



## U.S. MERIT SYSTEMS PROTECTION BOARD

### Case Report for October 10, 2014

#### BOARD DECISIONS

**Appellant:** Sean McNab  
**Agency:** Department of the Army  
**Decision Number:** [2014 MSPB 79](#)  
**MSPB Docket Number:** CH-0752-13-4643-I-1  
**Issuance Date:** October 7, 2014  
**Appeal Type:** Removal  
**Action Type:** AWOL

#### **Definition of Individual With a Disability Disparate Penalty Analysis**

The appellant was removed from his position based on leave related infractions. The appellant challenged the removal and asserted that the action was motivated by disability discrimination stemming from his diagnosed conditions of generalized anxiety disorder, major depressive disorder, and alcohol dependence. The appellant further asserted that the agency did not provide him with all of the materials relating to the underlying appeal. The administrative judge sustained the charged misconduct, found the appellant's affirmative defenses unproven, and affirmed the appellant's removal.

**Holding:** The Board affirmed the initial decision as modified to find that the appellant met the definition of an individual with a disability, but did not prove that he was the subjected to a disparate penalty.

1. The Board modified the initial decision to reflect that the appellant established that he was an individual with a disability. The appellant's condition of major depressive disorder was a disability as defined by the ADAAA, and the agency's knowledge of the severity of his condition was not

relevant to the determination of whether he was disabled. However, the agency did not breach its obligation to provide the appellant with a reasonable accommodation, and there was no evidence that the appellant's disability was a motivating factor in the removal.

2. To trigger the agency's evidentiary burden on disparate penalty analysis, the appellant first meet an initial burden of showing there is enough similarity between the nature of the misconduct and other factors to lead a reasonable person to conclude that the agency treated similarly-situated employees differently. Here, the Board held the appellant did not make such a showing.

3. The agency did not violate the appellant's due process rights, because the record supported the administrative judge's conclusion that the appellant's claim that he requested the underlying materials supporting his proposed removal was not credible.

4. Vice Chair Anne Wagner dissented in part. She agreed with the majority's conclusion that the agency proved its charges and that the appellant failed to prove his affirmative defense, but disagreed with the analysis of the disparate penalties issue. She stated that the appellant did meet his burden of establishing he was sufficiently similarly situated to trigger the agency's evidentiary burden, and that the matter should have been remanded for further development of the record with respect to penalty analysis.

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

**Petitioner: Maria Lavinia Jones**

**Respondent: Merit Systems Protection Board**

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

**Case Numbers: [2014-3072](#) and [2014-3081](#)**

**MSPB Docket No. CB-7121-13-0111-V-1 and DC-0752-13-0168-I-1**

**Issuance Date: October 8, 2014**

**Jurisdiction - Election of Remedies**

**Jurisdiction - Discrimination Claims**

**Joint Retirement and Removal Claims**

The appellant was removed from her position, and filed a grievance of that action through the agency's negotiated grievance procedure. The appellant lost her grievance at arbitration, and followed that decision by filing an appeal to the Board. At the Board, the administrative judge questioned whether the Board held jurisdiction over the appeal, because the petitioner elected to pursue her negotiated grievance procedure instead of a Board appeal, and because she retired one day prior to the effectuation of her removal. The appellant responded that her appeal was based on discrimination and legal errors by the arbitrator. On those grounds, the administrative judge transferred part of her appeal to the Board for review of the arbitrator's decision on her discrimination allegations. However, the administrative judge retained jurisdiction over what he perceived to be a claim of involuntary resignation by the appellant, and created a second appeal with just that claim. The administrative judge then held that the appellant did not satisfy the standard to establish Board jurisdiction over her involuntary retirement claim, and dismissed the second appeal. At the Board, the appellant's first appeal related to her grievance was dismissed for lack of jurisdiction because the petitioner did not raise any allegations of discrimination in the grievance. For her second appeal regarding her involuntary retirement, the Board held that the administrative judge improperly construed the claim as a separate claim, and instead should have viewed the claim as a removal. The Board then denied that appeal for lack of jurisdiction, due to her electing to file a grievance through her negotiated grievance procedure.

**Holding:** The Court affirmed.

- 1. Federal employees can challenge an eligible adverse action through either a negotiated grievance procedure or at the Board, but cannot do both.**
- 2. The Board only has jurisdiction to review discrimination claims in an appeal from a decision of an arbitrator in a negotiated grievance procedure. Here, there were no discrimination claims in the record.**
- 3. In an appeal in which an employee elects to retire concurrently with her removal, or shortly before her removal, the Board will consider the appeal to be a removal appeal, not an involuntary retirement appeal.**