



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for May 15, 2015

The U.S. Court of Appeals for the Federal Circuit issued the following precedential decision this week:

Petitioner: Katherine Archuleta, Director, Office of Personnel Management

Respondents: Tony D. Hopper & Merit Systems Protection Board

Tribunal: U.S. Court of Appeals for the Federal Circuit

Case Number: [2013-3177](#)

MSPB Docket No. CH-0731-09-0798-I-3

Issuance Date: May 13, 2015

Jurisdiction Over Suitability-Based Removals Unified Penalty Jurisdiction Suitability Penalty Analysis

Respondent Hopper (Respondent) was appointed to a position with the Social Security Administration (SSA) in April 2008, leading to OPM initiating a background investigation. Approximately 15 months later, OPM informed the Respondent that it had questions regarding his suitability for federal employment, and therefore intended to instruct SSA to remove him, cancel his eligibility for reinstatement, and debar him from federal employment for three years. Pursuant to OPM's directive, SSA removed the Respondent. The Respondent appealed the removal to the Board, and after a procedural delay, the Administrative Judge ("AJ") reviewed the matter as an adverse action appeal and conducted a hearing in October 2011. At the hearing, OPM gave an opening statement criticizing the Board's decision to assume jurisdiction over a

suitability-based removal, but otherwise refused to participate. In his defense, the Respondent presented testimony from his second level supervisor who stated that he would have issued a penalty less than removal for the Respondent's problems revealed in the background investigation. In the initial decision, the AJ sustained the charge, and, pursuant to the Board's holding in *Aguzie v. Office of Personnel Management*, 112 M.S.P.R. 276 (2009), conducted an independent *Douglas* factor analysis to determine the penalty. Based on the Respondent's supervisor's unchallenged testimony, the AJ mitigated the penalty to a letter of reprimand. OPM petitioned for review by the full Board, arguing again that the Board did not have jurisdiction over the removal because it was based on a suitability determination. The Board disagreed and affirmed the administrative judge's initial decision.

Holding: The Court withdrew its December 8, 2014, Opinion and replaced it with the present Opinion to clarify its prior holding.

- 1. Suitability-based removals are included within the definition of "removal" for purposes of Board jurisdiction. Accordingly, suitability-based removals are appealable adverse actions under Chapter 75 for qualifying employees.**
- 2. In a suitability-based removal, OPM's penalty determination does not receive deference. It bears the burden of persuading the Board of the appropriateness of the penalty imposed, and the Board must review the penalty in light of the *Douglas* factors.**
- 3. The Court clarified in this Opinion that, when reviewing a suitability-based removal, the Board also has jurisdiction to review debarments and cancellations of eligibility as part of a unified penalty arising from the same set of circumstances as the removal.**

The U.S. Court of Appeals for the Federal Circuit issued the following nonprecedential decisions this week:

Petitioner: Johnnie Lewis

Respondent: Merit Systems Protection Board

Intervenor: U.S. Postal Service

Tribunal: U.S. Court of Appeals for the Federal Circuit

Case Numbers: [2014-3108](#)

MSPB Docket No. CH-0353-12-0349-I-1
Issuance Date: May 13, 2015

Holding: The Court affirmed the Board's final decision dismissing the petitioner's partial restoration and constructive suspension appeal for lack of jurisdiction because the petitioner failed to bid on any positions compatible with his medical restrictions.

Petitioner: Tanya Pelcher-Herring
Respondent: Merit Systems Protection Board
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Numbers: [2015-3060](#)
MSPB Docket No. DC-0752-13-0152-B-1
Issuance Date: May 14, 2015

Holding: The Court affirmed the Board's final order dismissing the petitioner's petition for review as untimely because the petitioner failed to show that she received the initial decision on the date she claimed.

Petitioner: Sidney Nelson, Jr.
Respondent: Office of Personnel Management
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Numbers: [2014-3191](#)
MSPB Docket No. SF-0845-13-0347-I-1
Issuance Date: May 14, 2015

Holding: The Court affirmed the Board's final order affirming the respondent's finding that the appellant was overpaid in disability annuity benefits because his earnings income for certain years exceeded 80% of his base pay at retirement.

Petitioner: Sidney Nelson, Jr.
Respondent: Merit Systems Protection Board
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Numbers: [2014-3192](#)
MSPB Docket No. SF-0752-13-0512-I-1
Issuance Date: May 14, 2015

Holding: The Court affirmed the Board's final order dismissing the petitioner's involuntary retirement appeal for lack of jurisdiction because he failed to show that there was an accommodation available for his disability that would have allowed him to continue employment.

- **The MSPB did not issue any precedential decisions this week**

[MSPB](#) | [Case Reports](#) | [Recent Decisions](#) | [Follow us on Twitter](#) | [MSPB Listserv](#)