



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for July 18, 2014

BOARD DECISIONS

Appellant: Ellis A. Archerda
Agency: Department of Defense
Decision Number: [2014 MSPB 49](#)
Docket Number: SF-0752-12-0208-I-1
Issuance Date: July 11, 2014
Appeal Type: Adverse Action
Action Type: Removal

Medical Requirements for Position Penalty Analysis of Disability Discrimination Claim

The appellant, a GS-7 Firefighter, was removed based on a charge of failure to follow instructions relating to his failure to respond to the agency's earlier requests for additional medical information pertinent to his diagnosed condition of post-traumatic stress disorder (PTSD). During an annual medical examination, the agency learned from the appellant that he had recently been granted a disability retirement annuity from his Firefighter position with the U.S. Air Force Reserve. When the appellant did not respond to the agency's first request for additional medical information in connection with his condition, the agency suspended him for 14 days. After the appellant did not respond to the agency's second request for additional medical information, the agency removed him. The administrative judge (AJ) reversed the action and found that while the appellant failed to follow instructions in connection with the request for additional medical information, the agency failed to show that it had authority to require the appellant to produce the documentation. The AJ further found that the appellant did not establish his affirmative defense of disability discrimination.

Holding: The Board reversed the AJ's findings on the charged misconduct and affirmed the finding that the appellant failed to establish his affirmative defense of disability discrimination.

1. The AJ erred in reversing the action because the agency was entitled to the medical documentation for the purpose of ascertaining the appellant's continuing medical ability to perform the duties of Firefighter. The appellant's failure to provide the additional medical information established the charge of failure to follow instructions.

2. The penalty of removal was appropriate given the nature and seriousness of the offense, the appellant's position as a Firefighter, the appellant's past disciplinary record, the clarity of being on notice, and the potential for rehabilitation.

3. The AJ erred in applying a disparate treatment analysis to the appellant's affirmative defense of disability discrimination. The AJ should have analyzed the issue on the basis of whether the agency's medical inquiry was job-related and consistent with business necessity.

Appellant: Joshua R. Marcantel

Agency: Department of Energy

Decision Number: [2014 MSPB 50](#)

Docket Number: AT-0752-13-0507-I-1

Issuance Date: July 15, 2014

Appeal Type: Adverse Action

Action Type: Removal

Requirement to Provide Agency with Correct Address

Presumption of Receipt

Intentional or Negligent Frustration of Service

Length of Minimal Filing Delay

The appellant, a Nuclear Materials Courier, appealed his removal for failure to maintain a condition of his employment. The Agency delivered the notice of removal to the appellant via certified mail at his address of record on March 16, 2013. The address of record was actually the address of the appellant's father in LaFayette, Louisiana. At the time of delivery, his father received the notice for the appellant, due to the appellant's job at an off-shore oil rig in the Gulf of Mexico. On March 19, 2013, the appellant returned to his home in Knoxville, Tennessee, and on March 28, 2013, his

father notified him of the removal. On April 29, 2013, the appellant appealed his removal to the Board, and the AJ dismissed the appeal for untimeliness.

Holding: The Board affirmed the initial decision dismissing the appeal.

1. Board regulations require that an appellant keep an agency informed of his address for purposes of receiving an agency decision.
2. The appellant was presumed to have received the removal notice on March 16, 2013, because his father received the notice at the appellant's designated address of record for receipt of official correspondence on that day.
3. The appellant's failure to communicate with his father for 9 days after returning home to learn about the removal notice constituted a frustration of service such that he could not later claim the later date, as his receipt date.
4. The 14-day delay in filing was not considered minimal for purposes of establishing good cause for untimeliness.

