



## **U.S. MERIT SYSTEMS PROTECTION BOARD**

### **Case Report for July 25, 2014**

#### **BOARD DECISIONS**

**Appellant:** Johnathan Gajdos

**Agency:** Department of the Army

**Consolidation:** Army Training Doctrine Command v. Department of the Army

**Decision Number:** [2014 MSPB 55](#)

**Docket Number:** SF-0752-13-1913-I-1 and consolidation SF-0752-13-4840-I-1

**Issuance Date:** July 22, 2014

**Appeal Type:** Adverse Action

**Action Type:** Furlough

**Furlough Guidance from RIF Principles**

**Efficiency of the Service in Furlough Cases**

**Furlough and Individual Due Process Considerations**

The appellant, an assistant professor, appealed the agency's decision to furlough him for no more than 11 workdays. The furlough was issued pursuant to the Balanced Budget and Emergency Deficit Control Act. Before issuing the furlough, the agency provided the appellant an opportunity to respond to the proposal, and the proposal notice indicated that no decision would be made until consideration was given to the appellant's reply. In the decision issuing the furlough, the deciding official stated the appellant's reply had been considered, but the reasons for the furlough remained valid, and the conditions related to the furlough were the most equitable means of implementing the furlough. On appeal, the administrative judge (AJ) upheld the decision, holding that the agency proved the furlough promoted the efficiency of the service. Additionally, the AJ held that the agency did not violate the appellant's due process rights. The AJ stated that due process

does not require an agency to address every argument made in response to a proposal. The AJ further stated that the deciding official had discretion to change the proposed action, and that his limited discretionary review was consistent with furloughs resulting from a sequestration.

**Holding: The Board affirmed, but modified, the initial decision's due process analysis.**

1. The Board applied Reduction in Force (RIF) principles to determine whether a furlough for 30 days or less promoted the efficiency of the service.
2. An agency establishes that a furlough promotes the efficiency of the service by showing the furlough was a reasonable management solution to the financial restrictions placed on it, and that the furlough was applied in a fair and even manner.
3. The efficiency of the service standard does not encompass all agency spending decisions. For furloughs, it only applies to issues about the uniform, consistent application of the furlough.
4. Administrative disruptions arising from a furlough do not mean the furlough does not promote the efficiency of the service.
5. The Board applied the three factor due process test from *Mathews v. Eldridge*, 424 U.S. 319 (1976), to determine that the agency's action did not violate the appellant's due process. Under this analysis, the Board held that the large volume of decisions, combined with the reduced risk of erroneous deprivation of due process due to the different type of action, outweighed the deprivation to the appellant such that the appellant's due process rights were not violated. The Board further stated that the availability of post-deprivation relief via Board appeal lessened the due process required to be given to the appellant when the decision was issued.
6. Vice-Chair Anne Wagner dissented. She stated that she believed the Board's holding meant that furloughed employees were entitled to less due process than employees subjected to other types of adverse actions.

**Appellant: Patrick Hollingsworth**

**Agency: Department of the Air Force**

**Decision Number: [2014 MSPB 56](#)**

**Docket Number: AT-0752-14-0199-I-1**

Issuance Date: July 23, 2014  
Appeal Type: Adverse Action  
Action Type: Removal

### **Elements of Tardiness Charge**

#### **Tardiness Charge Applied to Maxiflex Schedule**

The appellant, a Secretary, appealed his removal for tardiness. The agency removed the appellant for being at least 30 minutes late on four separate instances over the course of one month. The appellant worked a maxiflex schedule that required him to work 80 hours every two weeks on less than 10 workdays. In his schedule, he was allowed to work his 80 hours at any time between 7am and 5pm on any given day. On appeal, the appellant challenged the claim that he was tardy, due to the flexibility of his working hours, but the AJ upheld the removal.

**Holding: The Board reversed the initial decision.**

1. A charge of tardiness should be analyzed like a charge of AWOL. To prove a charge of tardiness, an agency must show: (1) the employee was scheduled for duty; (2) the employee was late for duty for the time charged; and (3) either the employee's absence was not authorized or his request for leave was properly denied.
2. The agency failed to prove its charge of tardiness because the appellant did not have core hours during which he was required to serve. The agency's claimed designated start time contradicted his maxiflex schedule, which allowed him to start at various times of the day, as long as he finished by 5pm.
3. The appellant's inability to arrive early enough on the last day of his pay period that would allow him to complete 80 hours for the pay period did not mean he was tardy on that day.

