



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for June 12, 2015

BOARD DECISIONS

Appellant: Lorena Mathis
Agency: Department of State
Decision Number: [2015 MSPB 39](#)
MSPB Docket No.: AT-0432-14-0867-I-1
Issuance Date: June 4, 2015
Appeal Type: Adverse Action
Action Type: Removal

Ward/Stone Ex Parte Communication

The appellant was removed from the position of GS-11 Passport Specialist based on unacceptable performance. The appellant asserted that the agency did not consider certain mitigating circumstances and alleged affirmative defenses of harmful procedural error, disability discrimination, and due process violations based on alleged *ex parte* communication that took place between the deciding official and a human resources (HR) employee. The administrative judge (AJ) affirmed the removal, concluding that the appellant failed to prove a harmful procedural error or a due process violation.

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

1. The deciding official's *ex parte* communication with the HR representative was not a violation of due process because it merely clarified or confirmed whether the allegations raised in the appellant's response to the proposed removal were supported by the facts, and did not

introduce new information.

2. The Board held that the AJ erred by conducting a harmful error analysis rather than a due process violation analysis when reviewing the *ex parte* communication issue.

Appellant: Mike A. Saiz

Agency: Department of the Navy

Decision Number: [2015 MSPB 40](#)

MSPB Docket No.: SF-0752-14-0054-I-1

Issuance Date: June 8, 2015

Appeal Type: Adverse Action

Action Type: Removal

Deference to Agency Penalty Determination

The appellant was removed from the position of Painting Worker based on a charge of possessing and using a controlled substance aboard a military installation. The AJ sustained the charged misconduct, but concluded that the penalty was not entitled to deference because the deciding official incorrectly assumed that the agency had a zero tolerance drug policy when it did not have one, only considered removal, and gave a cursory evaluation of other relevant *Douglas* factors. The AJ concluded that the maximum reasonable penalty under the circumstances was a 60 day suspension.

Holding: The Board granted the agency's petition for review, reversed the initial decision, and sustained the appellant's removal.

1. The AJ erred in finding that the deciding official applied a zero tolerance policy when deciding to remove the appellant. The record showed that the deciding official weighed the *Douglas* factors in making his decision, and therefore, his penalty determination was entitled to deference.

2. The Board concluded under its own independent analysis that, even if the agency's penalty determination was not entitled to deference, removal was still the appropriate penalty because the seriousness of the appellant's intentional drug-related misconduct outweighed the relevant mitigating factors.

Appellant: Barbara R. King
Agency: Department of the Air Force
Decision Number: [2015 MSPB 41](#)
MSPB Docket No.: DA-0752-09-0604-P-1
Issuance Date: June 10, 2015
Appeal Type: Adverse Action
Action Type: Reduction in Pay and Grade

Categories of Consequential Damage Awards Under WPEA

The appellant filed a motion seeking an award of compensatory damages and consequential damages under the Whistleblower Protection Enhancement Act (WPEA) after the administrative judge issued an initial decision reversing the appellant's reduction in grade and pay based on a finding that the appellant proved her affirmative defense of whistleblower reprisal. The Board subsequently held in an interlocutory appeal that the appellant was not eligible for compensatory damages under the WPEA, and the appeal was remanded to the administrative judge for further consideration of the appellant's request for consequential damages. At a damages hearing, the appellant testified that because of the reduction in pay and grade, she was unable to meet her financial obligations, and was thus forced to seek other employment. The appellant was eventually selected for a position with the agency in Los Angeles, California. As a result, she sold her house in Texas through a short sale and entered into a compromise loan with the Department of Veterans Affairs (VA) for the outstanding balance of \$64,949.00 on her VA mortgage. As part of her compromise loan, the VA absorbed the outstanding balance. The appellant was not required to pay the balance of the compromise loan back to the VA, but in the event that she ever sought another loan from the VA, the appellant would be required to pay the balance of original compromise loan back. In an addendum initial decision, the AJ awarded the appellant consequential damages for her losses related to her moving expenses and job search expenses. The AJ also awarded her \$64,949.00 for the amount of the compromise loan on her VA mortgage.

Holding: The Board granted the agency's petition for review, and affirmed in part and reversed in part the administrative judge's consequential damages award.

1. Consequential damage awards under the WPEA are limited to out of pocket losses, and do not include nonpecuniary losses.
2. The types of consequential damage awards allowed under the WPEA are

limited to the specific items listed in the statute, i.e., back pay and related benefits, medical costs incurred, and travel expenses.

3. The Board reversed the appellant's award of \$64,949.00 related to her compromised loan, because the compromise loan amount from the short sale of the appellant's house was not a recoverable type of consequential damage under the WPEA.

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

Petitioner: Andrew H. Bernard

Respondent: Department of Agriculture

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

Case Numbers: [2014-3083](#)

MSPB Docket No. DE-0752-11-0222-C-1

Issuance Date: June 11, 2015

Right to Discovery in Compliance Proceedings

The petitioner entered into a settlement agreement following his removal from the position of Supervisory Firefighter. The petitioner subsequently filed a petition for enforcement with the Board alleging breach of the settlement agreement, bad faith, and retaliation by the respondent. During the initial proceedings, the petitioner made multiple requests to the AJ to engage in discovery regarding the allegations of bad faith and retaliation, but the AJ failed to ever specifically respond or rule on these requests, and eventually denied the petition for enforcement. The petitioner petitioned for review of the AJ's decision to the Board, arguing that the AJ improperly denied his requests to engage in discovery. The Board held that parties in enforcement proceedings generally do not need to request permission for discovery and that the Board only becomes involved in discovery matters if a party files a motion to compel. Because the petitioner did not file a motion to compel, the Board concluded that the AJ did not err in ignoring the petitioner's requests.

Holding: The Court vacated the Board's decision and remanded the matter for further proceedings.

1. The Court held that neither the Board's discovery regulations, nor its precedent interpreting its discovery regulations, provided a clear guarantee

or guidance to the appellant that he had the right to proceed to discovery in an enforcement proceeding. Further, earlier Board precedent suggested that in an enforcement proceeding, an appellant may not be entitled to discovery to establish his allegations, although the AJ has discretion to grant discovery if it is necessary to resolve disputed facts.

2. The Court also found that the Board abused its discretion by holding that the AJ was not obligated to respond to the petitioner's requests to engage in discovery. The Court stated that the Board's pre-adjudication orders failed to provide clear and meaningful notice of an appellant's right to discovery and the AJ otherwise had no basis for disregarding the requests.

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

Petitioner: Cambra L. Lucas

Respondent: Office of Personnel Management

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

Case Numbers: [2014-3158](#)

MSPB Docket No. SF-0845-13-0413-I-1

Issuance Date: June 5, 2015

Holding: The Court vacated and remanded the Board's decision affirming that she was not entitled to a waiver of her repayment obligation arising out of an overpayment of benefits because the Board failed to consider new and material evidence in denying the petitioner's petition.

Petitioner: Milos Puaca

Respondent: Department of Veterans Affairs

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

Case Numbers: [2014-3173](#)

MSPB Docket No. CH-0432-12-0595-I-1

Issuance Date: June 8, 2015

Holding: The Court affirmed the Board's decision sustaining the petitioner's removal because the petitioner failed to maintain a satisfactory performance quality rating.

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