



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for September 4, 2015

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

Petitioner: Mark Shapiro

Respondent: Social Security Administration

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

Case Number: [2014-3113](#)

MSPB Docket No. CB-7521-11-0024-T-1

Issuance Date: September 1, 2015

Removal of Administrative Law Judge Statistical Evidence to Support Good Cause for Removal

The respondent filed a complaint with the MSPB seeking to remove the petitioner from the position of administrative law judge (ALJ) based on charges of unacceptable performance and neglect of duty. In support of its petition, the respondent presented documentary evidence reflecting the statistics of the number of case dispositions for all ALJs in the petitioner's office and across the region. This respondent also presented testimony of other ALJs who reviewed the petitioner's work and concluded that his assigned cases were no different than the typical workload for an agency ALJ. In a recommended decision, the presiding ALJ found that the respondent proved its charge of neglect of duty, and that this charge constituted good cause for removal. The Board affirmed the presiding ALJ's finding of good cause for removal based on a comparison of the number of cases the petitioner either scheduled for hearing or disposed of with cases scheduled or disposed of by his peers.

Holding: The Court affirmed.

1. The Court clarified that a complaint seeking removal of an ALJ for “good cause” pursuant to 5 U.S.C. § 7521 requires only that the agency describe with particularity the facts that support the proposed agency action. It is not bound by the “efficiency of the service” standard of requirement of 5 U.S.C. § 7512, which imposes the more stringent requirements that the agency to issue a notice stating the specific reasons for the proposed action and that the agency may only consider the reasons specified in the notice of the proposed action.

2. The Court declined to follow the Board’s precedent in *Social Security Administration v. Goodman*, 19 M.S.P.R. 321, 331 (1984) and *Social Security Administration v. Brennen*, 19 M.S.P.R. 335 (1984) to the extent that it requires some type of heightened evidentiary proof before an agency can rely on comparative production statistics to prove good cause for removal.

3. The court found that removal of an ALJ for deficiencies in productivity can be based on comparative statistics as a threshold showing of good cause for removal. To the extent that other factors may undermine the reliability of the comparative statistics, the Board can weigh those factors in making its ultimate determination of whether the charge of poor case production is supported by preponderant evidence that an ALJ’s production is substantially below the norm.

Petitioner: Beth Cobert, Acting Director, Office of Personnel Management

Respondents: Mary A. Miller and Merit Systems Protection Board

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

Case Number: [2014-3101](#)

MSPB Docket No. SF-0752-11-0766-R-2

Issuance Date: September 2, 2015

Removal Based on Refusal to Accept Directed Reassignment

The respondent, Mary Miller, served as a GS-13 Park Superintendent for the National Park Service (“agency”), in Sitka, Alaska. In 2010, the agency created a GS-13 Alaska Native Affairs Liaison position in Anchorage, Alaska. The agency issued Ms. Miller a directed reassignment to the position, stating that she had ten calendar days to consider the reassignment. The agency further

stated that if Ms. Miller did not accept the reassignment, she would be removed. After considering the offer, Ms. Miller ultimately rejected the reassignment, citing the geographic hardship that would be caused by the reassignment. The agency removed Ms. Miller, and in doing so stated that Ms. Miller was uniquely qualified to fill the newly created position, and that her refusal to accept the reassignment undermined the agency's ability to manage its workforce.

Ms. Miller appealed her removal to the Board, alleging that she was not qualified for the position, and that the agency's decision to reassign her was not bona fide because the new position was created for the sole purpose of reassigning her from her old position without issuing an adverse action. At the hearing, the agency's witnesses testified that Ms. Miller's performance in her superintendent position showed that she was the only person who could fill the new position. Ms. Miller testified that she was not qualified for the position, and also produced a personnel management consultant who provided similar testimony. After the hearing, the administrative judge ("AJ") upheld the removal. In the initial decision, the AJ applied the Board's test from *Ketterer v. Department of Agriculture*, 2 M.S.P.R. 294 (1980), which used a two-step burden shifting analysis to determine the validity of a removal due to a refusal to accept a management-directed reassignment. The initial decision stated that the AJ found credible the agency witnesses' testimony regarding the need for the position and Ms. Miller's qualifications for the position, and found not credible Ms. Miller's testimony rebutting the agency's claims.