**Appellant: Casey D. Weathers**  
**Agency: Department of the Navy**  
**Consolidation: Consolidated Furlough Appeals of the Naval Education and Training Command**  
**Decision Number: [2014 MSPB 57](#)**  
**Docket Number: SF-0752-13-3536-I-1 and consolidation SF-0752-13-4851-I-1**  
**Issuance Date: July 24, 2014**

Appeal Type: Adverse Action  
Action Type: Furlough

### **Furlough Similarly Situated Determination Furlough Guidance from RIF Principles**

The appellant alleged that his furlough unfairly exempted certain civil service employees and allowed them to remain working for the balance of FY 13, when other workers of equal grade and classification working in Navy Shipyards in other parts of the country were furloughed. The agency explained that certain employees were legitimately exempt from furlough because they were assigned to conduct maintenance work on ships critical to mission success. The AJ found that there was a legitimate management reason for exempting the referenced employees, and that the appellant was not exempted because he did not work directly for an excepted naval shipyard, and his position did not fall within the exemption.

**Holding: The Board affirmed the initial decision as modified.**

1. Which employees are similarly situated for purposes of an adverse action furlough is decided on a case-by-case basis, but the Board will be guided by reduction in force (RIF) principles in making that determination.
2. The Board modified the initial decision to find that the appellant was not similarly situated because the appellant, and others who were part of this consolidation, were all in different local commuting areas than the exempt employees, and the programs where they were assigned was in a different organizational unit.

**Appellant: Edward Antonio Kelly**

**Agency: Department of the Army**

**Consolidation: ACE Baltimore Pro Se No Hearing**

**Decision Number: [2014 MSPB 58](#)**

**Docket Number: PH-0752-13-5622-I-1 and consolidation PH-0752-13-5926-I-1**

**Issuance Date: July 24, 2014**

**Appeal Type: Adverse Action**

**Action Type: Furlough**

**Furlough Determined by RIF Regulations  
Furlough and Individual Due Process Considerations**

**Use of Overtime During Furlough  
Consistency of Number of Furlough Days Between Agencies  
Furlough Reliance on General Global Agency Advice**

The appellant challenged his furlough from his GS-12 Engineering Technician position on a number of procedural and substantive grounds. The AJ affirmed the furlough based on a finding that the agency provided a detailed factual basis for the furlough by showing that it was a reasonable management solution to the financial restrictions placed on it, and that it determined which employees to furlough in a fair and even manner.

**Holding: The Board affirmed the initial decision as modified, and affirmed the furlough actions.**

1. In accordance with RIF rules, the agency was not required to have subdivided personnel and furloughed employees based on their tenure group, veterans' preference within each group, length of service, and performance because there was no release of the appellant from his competitive level for more than 30 days.
2. The agency's procedures satisfied the requirement of due process, because the agency presented a factual basis for the furlough, and the deciding official made individual determinations as to whether there was a basis for an exemption.
3. The agency's policy under which it permitted the use of overtime to meet mission-critical needs was a matter within the agency's sound discretion and there was no showing that the agency used overtime to relieve certain employees, but not others, of the financial consequences of the furlough to the point where the furlough would not be viewed as meeting the efficiency of the service standard.
4. The inconsistency of the number of furlough days throughout the federal sector is irrelevant to the analysis of whether a particular agency provided that the furlough promoted the efficiency of the service.
5. The Army Corp of Engineer's reliance on a "global" DOD memo rather than guidance specific to its agency functions did not, in and of itself, show that the furlough was improper.

