U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for June 27, 2014

BOARD DECISIONS

Appellant: Alexander Buelna
Agency: Department of Homeland Security
Decision Number: 2014 MSPB 45
Docket Number: DA-0752-09-0404-B-1
Issuance Date: June 19, 2014
Appeal Type: Adverse Action
Action Type: Indefinite Suspension

Due Process Rights for Federal Employees Whose Security Clearances Have Been Suspended

The appellant, a Federal Air Marshal with the Transportation Security Administration, appealed his indefinite suspension, which was based on the suspension of his security clearance. The appellant was not given an opportunity to contest the suspension of his security clearance. On appeal, the AJ initially affirmed the suspension. The Board remanded for determination of whether the appellant was afforded due process. Upon remand, the AJ affirmed again, finding that the appellant received due process, because the decision maker had authority to choose an alternative penalty over the proposed suspension. The appellant appealed this decision to the Board, and while the appeal was pending, the Federal Circuit issued its decision in *Gargiulo v. Department of Homeland Security*, holding that the due process rights afforded to employees disciplined for loss of security clearance were derived from a statute, not from the constitution. Because this ruling directly affected the appellant's case, the Board invited the parties to brief the issue of how *Gargiulo* affected their case.

Holding: The Board affirmed, but modified, the initial decision, pursuant to *Gargiulo*.

1. A tenured federal employee is entitled to constitutional due process when an agency takes an adverse action based on a security clearance determination.

2. In accordance with *Gargiulo*, constitutional due process does not require an appellant be given the opportunity to contest the merits of the clearance suspension. However, this right can be granted via statute or internal agency regulation.

3. Constitutional due process does not require an appellant be given notice of the factual basis underlying the security clearance suspension. Instead, this notice is required by 5 U.S.C. § 7513.

4. Constitutional due process requires that an appellant be given notice of the facts underlying a clearance suspension to the extent those facts are considered in the determination of the penalty.

5. Constitutional due process requires the employee be given the ability to respond to the actual proposed action, not just the clearance determination.

6. Constitutional due process requires the employee be afforded an opportunity to invoke the discretion of a deciding official with authority to select viable alternative penalties, if any exist.

7. The Board's prior decisions in *Hairston v. Dep't of Defense*, *Diehl v. Dep't of the Army*, *Gaitan v. Dep't of Homeland Security*, *Gargiulo v. Dep't of Homeland Security*, *McGriff v. Dep't of the Navy*, and the first *Buelna* are modified to the extent they are inconsistent with the Board's decision in this appeal.

8. Vice-Chair Anne Wagner concurred in the decision. She agreed with the result, but believes that the Board's legal holdings were inconsistent with the Federal Circuit's holding in *King v. Alston*.

Appellant: Thomas Flores
Agency: Department of Defense
Decision Number: 2014 MSPB 46
Docket Number: DA-0752-10-0743-I-3
Issuance Date: June 19, 2014
Appeal Type: Adverse Action
Action Type: Removal

Denial of Eligibility to Occupy Sensitive Position
No Property Interest in Eligibility to Occupy a Sensitive Position
Waiver of Right to Respond to Deciding Official

The appellant was removed from the position of Military Pay Technician based on a charge of denial of his eligibility to occupy a sensitive position. The appellant appealed this determination to the Defense Office of Hearings and Appeals (DOHA), with the ultimate decision affirming the denial of his eligibility to occupy a sensitive position. The AJ affirmed the denial. The appellant asserted in his PFR that he was denied due process because the ultimate decision to remove him was made not by the deciding official, but by DOHA.

Holding: The Board denied the appellant's PFR, affirmed the initial decision as modified, and sustained the removal.

1. The Board found that because the Federal Circuit overruled its decisions in *Conyers* and *Northover*, in *Kaplan v. Conyers*, while the PFR was pending, the AJ incorrectly ruled that the Board had authority to review the merits of the DOHA determination that a Department of Defense employee is ineligible to occupy a sensitive position regardless of whether the position requires access to classified information. Thus, the Board vacated the part of the initial decision based on *Conyers* and *Northover,* and affirmed the underlying charge without reviewing the merits of the underlying clearance determination.

2. The Board affirmed the Federal Circuit's principle from *Gargiulo v. Department of Homeland Security*, that like a security clearance, the appellant has no property interest in eligibility to occupy a sensitive position.

3. The Board found that in the absence of any indication that the appellant made a reasonable effort to assert his right to respond, or that the agency denied him his right to respond through action, negligence, or

design, the appellant waived his due process right to respond to the deciding official before his removal.

