



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for March 11, 2016

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BOARD DECISIONS

Appellant: Zachary Batara
Agency: Department of the Navy
Decision Number: [2016 MSPB 15](#)
Docket Number: SF-0752-15-0560-I-1
Issuance Date: March 7, 2016
Appeal Type: Adverse Action by Agency
Action Type: Removal

Penalty
Mitigation

The agency removed the appellant, a Shipyard worker who admitted to frequent off-duty use of marijuana. The appellant filed a Board appeal, and the administrative judge sustained the charge but mitigated the removal to a 30-day suspension. She found that the agency's penalty determination was not entitled to deference because the deciding official failed to consider all of the mitigating factors, and that the removal penalty exceeded the tolerable limits of reasonableness. The agency filed a petition for review.

Holding: The Board granted the petition for review, reversed the initial decision, and upheld the removal.

1. **Standard.** The Board will review an agency-imposed penalty only to

determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness.

2. The deciding official considered the relevant penalty factors. The administrative judge found that the agency's penalty determination was not entitled to deference because the deciding official failed to consider that the appellant's supervisors remained confident in the appellant's ability to perform his duties. However, the penalty determination belongs to the agency - not the supervisors. The opinions of the appellant's supervisors were insufficient to overcome the judgment of the deciding official.

3. The removal penalty was not unreasonable.

- a. The appellant's work on submarines was such that his illegal drug use could result in substantial danger to the lives and safety of others, and it showed a flagrant disregard for Shipyard policy. The appellant was aware that his frequently repeated conduct was prohibited, and removal fell within the recommended range on the table of penalties
- b. Although the appellant and the agency both proffered comparators, these individuals' circumstances were so different from the appellant's that neither was similarly situated to him for purposes of a disparate penalty analysis. Therefore, this penalty factor was irrelevant.
- c. The agency's failure to take down or re-inspect the appellant's work after it learned of his drug use was not a mitigating factor. Nor were "the cultural and social mores regarding drug use for people of [the appellant's] age group."
- d. There were several mitigating factors, including the appellant's satisfactory work record, demonstrated reliability, and lack of prior discipline. The appellant also expressed remorse, successfully completed a drug treatment program, and produced two negative drug test results. However, considering that the appellant's service with the agency was only 3 years and his expressions of remorse and attempts at rehabilitation occurred only after the removal action, the mitigating factors provided an insufficient basis to disturb the agency's penalty determination.

COURT DECISIONS

PRECEDENTIAL:

Petitioner: Louise Klees-Wallace

Respondent: Federal Communications Commission

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

Case Number: [2015-3067](#)

Petition for review from arbitration

Issuance Date: March 10, 2016

Adverse actions - removal

Arbitration review

Final judgement rule

The agency proposed the petitioner's removal for leave-related reasons. In lieu of removal, the parties entered into a last chance agreement (LCA). Paragraphs 2(a) through 2(d) of the LCA set forth various conditions and requirements for the petitioner to take leave in the future. Any violation of the LCA would result in removal with no opportunity to respond or appeal.

The agency subsequently removed the petitioner for violating paragraph 2(c). The union filed a grievance, and the deciding official issued a decision, finding that paragraph 2(c) was inapplicable to the situation, but that removal was still appropriate because the petitioner had violated paragraph 2(d). The matter went to arbitration. The arbitrator issued an "Opinion and Interim Award," finding that the petitioner was deprived of the right to show that she did not violate paragraph 2(d), remanded the case to the agency for further proceedings, and retained jurisdiction to hear any appeal of the remanded grievance proceeding. The petitioner appealed to the court.

Holding: The court dismissed for lack of jurisdiction.

- 1. One constraint on the court's jurisdiction is the so-called "final judgment rule," which ordinarily limits its jurisdiction to appeals from a decision or order that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.**
- 2. Congress made arbitral decisions subject to judicial review in the same manner and under the same conditions as if the matter had been decided by the MSPB; both are subject to the final judgement rule.**

3. The arbitrator's Opinion and Interim Award was not a final order or decision. The arbitrator did not reach the ultimate question of whether the petitioner breached the LCA. Rather, the arbitrator remanded the matter to the agency to provide the petitioner with an opportunity to prove that she did not violate paragraph 2(d). An order remanding a matter to an administrative agency for further findings and proceedings is not final.

NONPRECEDENTIAL:

Harrelle v. Merit Systems Protection Board, No. [2016-1138](#) (Mar. 10, 2016) (MSPB No. DC-315H-15-0425-I-1) (affirming the Board's decision dismissing the appellant's termination appeal for lack of jurisdiction on the bases that the appellant's Foreign Service position was specifically excluded from chapter 75 coverage, and in any event, she did not have the requisite period of current continuous service to qualify as an "employee" under 5 U.S.C. § 7511(a)(1)).

Fisher v. Department of Health & Human Services, No. [2015-3207](#) (Mar. 10, 2016) (MSPB No. CH-0752-15-0099-I-1) (affirming the Board's decision that upheld the appellant's removal for AWOL, including the Board's finding that the agency proved by clear and convincing evidence that it would have removed the appellant notwithstanding his protected disclosure).

Skrettas v. Department of Veterans Affairs, No. [2015-3203](#) (Mar. 10, 2016) (MSPB No. AT-3443-15-0037-I-1) (affirming the Board's decision dismissing the appellant's removal appeal for lack of jurisdiction on the basis that the appellant waived his Board appeal rights in a settlement agreement).

Dominado v. Merit Systems Protection Board, No. [16-1133](#) (Mar. 10, 2016) (MSPB No. SF-0831-15-0490-I-1) (affirming the Board's decision dismissing the appellant's survivor annuity appeal for lack of jurisdiction on the basis that OPM had not yet issued a final, appealable decision, and there was no indication that such a decision from OPM was not forthcoming).