



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for December 12, 2014

BOARD DECISIONS

Appellant: Tamarah T. Grimes
Agency: Department of Justice
Decision Number: [2014 MSPB 87](#)
MSPB Docket Number: AT-0752-09-0698-I-5
Issuance Date: December 12, 2014
Appeal Type: Adverse Action
Action Type: Removal

Due Process in Security Clearance-Based Removals **Affirmative Defenses in Security Clearance-Based Removals** **Consideration of Merits in Security Clearance-Based Removals**

Following a security investigation that concluded that her continued employment posed an unnecessary and unacceptable operational risk, the appellant was removed from her critical-sensitive position of Paralegal Specialist based on charges of failure to maintain a qualification of her position and misrepresentation. The appellant disputed the charges in her appeal and asserted that the action was defective on due process grounds and was motivated by whistleblowing reprisal. The AJ sustained the charge and concluded that removal was an appropriate penalty. Because the AJ sustained the charge of failure to maintain a qualification of her position, he did not adjudicate the agency's second charge of misrepresentation. The AJ found further that the appellant did not establish her allegation of a due process violation based on the deciding official's consideration of additional evidence not contained in the proposal, because the information was cumulative of information already shared with the appellant. Finally, the administrative judge concluded that the appellant did not prove her allegation of whistleblower retaliation and found that the agency did not deviate from established internal adjudicative guidelines. After the appellant filed a

petition for review, the Board issued an order inviting the parties to submit additional argument as to the applicability of *Gargiulo v. Department of Homeland Security*, 727 F.3d 1181 (Fed. Cir. 2013).

Holding: The Board denied the appellant's petition for review, affirmed the AJ's initial in part, and vacated a portion of the decision.

1. It was not a due process violation for the deciding official to consider the agency's internal reconsideration decision without allowing the appellant an opportunity to respond to that decision. There was no violation because the disputed ex parte communications merely confirmed or clarified information already in the record and available to the appellant.
2. It was appropriate to not adjudicate the appellant's affirmative defense of whistleblower reprisal because such a claim would go to the merits of the agency's underlying basis for determining that the appellant is ineligible to hold a critical-sensitive position and obtain access to classified information.
3. To the extent that the AJ reviewed and adjudicated the grounds for the agency's decision to revoke the appellant's eligibility to hold a critical sensitive position and to obtain access to classified information, the Board vacated those portions of the initial decision.

The U.S. Court of Appeals for the Federal Circuit issued the following precedential decision this week

Petitioner: Katherine Archuleta, Director, Office of Personnel Management

Respondents: Tony D. Hopper & Merit Systems Protection Board

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

Case Number: [2013-3177](#)

MSPB Docket No. CH-0731-09-0798-I-3

Issuance Date: December 8, 2014

**Jurisdiction Over Suitability-Based Removals
Suitability Penalty Analysis**

Respondent Hopper (Respondent) was appointed to a position with the Social Security Administration (SSA) in April 2008, leading to OPM initiating a background investigation of him. Approximately 15 months later, OPM informed the Respondent that it had questions regarding his suitability for federal employment, and therefore intended to instruct SSA to remove him, cancel his eligibility for reinstatement, and debar him from federal employment for three years. Pursuant to OPM's directive, SSA removed the Respondent. The Respondent appealed the removal to the Board, and after a procedural delay, the AJ reviewed the matter as an adverse action appeal and conducted a hearing in October 2011. At the hearing, OPM gave an opening statement criticizing the Board's decision to assume jurisdiction over a suitability-based removal, but otherwise refused to participate. In his defense, the Respondent presented testimony from his second level supervisor who stated that he would have issued a penalty less than removal for the Respondent's problems revealed in the background investigation. In the initial decision, the AJ sustained the charge, and, pursuant to the Board's holding in *Aguzie v. Office of Personnel Management*, 112 M.S.P.R. 276 (2009), conducted an independent *Douglas* factor analysis to determine the penalty. Based on the Respondent's supervisor's unchallenged testimony, the AJ mitigated the penalty to a letter of reprimand. OPM petitioned for review by the full Board, and again argued only that the Board did not have jurisdiction over the removal because it was based on a suitability determination. The Board disagreed and affirmed the administrative judge's initial decision.

Holding: The Court affirmed the Board's decision to review the Respondent's removal as an adverse action appeal and further affirmed the Board's decision to mitigate the removal.

- 1. Suitability-based removals are included within the definition of "removal" for purposes of Board jurisdiction. Accordingly, suitability-based removals are appealable adverse actions under Chapter 75 for qualifying employees.**
- 2. In a suitability-based removal, OPM's penalty determination does not receive deference. It bears the burden of persuading the Board of the appropriateness of the penalty imposed, and the Board must review the penalty in light of the *Douglas* factors.**

The U.S. Court of Appeals for the Federal Circuit issued the following non-precedential decisions this week

Petitioner: Dorothy Burks (Thomas)

Respondent: U.S. Postal Service

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

Case Number: [2014-3115](#)

MSPB Docket No. AT-0752-12-0577-I-1

Issuance Date: December 8, 2014

Holding: The Court affirmed the Board's decision to uphold the petitioner's removal based on a charge of failure to attend work for six weeks.

Petitioner: Kathryn Michelle Walker

Respondent: Merit Systems Protection Board

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

Case Number: [2014-3155](#)

MSPB Docket No. PH-315H-12-0281-B-1

Issuance Date: December 9, 2014

Holding: The Court affirmed the Board's jurisdictional dismissal in a probationary termination effected two weeks prior to the expiration of the one year probationary period.

Petitioner: Sharon L. Blount

Respondent: Merit Systems Protection Board

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

Case Number: [2014-3156](#)

MSPB Docket No. DC-0752-13-0755-I-1

Issuance Date: December 9, 2014

Holding: The Court affirmed the Board's jurisdictional dismissal because the petitioner voluntarily resigned three days prior to the effective date of her removal.

Petitioner: Darwin M. Nealy

Respondent: U.S. Postal Service

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

Case Number: [2014-3157](#)

MSPB Docket No. DA-0353-12-0663-I-1

Issuance Date: December 9, 2014

Holding: The Court affirmed the Board's denial of the petitioner's request for corrective action based on its finding that the appellant's membership in the U.S. Army Reserves was not a motivating factor in his suspension for misconduct.

Petitioner: Ezell Wyrick

Respondent: Department of Transportation

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

Case Number: [2014-3162](#)

MSPB Docket No. SF-0752-12-0524-I-3

Issuance Date: December 9, 2014

Holding: The Court affirmed the Board's decision to uphold the petitioner's removal based on charges of lack of candor and operating a government vehicle without a driver's license.

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