



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for December 19, 2014

BOARD DECISIONS

Appellant: Rommel Boo
Agency: Department of Homeland Security
Decision Number: [2014 MSPB 86](#)
MSPB Docket Number: SF-0752-13-3302-I-1
Issuance Date: December 3, 2014
Appeal Type: Adverse Action
Action Type: Removal

Required Element of Misrepresentation Charge Penalty Analysis for Charge of Undermining Required Security Procedures

The appellant, a financial specialist with the Transportation Security Administration (TSA), appealed his removal based on charges of undermining required security procedures and misrepresentation. The appellant had been tasked with escorting a representative from the General Services Administration (GSA) through an area of an airport beyond the TSA security screening checkpoint. The appellant was authorized to escort the GSA representative to the area through a Security Identification Designated Area (SIDA) controlled door without the representative being screened, but not authorized to do so through a TSA security screening checkpoint. On one occasion, the appellant attempted to escort the representative through the security screening checkpoint without screening, because it provided a more direct route to their destination. The appellant was stopped by a Transportation Security Officer (TSO) and Supervisory Transportation Security Officer (STSO), who questioned whether the appellant had authority to escort the representative through the checkpoint without screening. The appellant incorrectly informed them that the Federal Security Director (FSD) had authorized the appellant to escort the representative through the checkpoint

without screening. Based on the appellant's statement, the representative was allowed to pass through the checkpoint without screening. The STSO then reported the incident to agency management, and the agency responded by issuing the appellant a notice of proposed removal. In response to the proposal, the appellant expressed remorse for his actions, and explained that he misunderstood the scope of his authority to escort individuals through TSA checkpoints. The agency nevertheless imposed his removal, and he appealed to the Board. After a hearing, the administrative judge (AJ) sustained both charges and upheld the removal. The AJ sustained the charge of undermining required security procedures because the representative passed through the checkpoint unscreened, and because the TSO and STSO were forced to expend additional effort and resources to respond to the incident. The AJ sustained the misrepresentation charge based on her finding that the appellant acted with the intent to deceive the TSO and STSO.

Holding: The Board granted the appellant's petition for review, vacated the AJ's initial decision in part, declined to sustain the misrepresentation charge, and mitigated the appellant's removal.

- 1. In accordance with *Leatherbury v. Department of the Army*, 524 F.3d 1293 (Fed. Cir. 2008), the Board held that to sustain a charge of misrepresentation, an agency must prove that the appellant intended to defraud, deceive, or mislead the agency "for his own private material gain." Here, there was no evidence in the record that the appellant made his statement to the TSO and STSO for his own private material gain. Therefore, the Board did not sustain the charge of misrepresentation.**
- 2. The Board's prior decisions in *Seas v. U.S. Postal Service*, 73 M.S.P.R. 422, 427 (1997), and *Schoeffler v. Department of Agriculture*, 47 M.S.P.R. 80, 84, *vacated in part*, 50 M.S.P.R. 143, *enforcement dismissed*, 51 M.S.P.R. 20 (1991), are modified to the extent that they suggest that an agency does not need to establish that an employee personally benefited from the misrepresentation.**
- 3. "Private material gain" with respect to a misrepresentation charge is to be construed broadly, and is not limited to financial gain.**
- 4. Because the charge of misrepresentation was not sustained, and because the deciding official did not express whether the same penalty would have been imposed for just the charge of undermining required security procedures, the Board analyzed the penalty under the *Douglas* factors to determine the maximum reasonable penalty. Pursuant to this analysis, the Board determined that the maximum reasonable penalty for**

the sustained charge was a 30-day suspension, and mitigated the penalty to the same.

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

Petitioner: Rakhmatulla Asatov

Respondent: Merit Systems Protection Board

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

Case Number: [2013-3124](#)

MSPB Docket No. PH-4324-13-0227-I-1

Issuance Date: December 18, 2014

Holding: The Court affirmed the Board's dismissal of the appellant's USERRA appeal for failure to state a claim upon which relief can be granted because Board orders are not enforceable against the National Guard Adjutants General.

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