## **The U.S. Court of Appeals for the Federal Circuit Issued the Following Precedential Opinions:**

**Appellant:** Richard Erickson

**Agency:** U.S. Postal Service

**Decision Number:** [2008-3216 and 2010-3096](#)

**Docket Numbers:** AT-3443-07-0016-I-2 and AT-3443-07-0016-M-1

**Issuance Date:** July 18, 2014

**Appeal Type:** Removal

**Action Type:** Attorney Fees

### **Attorney Fees for Federal Circuit Appellate Work in USERRA Appeal**

#### **Interpretation of USERRA Statute**

#### **Attorney Fees Equal Access to Justice Act/Timeliness**

#### **Statutory Interpretation of Attorney Fee Provision in Back Pack Act to USERRA**

The appellant was removed from his Postal Service position for excessive use of military leave. The case went to the Federal Circuit twice and was remanded to the Board. In the second remand proceeding, the Board ruled that the appellant established his USERRA discrimination claim and ordered him reinstated with back wages and benefits as of the date of his removal. The appellant then filed an application with the court seeking attorney fees related to legal work performed in connection with the two appeals before the Court. The appellant made four arguments addressed by the Court: (1) the USERRA attorney fee statute at 38 U.S.C. § 4324(c)(4) authorizes attorney fees incurred during judicial review; (2) if the Board lacks authority under USERRA to grant attorney fees, the court should interpret the grant of fees under the general intent of the USERRA statute because USERRA is to be construed liberally in favor of veterans; (3) that the Equal Access to Justice Act (EAJA) authorizes the award of fees if the government's position in the case was not "substantially justified"; and (4) that the Back Pay Act independently authorizes an award of attorney fees for work performed on appeals brought by preference eligible employees of the Postal Service.

**Holding:** The Court denied the attorney fee application.

1. The Board is not authorized to award fees incurred during judicial review under USERRA because the focus of the USERRA attorney fee provision is on legal work before the Board.

2. The USERRA statute cannot be liberally construed to resolve this issue in favor of veterans because the court is not authorized to award attorney fees in the absence of statutory authority to do so.

3. The Court stated *Covington v. Department of Health and Human Services*, 818 F.2d 838 (Fed. Cir. 1987) was no longer good law, because it was issued prior to *Former Emps. of Motorola Ceramic Prods. V. United States*, 336 F.3d 1360, 1366 (Fed. Circ. 2003). Now, the application for attorney fees must be filed within 30 days from the time the court remands the case to the Board on the USERRA discrimination issue. .

4. The attorney fee provision of the Back Pay Act does not apply to preference eligible Postal Service employees because the Back Pay Act does not generally apply to the Postal Service unless specifically enumerated in the statute, the Postal Service is not defined as an executive agency, and the Back Pay Act is not specifically “applicable to a preference eligible” Postal Service employee with regard to rights to recover attorney fees.

5. The Court noted that the Board’s holding in *Andress v. U.S. Postal Service*, 56 M.S.P.R. 501 (1993), that the Back Pay Act as a whole is a “provision of Title 5 relating to a preference eligible” is questionable because the Back Pay Act has no special application to veterans.

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

**Petitioner:** James R. Arnold

**Respondent:** Merit Systems Protection Board

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

**Case Number:** [2014-3073](#)

**MSPB Docket No.** SF-0752-09-0965-C-1

**Issuance Date:** July 24, 2014

**Reasonable Time to File Petition for Enforcement  
Board Consideration of Facts and Circumstances**

The appellant, a mail handler, appealed his removal from the Postal Service, but later settled his Board appeal. The decision dismissing the Board appeal stated a petition for enforcement must be filed within a reasonable time after non-compliance was discovered. In September 2012, the appellant filed a petition for enforcement with the Board, claiming that the agency breached his settlement agreement by interfering with his injury compensation claim with the Office of Workers' Compensation Programs (OWCP), which his settlement agreement allowed him to file. The appellant based his claim on a November 2011 decision from OWCP in which OWCP claimed it relied on information derived from agency counsel, and claimed that he waited 10 months to file the petition because he was trying to save money to hire an attorney. He also assumed the 1 year appeal deadline for OWCP decisions also applied to petitions for enforcement to the Board. The AJ dismissed the petition as untimely, holding that nothing in the initial decision indicated that the time for filing a petition for enforcement would be associated with the time to file an OWCP appeal, that waiting to file the petition until he could afford an attorney was not a sufficient reason to delay the filing, and that the agency's prejudice is not a factor in the case. The Board affirmed.

**Holding: The Court vacated and remanded the decision.**

1. The reasonableness of the time period to file a petition for enforcement depends on the circumstances of the case.
2. The Board failed to determine whether the appellant's excuse was reasonable under the facts and circumstances of his case.

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