



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for April 17, 2015

BOARD DECISIONS

Appellant: Lee Ronso
Agency: Department of the Navy
Decision Number: [2015 MSPB 32](#)
MSPB Docket No.: AT-0752-13-4332-I-1
Issuance Date: April 14, 2015
Appeal Type: Adverse Action
Action Type: Furlough

Exceptions to Furlough for Cause

The appellant appealed the agency's decision to furlough him for up to eleven days from the position of Rehabilitation Program Manager. The administrative judge (AJ) affirmed, finding the agency established that the appellant met the criteria for being subject to, and not excepted from, the furlough in his position as an outpatient services medical employee, and that the government shutdown and sequestration required separate assessments of staffing needs.

Holding: The Board denied the petition for review and affirmed the initial decision as modified.

1. The Board modified the initial decision to state that the issue of whether the appellant fell within the exception to the furlough was more appropriately analyzed as one of cause, and not an issue of the efficiency of the service. The agency's burden of proof to establish "cause" for the furlough is whether the appellant met the criteria established by the

agency for being subject to, and not excepted from, the furlough.

2. The Board concluded that the AJ was correct in determining that the exception for those employees necessary to protect safety of life and property was limited to medical staff providing emergency and in-patient services. Here, the appellant did not fall within this exception because he provided out-patient services.

3. The Board agreed with the AJ that the government shutdown and sequestration each required a unique assessment of staffing needs, and therefore rejected the appellant's argument that his "exempt" status during the government shutdown meant that the agency could not prove it had cause to furlough him as a result of sequestration.

Appellant: Rachel K. Angel

Agency: Office of Personnel Management

Decision Number: [2015 MSPB 33](#)

MSPB Docket No.: CH-844E-14-0283-I-1

Issuance Date: April 15, 2015

Appeal Type: Disability Retirement

Disability Retirement

Application of Bruner Presumption

The appellant was removed from her position as a Biological Science Laboratory Technician based on a charge of inability to perform the essential functions of her position. Prior to her removal, the appellant filed an application for disability retirement based on a condition of migraine headaches. OPM denied the application and asserted: (1) that the appellant failed to establish a prima facie case of entitlement to a disability retirement annuity because she was removed from her position for inability to perform the essential functions of her position; (2) that the appellant failed to prove her qualification for a disability retirement annuity because she applied for other full-time positions, and was employed in various part-time positions after she allegedly became disabled from her position; and (3) that the medical evidence the appellant produced was insufficient to meet her burden of proving that she was unable to render useful and efficient service in her position. The AJ reversed OPM's determination, finding: (1) the appellant was not required to submit an SF-50 or a proposal and decision notice with her application as long as she met the preponderance of the evidence standard by through other relevant evidence; (2) the employing agency provided the appellant with a temporary accommodation on a part-time schedule but could

not permanently accommodate her under this schedule indefinitely; and (3) under the totality of the circumstances there was sufficient medical evidence of the appellant's disabling condition based on both objective and subjective evidence.

Holding: The Board denied the petition for review and affirmed the initial decision.

1. For disability retirement, an appellant is not required to show that her disability rendered her incapable of working in all positions. The relevant position for determining the appellant's qualification for disability retirement is the position last held before filing her application. Thus, the fact that the appellant had been able to work part-time positions with duties and responsibilities different from the position she held at the employing agency was to her application.

2. The appellant is not required to present any specific documentary evidence before the *Bruner* presumption applies. Here, the Board found that the appellant was not required to submit removal documents - the SF-50 and proposal and decision letters - in order for the burden of proof to shift to the agency. She only needed to provide preponderant relevant evidence that she was removed for inability to perform the essential functions of her position.

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

Petitioner: Jean Terrill

Respondent: Merit Systems Protection Board

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

Case Numbers: [2014-3185](#)

MSPB Docket No. DC-0752-13-0486-I-1

Issuance Date: April 10, 2015

Holding: The Court affirmed the Board's dismissal of the petitioner's removal appeal for lack of jurisdiction because the appellant was a reemployed annuitant with no Board appeal rights.

Petitioner: Robert J. Sarhan
Respondent: Department of Justice
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Number: [2014-3197](#)
MSPB Docket No. AT-0752-13-2702-I-1
Issuance Date: April 10, 2015

Holding: The Court affirmed the Board's dismissal of the petitioner's removal appeal based on a finding of *res judicata* because the Board decided the same appeal in 2007.

Petitioner: Joel R. Mueller
Respondent: Office of Personnel Management
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Number: [2014-3213](#)
MSPB Docket No. DE-831E-13-0269-I-1
Issuance Date: April 13, 2015

Holding: The Court affirmed the Board's dismissal of the petitioner's appeal as withdrawn because the petitioner was advised that the withdrawal of his appeal was an act of finality.

Petitioner: Charles Edwards
Respondent: Merit Systems Protection Board
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Number: [2015-3020](#)
MSPB Docket No. PH-0752-13-0303-I-1
Issuance Date: April 14, 2015

Holding: The Court affirmed the Board's dismissal of the petitioner's petition for review as untimely because the petitioner did not show why the new medical evidence he submitted with his petition for review warranted an outcome different from the initial decision.

Petitioner: Derrick L. Scott
Respondent: Department of Agriculture
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Number: [2015-3049](#)
MSPB Docket No. PH-0752-13-0303-I-1
Issuance Date: April 15, 2015

Holding: The Court affirmed the Board’s decision upholding the petitioner’s removal from his law enforcement position based on a charge of lack of candor by making a false statement on an agency form.

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