



## **U.S. MERIT SYSTEMS PROTECTION BOARD**

### **Case Report for January 9, 2015**

#### **BOARD DECISIONS**

**Appellants: James A. Goeke & Joseph W. Bottini**

**Agency: Department of Justice**

**Decision Number: [2015 MSPB 1](#)**

**MSPB Docket Numbers: SF-0752-12-0598-I-1, SF-0752-12-0600-I-1**

**Consolidation Docket Number: CB-0752-15-0228-I-1**

**Issuance Date: January 2, 2015**

**Appeal Type: Adverse Action**

**Action Type: Suspension**

#### **Agency Disciplinary Procedure**

#### **Harmful Procedural Error**

The appellants appealed their suspensions based on allegations that they committed professional misconduct during the criminal prosecution of a United States Senator. The agency's disciplinary process called for a Professional Misconduct Review Unit (PMRU) attorney to review an employee's record to determine whether discipline was warranted, and if so, to serve as the proposing official for the disciplinary process. The Chief of the PMRU (Chief) would then act as the deciding official for the proposed discipline. Here, the PMRU attorney reviewed the appellants' actions and made a determination that discipline was not warranted. The Chief disagreed with the PMRU attorney's assessment, personally substituted himself into the role of proposing official, and proposed suspensions for both appellants. The new deciding official, an Associate Deputy Attorney General, upheld the charges and imposed the suspensions. On appeal, the administrative judge (AJ) reversed the suspensions. The AJ found that the agency violated its internal disciplinary process by allowing the Chief to substitute himself into the role of proposing official, and that this error was harmful procedural error because

it likely led to stronger discipline than the agency otherwise would have issued.

**Holding:** The Board affirmed the initial decision as modified by the opinion and order.

1. When issuing discipline, an agency is required to follow its internal disciplinary procedure, and the Board is obligated to enforce that procedure. Here, the agency's decisions to replace the PMRU attorney as designated proposing official because the PMRU attorney concluded that the appellants should not be disciplined, and to appoint a member of management, rather than a rank-and-file attorney, to serve as the new proposing official, were violations of the agency's internal disciplinary procedure and therefore were errors.

2. The agency's procedural violations constituted harmful procedural errors justifying a reversal of the penalty because the errors led to a harsher penalty than otherwise would have been imposed.

**Appellant:** Margaret M. Reed

**Agency:** Department of Veterans Affairs

**Decision Number:** [2015 MSPB 2](#)

**MSPB Docket No.:** CH-1221-13-1557-R-1

**Issuance Date:** January 6, 2015

**Appeal Type:** Individual Right of Action

**Action Type:** Suspension

**Protected Disclosures Under the WPEA**

**Personnel Actions Under the WPEA**

**Contributing Factors Under the WPEA**

**Perceived Whistleblower Claims Under the WPEA**

After the appellant's grievance of an official admonishment was denied, she requested to meet with her facility Director because she believed the grievance process was futile. The appellant's supervisors threatened to discipline her if she went through with the meeting. She subsequently met with the Director to discuss the grievance process, and also alleged that her supervisors retaliated against her by failing to follow grievance procedures. After that meeting, the appellant's supervisor proposed to suspend her for three days based on complaints from various agency officials. The suspension was effectuated, and the admonishment was considered in the decision to

suspend her. The admonishment was eligible to be removed from the appellant's personnel file three months prior to the suspension, but her supervisor elected to not remove it. The appellant filed an IRA with the Board, alleging that the suspension was issued as reprisal for her complaints about the grievance. At the Board, the administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant failed to make a nonfrivolous allegation that she made a protected disclosure, and that the appellant's grievance was not protected activity under the Whistleblower Protection Enhancement Act (WPEA).

**Holding:** The Board reopened the appeal, vacated its November 25, 2014 Opinion and Order in its entirety (2014 MSPR 85), and replaced it with the present decision.