Appellant: Mary Abbott
Agency: United States Postal Service
Decision Number: 2014 MSPB 47
Docket Number: DC-0752-12-0366-I-1
Issuance Date: June 23, 2014
Appeal Type: Adverse Action
Action Type: Enforced Leave

Difference between enforced leave suspension and constructive suspension
Burden of proof for enforced leave suspension

The appellant, an EAS-17 supervisor for the Postal Service, appealed the agency's decision to place her on enforced leave due to the lack of available work within her medical restrictions. On appeal, the AJ dismissed the matter for lack of jurisdiction, finding that the appellant failed to establish that the agency action constituted a constructive suspension.

Holding: The Board remanded the matter for adjudication on the merits.

1. An agency's placement of an employee on enforced leave for more than 14 days constitutes an appealable suspension within the Board's jurisdiction. The Board's past decisions in which enforced leave claims were treated as constructive suspensions, beginning with *Chiders v. Department of the Air Force*, are overruled.

2. To sustain an enforced leave suspension, the agency must prove by preponderant evidence that the charged conduct occurred, that a nexus exists between the conduct and efficiency of the service, and that the penalty is reasonable.

Appellant: John E. Burke
Agency: Department of Veterans Affairs
Decision Number: 2014 MSPB 48
Docket Number: CH-1221-09-0288-C-2 and CH-1221-09-0288-C-3
Issuance Date: June 23, 2014
Appeal Type: Retaliation IRA
Action Type: Compliance

Material Breach of Settlement Agreement
Remedy for Breach of Settlement Agreement

The parties entered into a settlement agreement resolving the appellant's individual right of action (IRA) appeal. Among the pertinent provisions included in this agreement was a provision requiring the agency to remove a reprimand from the appellant's Official Personnel File (OPF) some three years following execution of the agreement. The appellant later filed three separate petitions for enforcement raising a number of issues, including the agency's failure to remove the reprimand from his OPF. The agency was found in compliance with the settlement agreement in all three petitions for enforcement; the second and third petitions are the subject of the instant decision. The AJ found with respect to the failure to remove the reprimand, that although the agency delayed removal of the reprimand for three years following execution of the agreement, there was no breach of the agreement because the agency ultimately complied with the agreement by removing it.

Holding: The Board denied the appellant's PFR, and affirmed the initial decision as modified.

1. The Board found that the agency materially breached the settlement agreement as to its failure to timely remove the reprimand from the appellant's OPF because this provision went to a matter of vital importance to the appellant and went to the essence of the contract. The fact that the agency eventually removed the reprimand does not mean that there was no breach.

2. Here, because a material breach was established, the appellant was entitled to either enforcement of the disputed provision, or rescission of the settlement agreement and reinstatement of the appeal. Because the appellant indicated that he did not want to risk losing any benefits he received under the agreement, and there was no further meaningful relief available regarding the removal of the reprimand from his OPF, the matter was moot.

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

Petitioners: William Robert Kelly
Respondent: Merit Systems Protection Board
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Number: **2013-3178**
MSPB Docket No. DC-0752-12-0131-I-1
Issuance Date: June 24, 2014

Jurisdiction
Involuntary Resignation

The appellant became dissatisfied with an internal agency investigation into alleged plagiarism of a publication by a colleague and communicated to agency officials that he wanted to retire. The agency prepared a Resolution Agreement signed by the appellant that permitted him to work from home for one year and to resign from his position thereafter. The appellant attempted to rescind and withdraw the resignation, but the agency denied his request. The appellant later retired. The appellant then filed an appeal asserting that his resignation was involuntary, and an Individual Right of Action appeal alleging that he was the subject of whistleblower retaliation. The AJ held a hearing on the limited jurisdictional issue of whether the appellant's resignation was voluntary. The AJ dismissed the appeal for lack of jurisdiction based on a finding that the appellant's resignation was voluntary, and dismissed the IRA appeal based on a finding that the appellant failed to establish a nonfrivolous allegation of Board jurisdiction over his IRA appeal. The Board affirmed these findings.

Holding: The Court affirmed the Board's order dismissing the appeal for lack of jurisdiction.

1. The court affirmed the Board's finding based on *Terban v. Department of Energy*, that a resignation is presumed voluntary unless an employee shows that the resignation was the product of misinformation or deception, or the product of coercion by the agency. The appellant did not argue that his resignation was the product of misinformation or deception, and there was substantial evidence that the appellant's

resignation was not the product of coercion. The court noted that the AJ correctly pointed out that the appellant initiated discussions with the agency concerning his resignation, negotiated the terms of the resolution agreement, and understood the terms of the agreement when he signed it.

2. The court affirmed the Board's jurisdictional finding on the appellant's IRA appeal because the resignation was found voluntary and thus did not constitute a prohibited personnel action within the scope of the WPA.

