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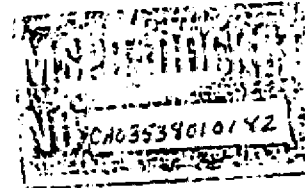
UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

RICHARD J. RUPPERT

v.

UNITED STATES POSTAL SERVICE



OPINION AND ORDER

While serving a probationary period with the agency, the appellant received a marginally satisfactory performance rating. A short time later he sustained a compensable injury. While he was recuperating from his injury, the agency terminated his employment for unsatisfactory performance. Upon his recovery within one year, he was refused restoration by the agency. The agency claimed that the restoration procedures did not apply in the case of an employee who was terminated for cause.

The appellant appealed to the Chicago Regional Office. Relying on Miller v. U. S. Postal Service, MSPB Order No. DA035309006, September 30, 1980, the presiding official held that, since the appellant's separation was not the result of compensable injury alone, he was not entitled to restoration rights.

In his petition for review,^{1/} the appellant raised essentially two arguments: first, that Miller was wrongly

^{1/} The agency alleged in its response to the petition for review that appellant's petition is untimely based on the date of receipt by the Office of the Secretary. However, the Board's practice is to accept the postmark date as the date of filing. See Beer v. Department of the Army, 440 F.2d 1126 (1971) at 1127 n.2. Using this standard, appellant's petition is timely filed.

decided, and, second, that it is distinguishable from the appellant's case. The Office of Personnel Management (OPM) intervened pursuant to 5 U.S.C. § 7701(d)(1) and filed a brief in support of the appellant's petition. The petition for review is hereby GRANTED.

The Office of Personnel Management was given authority in 5 U.S.C. § 8151(b) to issue regulations providing for the restoration of employees who fully recover from compensable injuries within one year. The regulations issued pursuant to that authority are found at 5 C.F.R. Part 353. Section 353.103(c)(1) of that part limits employees entitled to restoration to those who were ". . . separated or furloughed from a position without time limitation as a result of compensable injury . . ." OPM further explained this entitlement in its Federal Personnel Manual at chapter 353, subchapter 2, paragraph 2-6a(1):

The agency is required to restore the employee unless he or she was separated because of reduction in force, for cause, or for other reasons unrelated to the injury.

In Miller, the Board held that an employee who had been removed for failure to meet attendance requirements and for absence-without-leave and whose grievance concerning the action had been finally decided was not entitled to restoration because the removal was clearly for cause unrelated to the injury. Both the appellant in this case and the OPM suggest that Miller does not reflect a correct articulation of the law and regulation, but neither argues that the separation in that case was related to the compensable injury. In fact, in Miller the appellant was

removed for extensive absences which began considerably before his injuries and continued until his removal. A grievance filed by the appellant in Miller resulted in a determination that just cause existed for the removal, and to the extent that any of the absences were related to his injury, he had his opportunity to argue before the arbitrator that they did not constitute cause for removal. The Board finds no basis for concluding that Miller represents an incorrect application of law or regulation.^{2/}

Appellant's second argument is that his case is distinguishable from Miller. The rating form which was used by his supervisor offered three possible recommendations: (1) satisfactory performance - retain the employee; (2) not fully satisfactory but merits continued employment; or (3) unsatisfactory - separate the employee. On July 7, 1980, appellant's supervisor indicated that he was not fully satisfactory but merited continued employment. On July 11, 1980, the appellant was injured and placed in a leave-without-pay (LWOP) status. On August 20, 1980, while still on LWOP, appellant was issued a notice of termination of his employment because of unsatisfactory performance. In its October 2, 1980, letter to the Regional Office, the

^{2/} We are persuaded, however, that the decision in Miller warrants clarification. There we stated that "[t]he separation or furlough had to have resulted from the compensable injury alone in order for restoration rights to accrue." That statement, however, must be read in the context of the facts of that case, where there was no persuasive evidence that appellant's removal was in any way related to his injury. Under the substantially related test which we adopt here today, the outcome in the Miller case would remain the same.

agency commented that, after the appellant was injured and off-duty, there was no opportunity for him to improve his performance.

The appellant argues that there is a relationship between his injury and the reason for his separation. The Board agrees. Appellant's supervisor had the choice of recommending appellant's separation only days before his injury but, instead, he recommended retention. The agency does not assert that appellant's performance deteriorated during those few days but rather admits that the basis for the separation was the absence of any opportunity for appellant to demonstrate improved performance once he was injured. It is obvious, then, that while the injury may not have been the precise reason given for the separation, e.g., the reason recorded on the SF-50, the separation indisputably would not have occurred in the manner that it did had appellant not been injured. The Board finds that appellant's separation was substantially related to his injury.

Nothing in the applicable law, 5 U.S.C. § 8151(b)(1), precludes entitlement to restoration under the circumstances of appellant's case. OPM asserts that, under its regulation at 5 C.F.R. § 353.103(c)(1), a restoration right applies if the separation is substantially related to the compensable injury. See OPM brief at 4, April 30, 1981. The Board gives great weight to the OPM interpretation of its own regulation, see United States v. Larionoff, 431 U. S. 864, 872-73 (1977); National Distributing Co. v. U. S. Treasury Department, 626 F.2d 997, 1019 (D. D. C. Cir. 1980),

and we find that we are in accord. The Board finds that an employee is entitled under 5 C.F.R. 353 to restoration where his or her separation or furlough either resulted from or was substantially related to compensable injury.

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Notwithstanding the fact that appellant received a notice of termination for cause, i.e., unsatisfactory performance, the Board finds upon examination of the facts that appellant's separation was substantially related to his compensable injury.^{2/} Accordingly, the Board finds that the appellant was entitled to restoration rights.

The initial decision is hereby REVERSED and the agency is ORDERED to restore the appellant consistent with 5 C.F.R. Part 353C retroactive to the date compensation ceased, and furnish evidence of compliance with this decision to the Regional Office within ten (10) days of receipt.

This is the final order of the Merit Systems Protection Board in this case.

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

FOR THE BOARD:

November 4, 1981
Date

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Notwithstanding the fact that appellant received a notice of termination for cause, i.e., unsatisfactory performance, the Board finds upon examination of the facts that appellant's separation was substantially related to his compensable injury.^{3/} Accordingly, the Board finds that the appellant was entitled to restoration rights.

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FOR THE BOARD:

November 14, 1981
Date

Ernest H. Boston

Washington, D.C.

^{3/} Because the facts in appellant's case are not in dispute, it is unnecessary to remand for a hearing. The Board anticipates that hearings would be granted in similar cases where the appellant makes a non-frivolous argument that his separation was substantially related to the compensable injury. Cf. Ragland v. Internal Revenue Service, 2 MSPB 167 (1980).