

On 4 Sept 02, the MSPB issued a significant decision that will make it easier for employees claiming whistleblower status to receive a hearing on the merits of an individual right of action (IRA) after exhausting the administrative procedures provided by the Office of Special Counsel. In so doing, the Board overruled the jurisdictional requirements set forth in Geyer v DoJ. The following summary is taken from the MSPB web site:

Rusin v. Department of the Treasury

CH-1221-00-0028-W-1

September 4, 2002

Whistleblower Protection Act

- Jurisdiction, generally
- Proof of claim, generally
- Violation of law, rule, or regulation

Applying Geyer v. DoJ, 63 M.S.P.R. 13 (1994), the AJ dismissed this IRA appeal for lack of jurisdiction, without a hearing; the AJ concluded that the appellant's claim that he disclosed alleged violations of the instructions on the use of government credit cards was not a non-frivolous allegation of a whistleblowing disclosure. On PFR, the Board disagreed, and in so doing, overruled Geyer.

The Board began by noting the tension between Geyer and Yunus v. DVA, 242 F.3d 1367 (Fed. Cir. 2001). Under Geyer, to establish Board jurisdiction over an IRA appeal an appellant must show by preponderant evidence that he engaged in whistleblower activity, the agency took or failed to take, or threatened to take or fail to take, a "personnel action," and he raised the issue before the OSC, and proceedings before the OSC were exhausted. Yunus, however, states that the Board has jurisdiction over an IRA appeal if the appellant has exhausted his administrative remedies before OSC and makes nonfrivolous allegations that: (1) He made a protected disclosure, and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. Thus, under Geyer a determination of IRA jurisdiction turns on the weight of the evidence, whereas under Yunus such a determination turns on the sufficiency of the pleadings. Additionally, unlike Geyer, Yunus makes the "causative" (contributing

factor) element jurisdictional, at least insofar as the appellant must make a non-frivolous allegation of causation under Yunus.

The Board found that it was clear from Yunus and other court decisions that the Federal Circuit disapproves of the Geyer test. The Board thus overruled Geyer and adopted the Yunus approach.

Turning to the facts of the case, the Board found that the appellant had exhausted his OSC remedy, that he made non-frivolous allegations that he was affected by “personnel actions,” and that under the knowledge - timing test he made a non-frivolous allegation of contributing factor. The Board then explained that the appellant alleged that he disclosed a violation of a “rule” within the meaning of 5 U.S.C. § 2302(b)(8). Whether a directive is a “rule” does not depend on the title of the document in which it appears. Rather, a substantive examination is required. Although the term “rule” is not defined in the WPA, considering the remedial purpose of the WPA, dictionary definitions of “rule,” and the purpose of the instructions on the use of government credit cards, the Board concluded on the facts presented that the appellant made a non-frivolous allegation that he reasonably believed what he disclosed was a violation of a “rule.” The Board did not adopt a specific definition of “rule.”

Finding the Yunus test met, the Board remanded the appeal for further adjudication.

Board Member Slavet issued a separate opinion concurring in the Board decision overruling Geyer and adopting Yunus. Board Member Slavet also addressed two other decisions, *Spruill v. MSPB*, 978 F.2d 679 (Fed. Cir. 1992), and *Cruz v. Department of the Navy*, 934 F.2d 1240 (Fed. Cir. 1991) (en banc). According to Board Member Slavet, *Spruill* and *Yunus* both adopt a pleadings-based test for IRA jurisdiction, but to prevail the appellant must also present preponderant evidence on the elements of the claim; the elements are thus jurisdictional and merits. *Cruz*, on the other hand, held in a chapter 75 case (i.e., not an IRA) that jurisdiction depends on proof that the appellant was affected by an appealable action. Board Member Slavet stated that *Spruill* interpreted *Cruz* as actually addressing a merits issue. Board Member Slavet also pointed

out that a dismissal under Geyer is jurisdictional, whereas if sufficient allegations are presented under Yunus and the claim fails on the proof, the dismissal is “on the merits,” which carries res judicata effect. Thus, after Yunus, an AJ should advise an appellant to come forward with all known whistleblower retaliation contentions to minimize the chance of unwitting forfeiture of arguments for relief.

Linda B. R. Mills
Associate Command Counsel
Voice: (703)617-8049; DSN 767-8049
FAX: (703)617-5680; DSN 767-5680