



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for February 13, 2015

BOARD DECISIONS

Appellant: Robert Frederick
Agency: Department of Homeland Security
Decision Number: [2015 MSPB 11](#)
MSPB Docket No.: AT-0752-11-0620-B-2
Issuance Date: February 10, 2015
Appeal Type: Adverse Action
Action Type: Indefinite Suspension

Use of Same Factual Specification for Multiple Adverse Actions

On March 4, 2010, the appellant was issued a notice of proposed indefinite suspension based on its Office of Professional Responsibility's (OPR) investigation into allegations that the appellant tape recorded a conversation in the workplace, and the fact that an arrest warrant had been issued for his arrest due to his alleged violation of Florida's wiretap laws. On June 10, 2010, the agency issued the indefinite suspension, and in doing so stated that its only factual support for the suspension was the issuance of the arrest warrant. Shortly after the agency imposed the suspension, the Board issued its decision in *Gonzalez v. Department of Homeland Security*, 114 M.S.P.R. 318, which held that an internal agency investigation cannot be the basis for an indefinite suspension. Due to *Gonzalez*, the agency issued a second notice of proposed suspension to the appellant, again citing to the issuance of the arrest warrant as the supporting specification for the suspension. The agency subsequently imposed the suspension, effective March 24, 2011, and stated that the suspension was based solely on the charge and specification outlined in the second proposed suspension, and not based on the charges and

specification from the first suspension. The appellant appealed the second indefinite suspension to the Board, and after multiple procedural issues regarding his appeal were addressed by the administrative judge (AJ) and the Board, the AJ upheld the suspension. The AJ found that, even though the two suspensions relied on the same factual specification, the second suspension was allowed because the indefinite suspensions covered different periods of time.

Holding: The Board granted the appellant's petition for review, reversed the remand initial decision, and did not sustain the appellant's second indefinite suspension.

1. Agencies cannot rely on the same factual specification in effecting separate disciplinary or adverse actions. Here, although the charges supporting the first and second suspensions were different, both suspensions still were issued based on the same factual specification, which was the appellant's arrest warrant. Accordingly, the Board did not sustain the second suspension.

Appellant: Troy S. Piirainen

Agency: Department of the Army

Decision Number: [2015 MSPB 12](#)

MSPB Docket No.: DE-3330-14-0057-I-1

Issuance Date: February 11, 2015

Appeal Type: Veterans Employment Opportunity Act

Action Type: Non-Selection

Right to be Considered Under Veterans' Readjustment Act

The agency opened a senior training instructor position and decided to hire for the position internally. The appellant's second-line supervisor informed the appellant and his co-worker, both of whom were preference-eligible veterans, that the position was going to become available and encouraged them to apply. The appellant's co-worker applied for the position, but the appellant only sent e-mails to his second-line supervisor seeking advice on how to proceed and did not actually apply. The second-level supervisor did not respond to his inquiries. The agency then selected the appellant's co-worker for the position via its Veterans' Readjustment Act (VRA) authority, which allowed it to appoint an employee to the position without announcing the job or rating and ranking applicants. The appellant appealed his non-selection to the Board, asserting that the agency violated his veterans' preference rights under the Veterans Employment Opportunity Act of 1998 (VEOA). The AJ

denied his request for corrective action based on a finding that the appellant was not “on file,” for purposes of the VRA because the appellant did not submit an application for the position.

Holding: The Board denied the petition for review.

1. The appellant was not “on file” for purposes of the VRA because he did not actually submit an application for the position. Accordingly, his rights under VEOA were not violated.

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

Petitioner: Sandra E. Simmons

Respondent: Merit Systems Protection Board

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

Case Number: [2014-3142](#)

MSPB Docket No. DC-0432-13-1309-I-1

Issuance Date: February 6, 2015

Holding: The Court affirmed the Board’s decision dismissing the petitioner’s appeal as untimely based on its finding that the petitioner did not show good cause for her untimely filing.

Petitioner: Ann Marie Duncan

Respondent: Merit Systems Protection Board

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

Case Number: [2014-3187](#)

MSPB Docket No. DC-752S-14-0506-I-1

Issuance Date: February 6, 2015

Holding: The Court affirmed the Board’s decision dismissing the petitioner’s appeal of her 5-day suspension for lack of jurisdiction based on its finding that the Board does not have jurisdiction over suspensions lasting 14 days or less.

Petitioner: Diane King

Respondent: Department of Veterans Affairs

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

Case Number: [2014-3208](#)

MSPB Docket Nos. AT-0330-12-0737-C-1, AT-0330-12-0739-C-1, AT-0330-12-0741-C-1

Issuance Date: February 6, 2015

Holding: The Court affirmed the Board's decision denying the petitioner's three petitions for enforcement of final Board orders requiring the agency to reconstruct its hiring decisions, in accordance with veterans' preference procedures, based on its finding that the respondent lawfully exercised its pass-over authority.

Petitioner: Peter Agoranos

Respondent: Department of Justice

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

Case Number: [2014-3209](#)

MSPB Docket Nos. CH-0432-11-0182-B-1, CH-1221-0466-B-1

Issuance Date: February 9, 2015

Holding: The Court affirmed the Board's decision in an Individual Right of Action appeal upholding the petitioner's personnel actions based on its finding that the respondent proved by clear and convincing evidence that it would have taken the personnel actions even if the petitioner had not made protected disclosures.

Petitioner: William B. Jolley

Respondent: Department of Justice

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

Case Number: [2014-3202](#)

MSPB Docket No. SF-4324-14-0405-I-1

Issuance Date: February 10, 2015

Holding: The Court affirmed the Board's decision denying the petitioner's request for corrective action under the Uniformed Services Employment and Reemployment Rights Act based on its finding that the respondent was not the petitioner's employer for purposes of the statute.

Petitioner: Robin Weiss

Respondent: Merit Systems Protection Board

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

Case Number: [2014-3105](#)

MSPB Docket No. DC-315H-10-0671-B-1
Issuance Date: February 10, 2015

Holding: The Court affirmed the Board's decision dismissing the petitioner's appeal as untimely based on its finding that the petitioner did not show that her medical illness and technical issues prevented her from timely filing her appeal.

Petitioner: Corey Demond Stoglin

Respondent: Merit Systems Protection Board

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

Case Number: [2014-3099](#)

MSPB Docket No. CH-0752-12-0357-I-1

Issuance Date: February 11, 2015

Holding: The Court affirmed the Board's decision dismissing the petitioner's petition for review as untimely based on its finding that the petitioner did not show good cause for his untimely filing.

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