Appellant: In Re Tinker AFSC/DP

Agency: Department of the Air Force

Decision Number: [2014 MSPB 51](#)

Docket Number: DA-0752-14-0157-I-1

Issuance Date: July 15, 2014

Appeal Type: Interlocutory Appeal

Action Type: Furlough Based on Budgetary Considerations

Interlocutory Appeal

Furlough Based on Budgetary Considerations

Agency Authority to Exempt Employees from Furlough

Agency's Burden of Proof in Furlough Decision

The appellants were furloughed for six days based on "extraordinary and serious budgetary challenges facing the Department of Defense." The appellants appealed the actions, alleging that the agency did not treat similar employees with fairness and equity because the agency exempted

employees who were Oklahoma tornado victims whose homes were deemed uninhabitable, but not those employees whose homes received extensive damage but were deemed livable. The agency asserted that it exercised separate "safe haven" continuation of salary authority under 5 U.S.C. § 5522-23 with regard to employees whose homes were destroyed. Following prehearing discussion of issues with the parties, the AJ issued an interlocutory order on the issue of whether the agency's "safe haven" decision to exempt employees victimized by the Oklahoma tornado should be analyzed as part of the agency's burden of proving that it treated employees in a fair and even manner, or whether the "safe haven" decision should be considered under a harmful procedural error analysis with the appellants having the burden of proof. After detailed findings on this issue, the AJ held that the question of whether "safe haven" employees were properly excluded from the furlough was appropriate for certification of an interlocutory appeal because the allocation of the burden of proof concerning the agency's "safe haven" decision was an important question of law about which there was substantial ground for difference of opinion, and an immediate ruling would materially advance the completion of more than 1,200 Tinker Air Force Base furlough appeals pending in the regional office.

Holding: The Board affirmed the AJ's findings on the issue of the agency's burdens of proof, found that whether a statute or regulation precluded the agency from furloughing "safe haven" employees is not determinative as to whether the agency treated its employees in a fair and even manner, vacated the stay order, and returned the case to the regional office for further adjudication.

1. Certification of a ruling for interlocutory review is appropriate when:
(a) the ruling involves an important question of law or policy about which there is substantial ground for difference of opinion, and (b) an immediate ruling will materially advance the completion of the proceeding, or the denial of an immediate ruling will cause undue harm to a party or the public.
2. The "safe haven" decision authorized under 5 U.S.C. §§ 5523(a) and 5522(a)(2) in the context of a furlough decision should be analyzed as part of the agency's burden of proving that it treated employees in a fair and even manner.
3. The agency's implementation of the "safe haven" provision should not be analyzed as an affirmative defense of harmful procedural error by the

agency. Instead, the Board views the appellants' assertion as an allegation that the agency did not meet its burden of proving that its action promoted the efficiency of the service.

4. In an adverse action furlough, the Board's focus is on the legitimacy of the reasons for the furlough at the time the furlough decision is made and not after the fact.

Appellant: Michael Gaydar

Agency: Department of the Navy

Decision Number: [2014 MSPB 52](#)

Docket Number: PH-3443-13-0583-I-1

Issuance Date: July 17, 2014

Appeal Type: Jurisdiction

Action Type: Reduction in Pay

Rate of Basic Pay Under Statutory Pay Cap

In this appeal for future back pay, the appellant asserted that he will be due back pay from a related appeal challenging the agency's furlough action. He asserted that he was due back pay because the furlough's reduction in his basic pay should require the agency to pay him locality or premium pay that was otherwise blocked due to a statutory pay cap for his Executive Schedule position. The AJ dismissed the appeal for lack of jurisdiction based on a finding that the appellant's arguments relating to the proper calculation of his back pay were premature and that he could make the arguments relating to the proper calculation of his back pay in a compliance matter if he prevailed on the merits of the furlough.

Holding: The Board affirmed the AJ's findings as modified, dismissed the appeal for lack of jurisdiction, and addressed an argument that was not addressed below.

1. A reduction in pay is appealable only when the rate of basic pay fixed by law or administrative action for the position held by the position decreases. The phrase "rate of basic pay" is given a narrow construction.
2. A failure to increase the appellant's rate of basic pay in connection with a furlough does not generally constitute a reduction in the rate of basic pay.

