



## U.S. MERIT SYSTEMS PROTECTION BOARD

**Case Report for November 21, 2014**

### **BOARD DECISIONS**

**A Board Chief Administrative Judge issued the following Nonprecedential Final Decision pursuant to the Board's VA SES expedited review procedures:**

**Appellant:** James R. Talton

**Agency:** Department of Veterans Affairs

**MSPB Docket No.:** [AT-0707-15-0094-I-1](#)

**Issuance Date:** November 19, 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, was Director of the Central Alabama Veterans Administration Healthcare System, and appealed his removal for failure to timely take disciplinary action against two employees who committed significant misconduct. In both instances, the appellant was extensively and regularly briefed concerning the alleged misconduct of these two employees, but took no action against either employee until well over one year following the occurrence of the incidents. When interviewed by the agency, the appellant initially denied knowledge of the specifics of the employees' misconduct, and then later gave conflicting accounts of how he handled these two matters. Based on the appellant's inaction in timely addressing these two incidents of employee misconduct, and his inconsistent statements to investigators about the misconduct, the agency removed the appellant under the VA SES expedited adverse action procedures.

In a decision issued following the MSPB's expedited hearing process for VA SES employees, the Administrative Judge sustained the charged misconduct based on the hearsay evidence contained in the agency's investigative report, and found the appellant's claims that he was unaware of the severity of the underlying actions not credible. The Administrative Judge further held that the appellant failed to prove his affirmative defenses, and concluded that the penalty of removal was reasonable and within the narrowly prescribed authority set forth in 38 U.S.C. § 713(a)(1). The Administrative Judge's decision is final pursuant to 38 U.S.C. § 713(e)(2).

## **The U.S. Court of Appeals for the Federal Circuit issued a precedential decision in the following case:**

**Petitioner:** Steven B. Berlin, *et al.*

**Respondent:** Department of Labor

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

**Case Number:** [2014-3031](#)

**MSPB Docket No.:** CB-7521-13-0072-T-1, *et al.*

**Issuance Date:** November 20, 2014

### **Determination of Good Cause for ALJ Furloughs**

The appellants, who served as administrative law judges (ALJs), appealed the agency's decision to furlough them for 5.5 days under the Budget Control Act of 2011 (Act). The Act required that the same percentage sequestration applied to all programs, projects, and activities within a budget account. To fulfill its responsibilities under the act, the agency applied a 5% cut to all of the subaccounts within its "Management Salaries and Expenses" account, including the adjudication subaccount, which covered the Office of Administrative Law Judges. The agency calculated that to make the required cuts, it needed to furlough the ALJs for 5.5 days. The ALJs appealed the furloughs, arguing that other employees not covered by the adjudication subaccount had shorter furloughs. At the Board, the matter was first heard by an administrative law judge from the United States Coast Guard, who held that the agency met the "good cause" standard required to furlough ALJs. However, the administrative law judge also held that the furloughs should be reduced to 4 days because the "special status" of the ALJs required the agency to reallocate funds in such a manner such that the ALJs did not receive a longer furlough than other employees covered by the "Management Salaries

and Expenses” account. The agency petitioned the full Board for review, and the Board vacated the initial decision. The Board held that the agency had good cause to furlough the ALJs for the full 5.5 day period, because the agency had sound business reasons for its decision, and that there was no evidence that the decision was made for an improper reason or to interfere with the ALJs’ qualified judicial independence.

**Holding:** The Court affirmed.

1. When assessing the propriety of an ALJ furlough, “good cause” is defined on a case-by-case basis. Potential factors in a determination of “good cause” include: (1) whether the reason for the furlough is one that interferes with the ALJs’ judicial independence; (2) any disparate treatment; and (3) whether the agency had sound business reasons for issuing the furlough.

2. Here, the furloughs represented a sound business decision by the agency because the agency made a neutral decision to apply the cuts equally to each subaccount. The difference in furlough lengths did not mean that the agency did not meet the “good cause” standard because there was no evidence that the difference existed because of the employees’ ALJ status.

## **The U.S. Court of Appeals for the Federal Circuit issued the following nonprecedential decision this week:**

**Petitioner:** Herbert Russell

**Respondent:** Department of Health and Human Services

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

**Case Number:** [2014-3130](#)

**MSPB Docket No.** DC-3330-11-0405-B-1

**Issuance Date:** November 18, 2014

**Holding:** The Court vacated and remanded the Board’s final decision for a determination of whether the appellant received a Board Order providing for the submission of new evidence on the reconstructed selection process.

- **The MSPB did not issue any precedential decisions this week**

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