make a protected disclosure under the Whistleblower Protection Act (WPA) contributing to an adverse personnel action; and (2) the petitioner failed to raise a nonfrivolous allegation of Board jurisdiction with respect to her pay reduction. Concerning the WPA, the court agreed with the Board that two out of three of the petitioner's alleged disclosures reraised on appeal were not protected because one disclosure was overly broad and generalized, and the other disclosure pre-dated the events that allegedly formed the basis of her reasonable belief in the unlawfulness of the matter disclosed. The court also affirmed the Board's credibility-based finding that the third disclosure, while protected, did not contribute to an adverse personnel action because the petitioner did not prove that she suffered a lack of substantive work assignments, i.e. the alleged personnel action. The court also found no abuse of discretion in the administrative judge's denial of the petitioner's motion to compel discovery as untimely. Concerning the pay reduction appeal, the court found no error in the Board's conclusion that it lacked jurisdiction because pay reductions for Senior Executive Service members are not reviewable by the Board.

Bumgardner v. Department of the Navy, No. 2023-1713 (Fed. Cir. May 13, 2024) (MSPB Docket No. DC-3330-22-0043-I-1) (per curiam). The court affirmed the Board's decision denying the petitioner's request for corrective action under the Veterans Employment Opportunities Act of 1998 (VEOA). The court found no error in the Board's conclusion that, as a matter of law, the agency could not have violated veteran-preference rights when it selected a different candidate for the position because both the petitioner and the selectee were entitled to the same exact statutory benefits under the VEOA and agency policy. The court found no persuasive support for the petitioner's argument that he and the selectee were not entitled to the exact same veteran-preference benefits because the selectee was an internal candidate. The court also determined that the Board did not abuse its discretion by denying the

petitioner a full hearing and deciding the appeal as a matter of law based on the written record.

Swick v. Merit Systems Protection Board, No. 2023-2085 (Fed. Cir. May 10, 2024) (MSPB Docket No. DC-1221-17-0008-W-1) (per curiam). The petitioner appealed her resignation as involuntary and alleged whistleblower reprisal. The court affirmed the Board's dismissal for lack of jurisdiction based on the written record. Concerning the involuntary resignation claim, the court found that the petitioner's allegations did not demonstrate that she had no choice but to resign or that the agency's threat of disciplinary action was untrue or misleading. Concerning the whistleblower reprisal claim, the court found no error in the Board's determination that the petitioner failed to exhaust her administrative remedies with the Office of Special Counsel.

Broaden v. Department of Transportation, No. 2023-2316 (Fed. Cir. May 10, 2024) (MSPB Docket No. DE-4324-23-0098-I-1) (per curiam). The petitioner applied for numerous vacancies for Air Traffic Control Specialist, Support Specialist positions with the Federal Aviation Administration (FAA) but was not selected based on the FAA's requirement of civilian FAA experience. He previously appealed several of these nonselections with the Board, arguing that the FAA's requirement was inherently violative of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). The Board, finding that the credible testimony of an agency employee demonstrated sound reasons for not treating military air traffic controller experience as equal to civilian FAA experience, denied the petitioner's request for corrective action, and the court affirmed. The petitioner filed another USERRA appeal with the Board, raising the same challenges related to nonselections that preceded the court's final adjudication as well subsequent nonselections to Support Specialist positions. The Board invoked res judicata and applied collateral estoppel, respectively. Finding no error, the court affirmed the Board's decision.