- 1. The Board clarified in this Opinion and Order that the administrative judge properly gave the appellant explicit notice of how to establish jurisdiction over her appeal as a perceived whistleblower. But the Board also concluded that the appellant had not made a nonfrivolous allegation that the agency perceived her as a whistleblower, and thus vacated its earlier Opinion and Order based on its conclusion that there was no basis for a remand.**
- 2. The filing of a grievance that does not itself seek to remedy whistleblower reprisal is not a protected disclosure under the WPEA.**
- 3. The proposed three-day suspension, the decision effectuating the suspension, the Assistant Chief's alleged refusal to remove the admonishment from the appellant's personnel file, and the Chief and Assistant Chief's threats of discipline were all personnel actions under the WPEA.**
- 4. The Board did not have jurisdiction over the appellant's allegations of irregularities in the grievance process because she did not allege that these irregularities occurred as reprisal for any disclosure.**
- 5. The Board held that the appellant failed to nonfrivolously allege that any of her claimed protected disclosures were a contributing factor to her personnel actions.**
- 6. The Board stated that nothing in the WPEA precludes the Board from considering, at the jurisdictional stage, whether the appellant made a**

nonfrivolous allegation that a disclosure was a contributing factor to an agency decision.

**Appellant:** Charles V. Neighoff  
**Agency:** Department of Homeland Security  
**Decision Number:** [2015 MSPB 3](#)  
**MSPB Docket No.:** CH-0731-14-0365-I-1  
**Issuance Date:** January 6, 2015  
**Appeal Type:** Adverse Action  
**Action Type:** Removal

### **Timeliness**

#### **Servicemembers Civil Relief Act of 2003 Tolling**

The appellant appealed his suitability-based removal 8 months after the regulatory deadline. He asserted that the period of untimeliness was tolled by the Servicemembers Civil Relief Act of 2003 (SCRA), inasmuch as he was on active duty in Afghanistan for the majority of the 8 month period, and was otherwise on active duty for a remainder of the period after he returned from Afghanistan. The administrative judge (AJ) found that the SCRA's tolling provision was terminated when the appellant returned from Afghanistan, and the appellant failed to show good cause for waiver of the remainder of the period of untimeliness following his return from Afghanistan.

**Holding:** The Board granted the appellant's petition for review, reversed the initial decision on the threshold issue of timeliness and remanded the case for further adjudication.

1. Under the tolling provision of the SCRA, the period of active duty reflected on the appellant's DD-214 form determines the period excused for purposes of determining the timeliness of a petition for appeal. Here, although the appellant returned from Afghanistan on February 10, 2014, his DD-214 reflected that his active duty status ended on April 9, 2014. Thus, his petition for appeal filed on March 20, 2014, was timely.

**Appellant:** Johnny L. Ringo  
**Agency:** Department of Defense  
**Decision Number:** [2015 MSPB 4](#)  
**MSPB Docket Number:** SF-0752-13-1823-I-1

**Issuance Date:** January 6, 2015

**Appeal Type:** Adverse Action

**Action Type:** Removal

### **Leave Accrual**

The appellant was removed pursuant to a last chance agreement (LCA), which stated that any absence from work that occurred while the appellant's leave balance was zero would be grounds for removal. The LCA also stated that if he were removed, he would not initiate any civil litigation against the agency concerning his removal. The appellant was absent for six hours and did not have any leave to cover his absence, and therefore was removed pursuant to the LCA. On appeal, the appellant argued that he was due to earn six hours of leave at the end of the pay period during which he was absent. The AJ dismissed the appeal for lack of jurisdiction based on the LCA. The AJ found that the appellant did not have sufficient leave to cover his absence, and therefore did not make a nonfrivolous allegation that he complied with the LCA.

**Holding:** The Board affirmed the initial decision.

1. **Accrued annual and sick leave are available for use only after the completion of the full biweekly pay period in which they are earned. Here, the Board held that because he had yet not completed the pay period when he took his leave, he could not use the leave he claimed would have covered his absence.**

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

**Petitioner:** Raymanda Preacely

**Respondent:** Department of the Treasury

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

**Case Number:** [2014-3190](#)

**MSPB Docket No.** CH-4324-12-0521-B-1

**Issuance Date:** January 7, 2015

**Holding:** The Court affirmed the Board's decision to uphold the petitioner's removal because she failed to show that her veteran status was a substantial or motivating factor in her removal.

**Petitioner:** Stephan Evans

**Respondent:** United States Postal Service

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

**Case Number:** [2012-3190](#)

**MSPB Docket No.** SF-0752-10-0966-I-2

**Issuance Date:** January 8, 2015

**Holding:** The Court affirmed the Board's decision to uphold the petitioner's removal because there was substantial evidence supporting the government's charges of misconduct.

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