Ms. Miller petitioned for review of the initial decision to the Board, and the Board vacated and reversed the initial decision. In rendering its decision, the Board issued three opinions. In the first opinion, the Board stated that it was abandoning its prior two-step test from *Ketterer* in favor of a single efficiency of the service standard that would analyze together both the reason for the reassignment and the adverse action. Under this new test, the Board held that the reassignment and removal did not promote the efficiency of the service, and therefore reversed the removal. Shortly thereafter, the Board vacated this decision on its own motion and issued a second opinion. In the second opinion, the Board reaffirmed its decision to abandon the *Ketterer* test, and stated that the evidence did not support a finding that Ms. Miller's reassignment was due to bona fide management considerations or that her removal promoted the efficiency of the service. The Office of Personnel Management then petitioned the Board to reconsider that decision, after which the Board issued a third opinion affirming its prior decision. In the third decision, the Board, citing to *Tunik v. Merit Systems Protection Board*, 407 F.3d 1326 (Fed. Cir. 2005), stated that it was not required to follow *Ketterer*, even though it had been adopted by the Federal Circuit in *Frey v. Department*

of Labor, 359 F.3d 1355 (Fed. Cir. 2004), because in the Board's view, the Federal Circuit had only endorsed *Ketterer* based on deference to the Board. The Board further modified its prior holding to state that the overall emphasis of its new test was on the agency's failure to show a bona fide reason for the reassignment, and that the agency was not required to show that a geographic reassignment was necessary. The Board also modified its prior holding by stating that the agency had failed to show any rational basis for requiring Ms. Miller to accept the reassignment.

Holding: The Court reversed the Board's decision, remanded the case to the Board, and instructed the Board to instate the Initial Decision as the final decision of the Board.

1. The Court held that the Board's two-step test from *Ketterer* became the "law of the circuit" when it was adopted by the Court in *Frey*. As a result, the Board was bound to follow this approach until or unless it was reversed by the Court *en banc* or by the Supreme Court.
2. Under the *Ketterer* test, the agency bears the initial burden of proving that the agency's decision to reassign the employee was a bona fide decision based on legitimate management considerations. If the agency meets this burden, the burden of producing rebuttal evidence shifts to the employee, but the burden of persuasion remains with the agency.
3. Applying the *Ketterer* test, the Court stated that, based on the AJ's unchallenged findings of fact and credibility determinations, substantial evidence in the record supported the AJ's holding that the agency established that it had legitimate management reasons for the reassignment, and that Ms. Miller failed to rebut the agency's case. The Court further stated that the Board's conclusion that credible evidence cast doubt on the agency's motivation was unsupported by the record.
4. The Court held that Ms. Miller's refusal to accept the directed reassignment bore directly on the efficiency of the service, and thus removal was an appropriate penalty.
5. In a concurring opinion, Judge Wallach stated that he concurred in the result, but believed that the record showed that the agency's actions were entirely pretextual and in bad faith, and that its conduct was reprehensible.

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

Petitioner: Melvin Eugene Gibbs

Respondent: Merit Systems Protection Board

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

Case Number: [2014-3122](#)

MSPB Docket No. DC-1221-14-0841-I-1

Issuance Date: August 31, 2015

Holding: The court affirmed the Board's final order dismissing the appellant's IRA appeal pursuant to the doctrine of laches because the appellant's 27-year delay in bringing the action was unreasonable and unexcused and the delay materially prejudiced the agency to defend against the allegations.

- **The MSPB did not issue any precedential decisions this week**

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