Petitioner: Hannah Harding
Respondent: United States Naval Academy
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Number: **2013-3092**
Arbitration Decision No. 120516-55631-7
Issuance Date: June 26, 2014

Petition for Review of Arbitrator's Decision
Limited Review of Penalty Determination

While off duty but driving on agency premises, the appellant was stopped by police and it was determined that she was intoxicated. The appellant told police that she had used cocaine the night before. The appellant later plead guilty to the offense of driving or attempting to drive while impaired by drugs or alcohol. The appellant was then removed from her position as a Cook at the United States Naval Academy based on a charge that she was under the influence of illegal drugs and alcohol while off-duty on government property. The arbitrator upheld the removal, finding: (1) that the agency established a nexus between her off-duty misconduct and her job duties; (2) that removal was within the tolerable limits of reasonableness; (3) that evidence showed that the deciding official showed a careful and reasoned consideration of the relevant Douglas factors; and (4) that the appellant did not establish that there was disparate treatment with regard to the removal penalty.

Holding: The Court affirmed the arbitrator's decision.

1. The Court held that, although the appellant raised numerous due process arguments in her petition, she did not preserve these issues before the arbitrator. Thus, the Court did not exercise its discretion to excuse the failure to raise those claims. The court also noted that even apart from the appellant's "procedural default," they would have rejected

the appellant's due process claims on the merits.

2. The Court also held that "the various formulations of our reviewing authority over agency penalty determinations bristle with words of limitation." Applying that "restrictive standard" to the Court's authority to review an arbitrator's decision, the Court held that the penalty of removal was not "outrageously disproportionate" to the offense or totally unwarranted, notwithstanding the appellant's 24 years of service with no prior disciplinary record.

The U.S. Supreme Court Issued a Decision in the Following Case:

Petitioner: National Labor Relations Board
Respondent: Noel Canning
Tribunal: U.S. Supreme Court
Case Number: 12-1281
Decision Below: 705 F.3d 490 (D.C. Cir. 2013)
Issuance Date: June 26, 2014
Appeal Type: Constitutional Law
Action Type: Recess and Appointments Clause in the United States Constitution

Presidential Power to Make Executive Recess Appointments Without Senate Approval

This case arose from a dispute between the Noel Canning soft-drink bottling company and the United Brotherhood of Teamsters over a collective bargaining contract provision pertaining to how a pay increase would be apportioned. The NLRB concluded that the employer violated the National Labor Relations Act (NLRA) by refusing to execute the labor agreement containing the disputed provision. The employer argued on appeal to the D.C. Circuit that the NLRB decision was invalid because the five-member Board voting on the decision did not constitute a quorum, in that three members appointed to the Board by President Obama were recess appointments. The D.C. Circuit held that the Board lacked a quorum when it voted on this case because the recess appointments were constitutionally invalid, and vacated the NLRB decision. The Court noted that the Recess and Appointments Clause of the U.S. Constitution is limited to appointments made during designated intersession recesses and not during *pro forma*

sessions, during which the Senate, by unanimous agreement meets every third business day where no business is to be conducted. Because these appointments occurred between *pro forma* sessions, and not during an official break between sessions, the Court found that the NLRB could not have lawfully acted because it lacked a minimum number of properly appointed members to enforce the NLRA. The Court also held that the appointments were invalid because the President's recess appointment authority only applies to vacancies that have occurred during the officially designated recess, and not those that were vacant prior to the recess as was the case with the three NLRB vacancies at issue.

The Supreme Court addressed the following issues: (1) Whether the President's recess-appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between enumerated sessions of the Senate; (2) Whether the President's recess-appointment power may be exercised to fill vacancies that exist during a recess, or is it limited to vacancies that first arose during that recess; and (3) Whether the President's recess-appointment power may be exercised when the Senate is convening every three days in *pro forma* sessions.

Holding: The Court affirmed as modified the opinion of the D.C. Circuit.

1. In a 54 page Opinion, the Court (Justice Breyer writing, with a 49 page concurrence by Justices Scalia, Roberts, Thomas, and Alito) held that the recess appointments clause empowers the President to fill any existing vacancy during most intra or inter session recess. Although the appointments clause does not specify a time limit the Senate must be in recess in order for the President to exercise recess appointment authority, a recess of more than three days but less than ten is presumptively too short to fall within the clause. Thus, the President cannot exercise his appointment authority during *pro forma* recesses in the Senate. The vacancy does not have to occur during the recess in order for the appointment to be valid but can be an existing vacancy that is filled. In the present case, since the three NLRB vacancies were filled during pro forma sessions, they were invalid.

2. A limitation on the President's recess power is that the House and the Senate can take the Senate out of recess and order a "pro forma" session that would block any recess appointment.

3. In his concurrence, Justice Scalia would have followed the clear

meaning of the appointments Clause that would limit recess appointments to between formal sessions. Justice Scalia noted that the majority opinion engages in "Judicial Adventurism" by making up presumptive standards for how long of a recess is too short.