



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for May 8, 2015

BOARD DECISIONS

Appellant: Constance A. West
Agency: Department of Health and Human Services
Decision Number: [2015 MSPB 34](#)
MSPB Docket No.: AT-315H-15-0196-I-1
Issuance Date: April 30, 2015
Appeal Type: Adverse Action
Action Type: Probationary Termination

Consideration of Pre-appointment Conditions for Probationary Termination

The appellant appealed her termination during her probationary period from the position of Health Scientist. The termination was based on her failure to demonstrate an acceptable level of performance. The appellant alleged that she was terminated based on conditions arising prior to her appointment because a memorandum from her supervisor recommending her termination referred to concerns the supervisor had over the appellant's perceived limitations prior to the appellant's appointment. The administrative judge ("AJ") upheld the removal, holding that the agency's reference to the appellant's prior experience was only background information that put her performance-based termination in context.

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

1. The Board found that the agency's reference to its pre-appointment concerns about the appellant's prior experience was insufficient to establish that the agency terminated her based on pre-appointment conditions.

Appellant: Defense Intelligence Agency

Agency: Department of Defense

Decision Number: [2015 MSPB 35](#)

MSPB Docket Nos.: DC-0752-13-6407-I-1, DC-0752-13-6613-I-1

Consolidation Docket No.: DC-0752-14-0632-I-1

Issuance Date: May 4, 2015

Appeal Type: Adverse Action

Action Type: Furlough

Furlough Exemptions

Furlough Due Process Considerations

The appellants, Assistant General Counsels in the agency Office of General Counsel ("OGC"), appealed their furlough for no more than 11 workdays due to sequestration. The furloughs were issued only to employees in the OGC whose funding came from Military Intelligence Program ("MIP") funds. OGC employees whose funding came from National Intelligence Program ("NIP") funds were exempted from the furlough. The appellants argued that the furloughs were improperly implemented because the billets providing funding for the positions within the OGC were misaligned and did not correspond to actual duties, which led to disparate treatment and the wrong employees being furloughed. One of the appellants, Kenneth Miller, also argued that the agency committed harmful procedural error because the proposing and deciding officials were not in his supervisory chain. The AJ affirmed the furloughs, holding that the furloughs were implemented in a fair and even manner because they were based on funding sources. The AJ also found that the agency did not commit harmful procedural error.

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

1. The Board affirmed the furlough, holding that it was implemented in a fair and even manner because it was based on the funding source of the position and not meant to target the appellants for personal reasons.

2. The Board held that appellant Miller did not prove harmful procedural error because he provided only speculation as to what his proposed deciding official would have decided had the proper procedures been used.

Appellant: Paul D. Jonson

Agency: Federal Deposit Insurance Corporation

Decision Number: [2015 MSPB 36](#)

MSPB Docket No.: PH-0752-13-0236-I-1

Issuance Date: May 4, 2015

Appeal Type: Adverse Action

Action Type: Removal

**Board Authority to Review Agency Regulations
Agency Authority to Issue Regulations and Definitions**

The appellant appealed the agency's decision to remove him based on his failure to satisfy eight separate debts to agency-insured institutions. The agency found that this conduct violated the prohibition in its minimum fitness regulations against a pattern or practice of defalcation. The agency's regulations provided that employees who violated its minimum fitness regulations would be terminated. Upon initial consideration of the appeal, the AJ certified multiple rulings regarding the agency's authority to issue its minimum fitness regulations for interlocutory review by the Board. The Board, in an Opinion and Order, heretofore referred to as *Jonson I*, 121 M.S.P.R. 56 (2014), found that the agency improperly issued its minimum fitness regulations because it did not first obtain concurrence with the regulations from the Office of Government Ethics ("OGE") as required by statute. Accordingly, the Board reversed the appellant's removal and remanded the appeal for further adjudication of the appellant's prohibited personnel practice claims. Upon remand, the appellant withdrew his prohibited personnel practice claims, and the AJ issued an initial decision adopting the Board's reversal of the appellant's removal. The agency then filed a petition for review, and submitted with it a declaration from OGE, provided to the agency after the issuance of the Board's interlocutory ruling, stating that OGE concurrence was not required prior to the promulgation of the agency's minimum fitness regulations.

Holding: The Board reversed its prior ruling from *Jonson I* and addressed additional rulings certified for interlocutory review by the AJ.

1. The Board has authority under its appellate jurisdiction to review whether an agency other than the Office of Personnel Management (“OPM”) has properly promulgated a regulation when determining whether to sustain an adverse action.

2. The Board’s statement from *Jonson I* that the agency’s minimum fitness regulations were invalidly promulgated did not mean that the Board was invalidating the minimum fitness regulations.

3. The Board deferred to OGE’s determination that its concurrence was not required by statute for the agency to promulgate its minimum fitness regulations, and therefore reversed its ruling from *Jonson I* stating that the regulations were invalidly issued.

4. The Board held that the agency was allowed to use its own definition of “defalcation,” which was broader than the definition used in the bankruptcy code.

5. The Board stated that, pursuant to the agency’s regulations, removal was the mandatory penalty for a pattern or practice of defalcation.

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

Petitioner: Dora L. Williams

Respondent: Office of Personnel Management

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

Case Numbers: [2015-3021](#)

MSPB Docket No. SF-0831-14-0631-I-1

Issuance Date: May 6, 2015

Holding: The Court affirmed the Board’s decision finding that the respondent properly denied the petitioner survivor benefits because the petitioner’s deceased spouse failed to elect a survivor benefit for the petitioner within two years of their marriage.

Petitioner: Rodney Haith
Respondent: Department of Veterans Affairs
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Numbers: [2014-3219](#)
MSPB Docket No. NY-0752-13-0239-C-1
Issuance Date: May 6, 2015

Holding: The Court affirmed the Board's decision finding that the respondent complied with its settlement agreement with the petitioner because the respondent indicated in the petitioner's SF-50 that he was separated for medical disability.

Petitioner: Larry L. Price
Respondent: Department of Housing and Urban Development
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Numbers: [2015-3014](#)
MSPB Docket No. CH-4324-12-0740-I-1
Issuance Date: May 7, 2015

Holding: The Court affirmed the Board's decision finding that the respondent's failure to select the petitioner for either of two vacant positions did not violate VEOA or USERRA because the respondent's announcement process was authorized by VEOA, and because the petitioner did not show under USERRA that his military service was a substantial or motivating factor in the decision to not hire him.

Petitioner: Daniel Thibeault
Respondent: Merit Systems Protection Board
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Numbers: [2014-3200](#)
MSPB Docket No. SF-0752-13-0646-I-1
Issuance Date: May 7, 2015

Holding: The Court affirmed the Board's decision dismissing the petitioner's appeal for lack of jurisdiction based on its finding that the petitioner voluntarily retired.