Appellant: Leslie A. Gallegos
Agency: Department of the Air Force
Decision Number: [2014 MSPB 53](#)
Docket Number: AT-0752-13-0258-I-1
Issuance Date: July 17, 2014
Appeal Type: Adverse Action
Action Type: Removal

**Directed Reassignment
Mobility Agreement and Failure to Fulfill Condition of
Employment
Prehearing Procedures**

The appellant was removed from her GS-13 Criminal Investigator (Special Agent) position based on a charge that she failed to fulfill a condition of employment when she refused to accept a directed reassignment pursuant to a valid agency mobility requirement. The appellant had been employed in the agency's Miami, Florida office and was ordered to Quantico, Virginia pursuant to a mobility agreement. The AJ sustained the charge of failure to accept a condition of employment and sustained the penalty of removal.

Holding: The Board denied the appellant's petition for review and affirmed the removal action.

1. Where there is no mobility agreement in place and a directed reassignment addresses an individual's situation, the individual's refusal to relocate does not support a charge of failure to meet a condition of employment. Instead, it justifies a charge of failure to accept a directed reassignment or some other charge appropriate under the circumstances.
2. In the absence of a mobility agreement, the agency must establish by preponderant evidence that the geographic reassignment was properly ordered due to bona fide management considerations in the interest of promoting the efficiency of the service.
3. In instances where there is a mobility agreement, the analytical focus is whether the agency's policy was supported by a legitimate management reason.

4. The appellant forfeited her affirmative defense of harmful procedural error when she did not object to the AJ's Order and Summary of Telephone Prehearing Conference within the established time period.

Appellant: Jerry Hodges

Agency: Department of Justice

Decision Number: [2014 MSPB 54](#)

Docket Number: NY-0752-11-0308-I-1

Issuance Date: July 17, 2014

Appeal Type: Adverse Action

Action Type: Removal

Standard for Agency to Engage in Interactive Process

Analysis of Discrimination Claim

Physical Improvement of Injured Appellants Prior to Close of Hearing

Back Pay in Retroactive Restoration

The appellant, a correctional officer within the Bureau of Prisons, appealed his removal for failure for medical/physical inability to perform the essential duties of his position. The appellant suffered a work-related injury in 2000, and in December 2009, an Office of Workers' Compensation (OWCP) physician determined that the appellant could return to work with no restrictions. In February 2010, the agency directed the appellant to return to work. Upon the appellant's return, he supplied the agency with a medical report from his personal physician that stated he could only perform his job within certain restrictions, and asked the agency to assign him to a new position that fit the restrictions. In October 2010, the appellant's doctor issued another report restricting the appellant's ability to work, and stated that the restrictions were permanent. Based on this report, in November 2010, the agency proposed to reasonably accommodate the appellant with a new position, because his restrictions prevented him from meeting an essential duty of his position, and the appellant agreed. The appellant and agency worked together to find the appellant a new position, but ultimately could not find one. On July 20, 2011, the agency removed the appellant for being unable to perform the full range of his duties, and the appellant appealed the removal to the Board. At his hearing in December 2011, the appellant's doctor testified that the appellant was physically able to perform the duties of his position. Based on this testimony, the agency offered the appellant a correctional officer position, contingent upon the appellant's doctor issuing a written report stating he could return to work. On January 31, 2012, the

appellant's doctor issued such a report, which stated he could return to work effective February 5, 2012. The agency then sent the appellant a letter stating the appellant could return to work on February 12, 2012, and that the appellant would be placed on leave without pay from July 20, 2011, through February 11, 2012. On March 16, 2012, the AJ issued an initial decision holding that the agency failed to prove its charge, and that the appellant proved his affirmative defense of disability discrimination. Based on this, the AJ reversed the removal, and ordered the agency to retroactively restore the appellant, effective July 20, 2011, with back pay.

