



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for April 10, 2015

BOARD DECISIONS

Appellant: Kevin M. Hawes
Agency: Office of Personnel Management
Decision Number: [2015 MSPB 29](#)
MSPB Docket No.: DE-0731-14-0059-I-1
Issuance Date: April 2, 2015
Appeal Type: Suitability Determination
Action Type: Removal/Debarment

Suitability Burden of Proof **Suitability Consideration of Mitigating Factors**

Following the appellant's appointment to the position of Field Examiner with the Department of Veterans Affairs, the Office of Personnel Management (OPM) issued a negative background and suitability determination and ordered the agency to remove the appellant from his position, cancel his eligibility for reinstatement and appointment, and debar him from federal employment for a period of three years. The negative suitability determination was based on three charges: (1) misconduct or negligence in employment; (2) criminal or dishonest conduct; and (3) material, intentional false statements in examination or appointment. The administrative judge (AJ) affirmed OPM's decision. In sustaining the first two charges pertaining to allegations that the appellant abused time and attendance requirements in a prior position, the AJ found that the appellant failed to present sufficient evidence rebutting this charge and there was otherwise sufficient independent evidence to support the charge.

Holding: The Board granted the appellant's petition for review, vacated the initial decision, and remanded the appeal to OPM to determine whether the suitability action taken was appropriate based on the sustained charge.

1. The Board found here that OPM failed to establish the first two charges by a preponderance of the evidence because the AJ improperly shifted the burden of proof to the appellant, and there was sufficient evidence to show that the appellant was not engaging in time and attendance abuse.

2. The Board also found that the AJ erred by failing to consider relevant mitigating factors, including the circumstances surrounding the conduct and the absence or presence of rehabilitation or efforts toward rehabilitation.

Appellant: Zoe V. Parker

Agency: Department of Veterans Affairs

Decision Number: [2015 MSPB 30](#)

MSPB Docket No.: CH-1221-14-0827-W-1

Issuance Date: April 6, 2015

Appeal Type: Adverse Action

Action Type: Removal

Falsification

The appellant was removed from the position of Social Work Associate, based on charges of: (1) violation of agency policy regarding patient abuse and employee/patient boundaries; (2) filing false reports/statements; (3) violation of agency directives regarding misuse of government equipment; and (4) lack of candor. The AJ sustained the first three charges, but found that the agency failed to prove the fourth charge. In sustaining the second charge, the AJ found that the appellant made a false statement by providing incorrect information in agency investigative reports and an EEO complaint.

Holding: The Board affirmed the initial decision but modified the analysis as to the falsification charge.

1. The Board found that the AJ did not fully and correctly analyze the intent element of the charge of filing false reports/statements because there was no analysis beyond the issue of whether the appellant provided incorrect information in a sworn statement. The Board noted that the appellant made a false statement in an agency investigative report but

there was no evidence that the appellant intended to defraud, deceive, or mislead the agency for her own personal material gain when she made the statement underlying the second specification of the falsification charge. Thus, the Board concluded that the second specification could not be sustained.

Appellant: Valerie Ann Thompson
Agency: Department of the Army
Decision Number: [2015 MSPB 31](#)
MSPB Docket No.: AT-0432-13-7724-I-2
Issuance Date: April 8, 2015
Appeal Type: Adverse Action
Action Type: Performance Based Removal

Performance Based Removal Under CCSA System Assessment of Credibility Findings

The appellant was removed from the position of Program Analyst, under the “Contribution-based Compensation and Appraisal System (CCSA),” an Office of Personnel Management (OPM) based personnel demonstration project used by some federal agencies. The intent of this system is to implement a “contribution based” appraisal system as opposed to the “performance based” systems normally contemplated under 5 U.S.C. § Chapter 43. The procedures and burdens of proof followed under the CCSA are significantly similar to a Chapter 43 performance based proceeding. The appellant was removed from her position based on unsatisfactory work performance in two critical work factors following her unsuccessful completion of a 60 day “contribution improvement period (CIP). The administrative judge reversed the removal action based on findings that the agency failed to show by substantial evidence that the appellant’s contribution under the CIP was unacceptable, or that the agency provided her a reasonable opportunity to improve.

Holding: The Board affirmed the initial decision.

1. The Board found that the agency failed to prove by substantial evidence that the appellant’s contribution during the CIP was unacceptable. Here, the Board noted that although the agency submitted voluminous documentary and testimonial evidence regarding the appellant’s performance, the agency could point to “almost no evidence” that the appellant’s performance was unacceptable. In this regard, the Board noted that much of the agency’s submissions consisted of unsworn statements and documents couched in generalities that did not specifically address the

allegations set forth in the proposed removal and thus did not reach the substantial evidence threshold of proof.

2. The Board also found that the agency failed to establish by substantial evidence that the CIP provided the appellant a reasonable opportunity to improve.

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

Petitioner: Quincy D. Hall

Respondent: Department of Transportation

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

Case Numbers: [2015-3011](#)

MSPB Docket No. DA-0752-12-0006-B-1

Issuance Date: April 8, 2015

Holding: The Court affirmed the Board's decision upholding the petitioner's removal based on its finding that the petitioner failed to complete the required training program.

Petitioner: Nicholas S. Trobovic

Respondents: General Services Administration, Merit Systems Protection Board

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

Case Numbers: [2014-3212](#), [2015-3025](#)

MSPB Docket No. NY-0353-07-0004-C-2, PH-831E-12-00241-I-3

Issuance Date: April 8, 2015

Holding: The Court consolidated the petitioner's two separate appeals and affirmed the Board's decisions in both matters. In the first matter, the Court affirmed the Board's decision denying the petitioner's petition to enforce his settlement agreement based on its finding that the petitioner materially breached the settlement agreement. In the second matter, the Court affirmed the Board's decision dismissing the petitioner's appeal for lack of jurisdiction based on its finding that OPM rescinded its denial of his retirement benefits.

Petitioner: Desiree M. Brown

Respondent: Office of Personnel Management

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

Case Numbers: [2015-3008](#)

MSPB Docket No. SF-0843-14-0470-I-1

Issuance Date: April 9, 2015

Holding: The Court affirmed the Board's decision upholding the respondent's denial of the petitioner's application for a retirement annuity based on its finding that the petitioner had withdrawn all of her retirement deductions from her retirement fund.

Petitioner: Rosalie M. Cieslinski

Respondent: Office of Personnel Management

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

Case Numbers: [2015-3030](#)

MSPB Docket No. SF-0843-14-0515-I-1

Issuance Date: April 9, 2015

Holding: The Court affirmed the Board's decision upholding the respondent's denial of the petitioner's application for survivor benefits based on its finding that the petitioner's husband was not qualified for annuity payments.