



## U.S. MERIT SYSTEMS PROTECTION BOARD

### **Case Report for February 5, 2016**

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#### **BOARD DECISIONS**

**Appellant:** Patrick W. Ryan  
**Agency:** Department of Homeland Security  
**Decision Number:** [2016 MSPB 7](#)  
**Docket Number:** DA-0752-15-0054-I-1  
**Issuance Date:** February 4, 2016  
**Appeal Type:** Adverse Action by Agency  
**Action Type:** Suspension - 30 Days

**Government Ethics**  
**Due Process - Adequacy of Notice**

The appellant is a Program Analyst whose duties for the agency included conducting market research for FEMA-contracted call centers. Outside the agency, the appellant was president of a private company, Texas Based Acquisitions (TBA), which was considering competing for a call center contract and working on a joint venture with another company that intended to compete for a contract. On September 4, 2013, the appellant sent emails to his supervisor and to an agency ethics officer to inform them of the situation and ask whether a conflict of interest existed and how to avoid such a conflict.

After learning of the situation, the agency proposed to remove the appellant based on five charges. The deciding official sustained only two of the five and mitigated to a 30-day suspension. The sustained charges were (1) "Ethics

Violations, including Apparent Conflict of Interest” and (2) failure to report an offense, status, or relationship. The first charge pertained to the appellant’s ability to use inside information from his federal job to further his private interests with TBA. The second charge pertained to the appellant’s failure to inform the agency of his role with TBA and to recuse himself from call center market research work prior to September 4, 2013. On appeal to the Board, the administrative judge sustained both charges and upheld the suspension.

**Holding:** The Board granted the petition for review, reversed the initial decision, and reversed the suspension because the agency did not prove either charge.

1. **Due Process:** The appellant had adequate notice of the charges against him. The notice of proposed removal was sufficiently detailed to allow for a meaningful response because it specified both the appellant’s relevant conduct and types of ethical violations. Moreover, the appellant filed a thorough reply to the proposed removal.
2. **Charge 1:** To prove the existence of an appearance of a conflict of interest, an agency must show that the employee’s interests or duties in one capacity would “reasonably create an appearance” of having an effect on his interests or duties in the other capacity. Although the appellant had inside information about call centers that he might have used to TBA’s advantage in a joint venture or contract bid, the appellant did not actually do so but instead sought ethics advice before proceeding. Cause under 5 U.S.C. § 7513 generally connotes some action or omission on the part of an employee. The appellant’s personal contemplations and the internal deliberations of TBA officers about pursuing call center contracting business were insufficient to create the appearance of a conflict of interest.
3. **Charge 2:** Under 5 C.F.R. § 2635.402(c)(1), an employee who becomes aware of the need to be disqualified from participating in a matter due to a financial conflict of interest should notify the person responsible for assigning him to the matter. However, the appellant’s plan to involve TBA in bidding for call center contracts had not progressed to the point that it triggered an obligation to disqualify himself from the market research project and notify his supervisor prior to September 4, 2013, at which time he notified his supervisor and fulfilled his ethical obligation under the regulation.

## COURT DECISIONS

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

*Seda v. Merit Systems Protection Board*, No. [2015-3221](#) (Feb. 3, 2016) (MSPB No. PH-0330-14-0719-I-1) (affirming the Board's decision dismissing this Veterans Employment Opportunities Act of 1998 appeal for lack of jurisdiction on the basis that the appellant did not exhaust his administrative remedies with the Department of Labor).

*Ohnstad v. Merit Systems Protection Board*, No. [2015-3220](#) (Feb 3, 2016) (MSPB No. SF-315H-15-0101-I-1) (affirming the Board's dismissal of the appellant's probationary termination appeal on the bases that the appellant lacked appeal rights under chapter 75 and did not raise a protected disclosure to the Office of Special Counsel that would support jurisdiction over an individual right of action appeal).

*Terwilliger v. Merit Systems Protection Board*, No. [2015-3203](#) (Feb. 4, 2016) (MSPB No. AT-3443-15-0037-I-1) (affirming the Board's decision dismissing the appeal for lack of jurisdiction where the appellant failed to identify any law, rule, or regulation that would permit her file an appeal seeking to require the agency to redeposit retirement contributions on her behalf).

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