



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for September 26, 2014

BOARD DECISIONS

Appellant: John Doe

Agency: Department of Justice

Decision Number: [2014 MSPB 75](#)

MSPB Docket Number: CH-0752-14-0332-I-1

Issuance Date: September 23, 2014

Appeal Type: Interlocutory Appeal

Action Type: Removal

Standard to Certify Interlocutory Review

Scope of Hearing in Security Clearance Adverse Actions

Difference Between “Harmful Procedural Error” and “Not in Accordance With Law” Analysis

Procedure in Determining Harmful Procedural Error

The appellant appealed his removal from his position based on his failure to maintain his eligibility to hold a Special-Sensitive, Level 4 position, which required access to classified information. The administrative judge found that the charges were functionally equivalent to a security clearance determination, and affirmed the removal. The appellant appealed the decision to the Board, and the Board reversed, based on its finding that the agency failed to apply its internal procedures regarding his eligibility for access to classified information. The Board then remanded the matter to the agency to provide the appellant with his rights under the agency’s internal procedures. However, the Board declined to rule on the petitioner’s affirmative defenses that the revocation of his security clearance was discriminatory. After the remand, the agency reversed its negative determination on the appellant’s access to classified information, and the appellant filed a new appeal with the Board shortly thereafter. During the

new proceeding, the administrative judge ruled that the hearing would be limited to whether the agency committed harmful procedural error in removing the appellant prior to the agency's internal review of his loss of access to classified information. The appellant objected, and filed a motion to expand the scope of the hearing to include consideration of his affirmative defenses, and a determination of whether the agency's action was not in accordance with law. The administrative judge denied the motion, but then granted the appellant's motion to certify the issue for interlocutory review by the Board.

Holding: The Board affirmed the ruling, vacated the order staying the proceedings, and returned the case to the regional office for further processing.

- 1. The Board found that recent developments in case law related to adverse actions based on security clearance determinations justified its further consideration of whether to consider the appellant's affirmative defenses.**
- 2. Certification for interlocutory review was proper due to the lack of guidance in the area of adverse actions based on security clearance determinations.**
- 3. In accordance with its recent reaffirmation of its pre-*Gargiulo* case law, the Board affirmed the administrative judge's decision to decline to expand the scope of the hearing to include the appellant's affirmative defenses.**
- 4. The administrative judge properly declined to hear the appellant's claim that his removal was not in accordance with law, because the matter should be analyzed under a harmful procedural error standard.**
- 5. On remand, the administrative judge is allowed to determine whether harmful procedural error occurred without holding a hearing.**

Appellant: Marco A. Romero
Agency: United States Postal Service
Decision Number: [2014 MSPB 76](#)
MSPB Docket Number: SF-0752-13-0217-I-1
Issuance Date: September 24, 2014
Appeal Type: Adverse Action
Action Type: Constructive Suspension

Jurisdiction Standard in Constructive Suspension Cases Consideration of Affirmative Defenses Without Board Jurisdiction

The appellant appealed the agency's failure to return him to work following his recovery from a medical condition. The appellant also raised an affirmative defense of retaliation for protected EEO activity. A hearing on jurisdiction was held, and the administrative judge found that the delay in the appellant's return to work was reasonable under the circumstances, and therefore the appellant failed to meet his jurisdictional burden to establish that an appealable suspension occurred. The administrative judge further held that the appellant did not prove his affirmative defense of retaliation.

Holding: The Board affirmed the initial decision as modified, and vacated the administrative judge's analysis of the appellant's retaliation claim.

- 1. To establish jurisdiction in constructive suspension cases involving voluntary leave, an appellant must prove by preponderant evidence that: (a) he lacked a meaningful choice in the matter; and (2) the agency's wrongful actions deprived him of the choice.**
- 2. Here, the Board lacked jurisdiction because the agency did not act improperly in refusing to allow the appellant to return to work.**
- 3. Because the Board lacked jurisdiction over the appellant's constructive suspension claim, it was improper for the administrative judge to separately adjudicate the appellant's affirmative defense.**

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