



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for April 3, 2015

BOARD DECISIONS

Appellant: Chih-Wei (Scott) Lu
Agency: Department of Homeland Security
Decision Number: [2015 MSPB 28](#)
MSPB Docket No.: CH-1221-14-0827-W-1
Issuance Date: April 1, 2015
Appeal Type: Individual Right of Action (IRA) appeal
Action Type: Interlocutory Appeal

Interlocutory Appeal Application of *Bolling* Standard to IRA appeals

The appellant filed an IRA appeal alleging that his removal from the position of Supervisory Transportation Security Officer was issued as reprisal for whistleblowing. During prehearing discussions, the appellant requested the approval of witnesses that would disprove the merits of a 2012 suspension relied upon by the agency in the issuance of the removal. The administrative judge (AJ) issued a prehearing order in which he found that the *Bolling* standard (the Board's review of a prior disciplinary action is limited to a determination of whether that action was clearly erroneous) regarding prior discipline was "not entirely applicable" in an IRA appeal. The AJ then issued an order certifying for interlocutory review his ruling that the Board's review of the appellant's 2012 suspension was not subject to the *Bolling* standard.

Holding: The Board affirmed the administrative judge's ruling as modified, vacated portions of the order, and returned the case to

the regional office for further adjudication.

1. The *Bolling* standard does not apply in IRA appeals. However, given that the 2012 suspension occurred two years prior to the protected disclosures in this matter, the AJ should exercise his discretion on remand to determine whether, and to what extent, evidence regarding the 2012 suspension relates to the Board's analysis of the appellant's claim of whistleblower reprisal.

- **The U.S. Court of Appeals for the Federal Circuit did not issue any decisions this week**

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