Holding: The Board reversed the initial decision with respect to disability discrimination and affirmed the initial decision on all other grounds.

1. The Board reversed the AJ's holding that the agency discriminated against the appellant based on his disability. The Board found that the agency engaged in an interactive process and attempted to reasonably accommodate him, and there was no showing that these efforts were a pretext for discrimination.
2. In a discrimination case, when the record is complete and a hearing has been held, the Board will proceed directly to the question of whether the appellant has proven the agency's proffered reason was a pretext for discrimination.
3. When an employee is removed for being physically unable to perform his duties, if the employee's physical condition improves prior to the end of his Board hearing such that he is able to perform his duties, his removal can no longer serve the efficiency of the service.
4. An employee who has been retroactively restored to duty by the Board is not entitled to back pay as of the date of retroactive restoration, unless the employee was ready, willing, and able to fulfill his duties on the retroactive restoration date.

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

Petitioner: Donald W. Cassidy

Respondent: Department of Justice

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

Case Number: [2014-3024](#)

MSPB Docket No. DA-1221-11-0365-B-1

Issuance Date: July 14, 2014

Burdens of Proof in WPA Cases

The appellant appealed two non-selections for immigration judge positions with the Executive Office for Immigration Review (EOIR), in the Department of Justice. The first position was in San Antonio, and the second was in Houston. The official responsible for checking references for applicants for the San Antonio position was the immigration court's assistant chief judge. When checking references, multiple individuals, including one judge that worked for the San Antonio immigration court, informed the assistant chief judge that the appellant did not have a favorable temperament. The assistant chief judge forwarded this information to the selection panel, which then decided to choose a different candidate due to the information. For the Houston position, the selection panel ultimately chose a different candidate due to the weakness of the appellant's panel interview. On appeal, the appellant alleged that he was not chosen for either position due to an e-mail exchange he participated in, which informed the assistant chief judge that the court was not adhering to the requirements of a prior settlement agreement. In his hearing, the AJ heard testimony from multiple officials discussing the appellant's negative temperament, and held that the agency proved by clear and convincing evidence that it would not have selected the appellant for either immigration judge position even if the appellant had not made any protected disclosures. The Board affirmed the decision.

Holding: The Court affirmed the Board's holding.

1. To succeed on a WPA claim, an employee must prove by a preponderance of the evidence that his protected disclosure was a contributing factor to the adverse personnel action. The appellant can satisfy this burden by meeting the "knowledge/timing" test. If an

appellant meets his burden, the agency must then prove by clear and convincing evidence that it would have taken the same personnel action even if the employee made no protected disclosure.

2. Substantial evidence supported the Board's finding that the agency proved it would not have hired the appellant for either immigration judge position even if he had not participated in the e-mail exchange.

Petitioner: Donna J. Deem

Respondent: Merit Systems Protection Board

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

Case Number: [2014-3037](#)

MSPB Docket No. SF-0752-12-0777-I-1

Issuance Date: July 17, 2014

Standard for Involuntary Resignation

The appellant appealed the Board's dismissal of her involuntary resignation claim for lack of jurisdiction. The appellant claimed she was harassed by her supervisor for 12 years, after which she was transferred to a separate office and given a new supervisor. 10 months after her transfer, the appellant retired, and then filed an appeal with the Board claiming her retirement was involuntary due to the harassment she suffered from her former supervisor. At the Board, the AJ held that the petitioner failed to make a non-frivolous allegation in support of jurisdiction and dismissed the appeal. The Board affirmed.

Holding: The Court affirmed the Board's holding.

1. To establish involuntary resignation, an employee must show: (1) the agency effectively imposed the terms of the employee's resignation or retirement; (2) the employee had no realistic alternative but to resign or retire; and (3) the employee's resignation or retirement was the result of improper acts by the agency.

2. Substantial evidence supported the Board's finding that the appellant's working conditions did not establish an involuntary resignation.