



## U.S. MERIT SYSTEMS PROTECTION BOARD

**Case Report for December 26, 2014**

### **BOARD DECISIONS**

**Appellant:** Robert Southerland  
**Agency:** Department of Defense  
**Decision Number:** [2014 MSPB 88](#)  
**MSPB Docket Number:** SF-0752-09-0864-A-1  
**Issuance Date:** December 18, 2014  
**Appeal Type:** Adverse Action  
**Action Type:** Attorney Fees

**Prevailing Party Definition**  
**Deference to EEOC Decisions**  
**EEOC Attorney Fee Decisions**

The appellant appealed a suspension and removal based on charges stemming from leave related infractions. Following a remand, the AJ sustained the charged misconduct and found that the appellant did not prove his affirmative defense of disability discrimination. The Board affirmed the AJ's findings, including that the appellant was "regarded as" disabled. The Board further held that the deciding official in this case made a statement constituting direct evidence of a discriminatory motive. The Board concluded, however, that the appellant did not ultimately prove his affirmative defense of disability discrimination because the agency would have taken the same action against the appellant absent the discriminatory motive. The AJ then denied the appellant's attorney fee petition based on an overall finding that the appellant was not the prevailing party for purposes of an award of attorney fees pursuant to 5 U.S.C. § 7701(g)(2) because the agency was the prevailing party, and the appellant obtained no relief whatsoever altering the parties' legal relationship.

**Holding:** The Board denied the petition for review, but affirmed the addendum initial decision as modified to further discuss the EEOC cases cited by the appellant, and denied the fee petition.

- 1. An appellant is considered to have prevailed in a case and to be entitled to attorney fees only if he obtains an “enforceable order” resulting in a material alteration of the legal relationship of the parties. Here, the appellant obtained only a finding that the deciding official’s statements constituted direct evidence of disability discrimination, but because the AJ ultimately concluded that there was no finding of disability discrimination, the appellant could not be considered a prevailing party for purposes of establishing an entitlement to attorney fees.**
- 2. As a matter of law, the Board generally defers to the EEOC on issues of substantive discrimination law unless the decision rests on civil service law for its support, or is so unreasonable that it amounts to a violation of civil service law. The Board has repeatedly declined to find that the EEOC’s interpretive guidelines have the force of law or to give those guidelines *Chevron* deference in instances where controlling court precedent declines to follow the EEOC’s interpretation. Instead, it will look to the EEOC’s administrative precedent as merely instructive, rather than controlling.**
- 3. An EEOC decision regarding an attorney fees award does not constitute a decision on an issue of substantive discrimination law. An attorney fees award is a remedy that could be available to individuals in a case, but only after a decision on the merits, or after the substantive issues have been resolved.**

**Appellant:** Eric S. Powell

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

**Decision Number:** [2014 MSPB 89](#)

**MSPB Docket Number:** DA-0752-14-0021-I-1

**Issuance Date:** December 18, 2014

**Appeal Type:** Adverse Action

**Action Type:** Removal

### **Merger of Charges**

The appellant was removed from his position of Supervisor, Customer Service, based on charges of failure to follow instructions and delay of mail. The charges were based on an incident in which the appellant was held responsible for failing to dispatch registered mail packages on time. The administrative

judge sustained the charged misconduct and concluded that removal was within the tolerable limits of reasonableness.

**Holding:** The Board denied the petition for review, and affirmed the initial decision as modified.

1. The Board modified the initial decision by finding that the charges of failure to follow instructions and delay of mail should be merged into one charge. The charges were based on the same conduct, and proof of one charge automatically constitutes proof of the other charge.

**Appellants:** Paul Prouty & James Weller

**Agency:** General Services Administration

**Decision Number:** [2014 MSPB 90](#)

**MSPB Docket Numbers:** DE-0752-12-0396-I-1, DA-0752-12-0519-I-1

**Consolidation Docket Number:** CB-0752-15-0112-I-1

**Issuance Date:** December 24, 2014

**Appeal Type:** Adverse Action

**Action Type:** Removal

#### **Agency Burden of Proof**

#### **Supervisory Responsibility for Employee Misconduct**

#### **Standard of Conduct for SES Members**

The appellants, Regional Commissioners within the agency's Public Buildings Service, appealed their removal for Conduct Unbecoming a Federal Employee. The removals were issued after the agency's OIG issued a report finding excessive spending occurred at the agency's 2010 Western Regional Conference. The agency asserted that the appellants knew, or should have known, that both the planning for the conference, and the money spent on the conference, were excessive. Separate hearings were conducted for the appellants, and the removals were reversed. The AJs held that the agency failed to introduce sufficient evidence into the record proving that either appellant had knowledge, or any reason to have knowledge, of the excessive spending associated with the conference. The AJ in appellant Prouty's case noted that the agency failed to introduce the majority of the evidence underlying the OIG's findings into the record. The agency appealed the decisions and the Board consolidated the appeals.

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

1. The Board affirmed the initial decisions reversing the removals because the initial decisions were fully supported by the record. The Board stated that the decisions made in planning and carrying out the conference reflected “a level of extravagance that [has] no place in government,” but the agency failed to prove that either appellant knew, or had reason to know, of the planning decisions.

2. A supervisor will be responsible for the misconduct of a subordinate employee if the supervisor actually directed the employee to commit the misconduct, or had knowledge and acquiesced in the employee’s misconduct.

3. Members of the Senior Executive Service (SES) are held to a higher standard of conduct than non-SES government employees.

**NONPRECEDENTIAL FINAL DECISION BY AN MSPB ADMINISTRATIVE  
JUDGE ISSUED PURSUANT TO THE VETERANS ACCESS, CHOICE, AND  
ACCOUNTABILITY ACT OF 2014**

**Appellant:** Sharon Helman  
**Agency:** Department of Veterans Affairs  
**MSPB Docket No.:** [DE-0707-15-0091-I-1](#)  
**Issuance Date:** December 22, 2014  
**Appeal Type:** Adverse Action/VA SES  
**Action Type:** Removal

**Expedited Review of Removal of VA SES Employee**

The appellant, a member of the Senior Executive Service at the Department of Veterans Affairs, appealed her removal from the position of Director of the Phoenix, Arizona, Medical Center. The removal was based on three charges of misconduct pertaining to lack of oversight related to the administration of medical center electronic patient wait lists, the acceptance of gifts from a contractor, and the failure to report the gifts received from a contractor. The AJ found that the VA failed to prove its charge related to the administration of an electronic wait list, but sustained the second and third charges regarding her acceptance of, and failure to report gifts, and concluded that removal was a reasonable penalty.

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