



## U.S. MERIT SYSTEMS PROTECTION BOARD

**Case Report for February 20, 2015**

### **BOARD DECISIONS**

**Appellant:** Jose E. Rosario-Fabregas  
**Agency:** Department of the Army  
**Decision Number:** [2015 MSPB 13](#)  
**MSPB Docket No.:** NY-0752-13-0167-I-1  
**Issuance Date:** February 13, 2015  
**Appeal Type:** Adverse Action  
**Action Type:** Constructive Suspension

#### **Constructive Suspension**

On December 2, 2011, the agency restored the appellant to its employment rolls pursuant to the Board's order in his prior removal appeal. However, the appellant did not return to duty at that time. On December 19, 2011, the appellant submitted a letter from his treating psychiatrist requesting that he be excused from work until January 16, 2012, due to an emotional condition. For the next several months, the appellant repeatedly delayed his return date due to the same emotional condition. On June 11, 2012, the appellant submitted a new letter from his psychiatrist recommending he work on a part-time schedule. The agency construed this letter as a request for accommodation through a modified work schedule and requested further information from the appellant regarding the details of his schedule, but the appellant did not provide any responsive information at that time. On June 25, 2012, the appellant informed the agency that he wished to return to work on a full-time basis on July 2, 2012. The agency responded by stating that the appellant's psychiatrist recommended he only work part-time, and therefore requested additional health information before returning him to duty. The

appellant then did not return to work on July 2, instead claiming that the agency prevented him from returning to duty. During the following weeks, the appellant submitted additional medical documentation to the agency, but the agency claimed the documentation was insufficient to restore him to duty. On July 25, 2012, the appellant provided a report from his psychiatrist stating that the agency's requests for medical documentation had exacerbated his condition and prevented the appellant from being able to work. The appellant then requested further leave commencing July 25, 2012, and the agency approved the request. On November 14, 2012, the appellant sent a new psychiatrist report to the agency that recommended he be returned to work on a part-time basis on November 19, 2012. On November 15, 2012, the agency proposed his removal on other grounds, placed him on paid administrative leave, and eventually removed him effective February 8, 2013. The appellant appealed the agency's failure to restore him to duty, and the administrative judge (AJ) found that the agency's refusal to allow him to return to work constituted a constructive suspension without due process from July 2, 2012, through November 17, 2012. The AJ further found that the agency failed to reasonably accommodate him during the same time period. The appellant filed a petition for review (PFR), arguing that his constructive suspension started on December 19, 2011. The agency filed a cross-petition for review, arguing that he was not constructively suspended at all.

**Holding:** The Board denied the appellant's petition for review, granted the agency's cross-petition for review, vacated the initial decision, and dismissed the appeal for lack of jurisdiction.

1. The appellant's use of leave between December 19, 2011, and July 1, 2012, did not constitute a constructive suspension because his psychological condition was not caused by any improper agency action. The agency was entitled to require medical documentation to substantiate any sick leave request in excess of 3 workdays.

2. The appellant's use of leave between July 2, 2012, and November 17, 2012, did not constitute a constructive suspension because the appellant did not provide medical documentation releasing him for full duty, and because he did not provide any information in response to their inquiries regarding the structure of a potential part-time schedule. The appellant's failure to engage in the interactive process after his request for accommodation and his failure to provide documentation releasing him for full-time work justified the agency's decision to not place the appellant back in duty status.

**Appellant:** John Lauri Salo  
**Agency:** Department of Defense  
**Consolidation:** In re DCMA Eastern Region Hearings v. Department of Defense  
**Decision Number:** [2015 MSPB 14](#)  
**MSPB Docket No.:** NY-0752-13-0302-I-1 and consolidation NY-0752-14-0063-I-1  
**Issuance Date:** February 13, 2015  
**Appeal Type:** Adverse Action  
**Action Type:** Furlough

### **Furlough Procedures**

The appellant was furloughed for 6 discontinuous days from his industrial engineer position due to sequestration. He appealed the action to the Board, arguing, among other things, that the agency should have applied reduction in force (RIF) procedures instead of adverse action procedures because the 6 furlough days occurred over a time period longer than 30 days. The administrative judge affirmed the furlough and held that the 6-day furlough constituted an adverse action, not a RIF.

**Holding:** The Board affirmed the Initial Decision as modified by the Opinion and Order.

1. The furlough was correctly analyzed as an adverse action, as opposed to a RIF. A discontinuous furlough of 22 workdays or less is covered by adverse action procedures, while a discontinuous furlough of more than 22 days is covered by RIF procedures.

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

**Petitioner:** Ramona Gill Herring  
**Respondent:** Merit Systems Protection Board  
**Tribunal:** U.S. Court of Appeals for the Federal Circuit  
**Case Number:** [2013-3170](#)  
**MSPB Docket No.** DC-844E-12-0778-I-1  
**Issuance Date:** February 18, 2015

## **Timeliness - Designated Representative Negligence**

In 2010, the petitioner was removed from her position with the Department of Navy. After her removal, she filed an application for disability retirement benefits with the Office of Personnel Management (OPM), which was denied. The respondent received the denial letter on July 14, 2012, making the due date for a Board appeal of the OPM denial August 13, 2012. The petitioner retained a law firm to file her appeal by the deadline, and provided the law firm with the necessary documents and payment to commence legal services. However, the law firm negligently failed to transmit the necessary documents to the petitioner's specific attorney in a timely fashion, so the petitioner's Board appeal was not filed until August 23, 2012. At the Board, the AJ dismissed the appeal as untimely filed, and the Board affirmed.

**Holding:** The Court reversed the Board's decision.

- 1. The Court held that the specific facts of this case demonstrated that the petitioner had done everything that could be reasonably expected of her, and the failure to timely file was due to circumstances beyond her control. Therefore, the Board's decision to dismiss her appeal as untimely was an abuse of its discretion.**
- 2. The negligence of an appellant's chosen representative can constitute good cause for untimeliness if the petitioner has exercised ordinary prudence under the circumstances and other mitigating factors are present.**
- 3. The Court noted that the Board has previously held that it will apply a more lenient timeliness standard in the context of retirement matters.**
- 4. Judge Reyna dissented, stating that a "good cause" determination is left to the Board's discretion, and the facts of this case do not lead to the conclusion that the Board abused its discretion.**