



## U.S. MERIT SYSTEMS PROTECTION BOARD

### Case Report for October 2, 2015

#### BOARD DECISIONS

**Appellants:** Rebstock Consolidation  
**Agency:** Department of Homeland Security  
**Decision Number:** [2015 MSPB 53](#)  
**MSPB Docket No.:** DA-1221-15-0060-W-1  
**Issuance Date:** September 29, 2015  
**Appeal Type:** Individual Right of Action  
**Action Type:** Retaliation

**WPEA Retroactivity**  
**Threat of Disciplinary Action for Refusal to Obey Order**  
**New Evidence**

The appellants are four Immigration and Customs Enforcement law enforcement officers who filed a collective complaint with the Office of Special Counsel (“OSC”) alleging that they were threatened with disciplinary action if they refused to follow several agency memoranda that provided guidance on the exercise of prosecutorial discretion in enforcing Federal immigration law. The appellants then filed separate individual Right of Action (“IRA”) appeals which were subsequently consolidated by the AJ, alleging that the agency violated 5 U.S.C. § 2302(b)(9)(D) by threatening to take disciplinary action against an employee for refusal to obey an order that would require that employee to violate the law. The AJ dismissed the consolidated appeals for lack of jurisdiction based on a finding that the events giving rise to the consolidated appeal occurred prior to the effective date of the Whistleblower Protection Enhancement Protection Act (“WPEA”), which expanded MSPB jurisdiction to include IRA appeals alleging violations of 5 U.S.C. §

2302(b)(9)(D). The AJ further found that even if some of the acts at issue occurred after the effective date of the WPEA, the appellants failed to make a nonfrivolous allegation of whistleblower retaliation.

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

1. The Board declined to give retroactive effect to the WPEA provision expanding jurisdiction over violations of 5 U.S.C. § 2302(b)(9)(D), because doing so would increase a party's liability for past conduct.
2. To the extent that the appellants were challenging agency actions occurring on or after the WPEA's effective date, the appellants' generalized assertions and fears of discipline without reference to any specific matter failed to constitute a nonfrivolous allegation that the agency threatened to take a personnel action.
3. The appellant's new evidence in the form of a nationally televised Presidential address and the testimony of an agency official before Congress did not affect the outcome because the Board may only consider the charges of wrongdoing that the appellant presented before OSC, and may not consider any subsequent recharacterization of those charges put forth before the Board.

**Appellant:** Wendell Terry Rogers  
**Agency:** Department of Defense  
**Decision Number:** [2015 MSPB 54](#)  
**MSPB Docket No.:** AT-0752-14-0682-I-1  
**Issuance Date:** September 30, 2015  
**Appeal Type:** Adverse Action  
**Action Type:** Indefinite Suspension

### **Indefinite Suspension Access to Classified Information Harmful Procedural Error**

The appellant was indefinitely suspended from his position as an Operations Research Analyst based on the suspension of his access to classified information pending final adjudication of his security clearance. The AJ reversed the indefinite suspension action based on a finding of harmful procedural error because the agency failed to accord the appellant certain "unfavorable administrative action" procedures required by internal agency regulations.

**Holding:** The Board granted the agency’s petition for review, reversed the initial decision, and sustained the agency’s indefinite suspension action.

1. The AJ erred in reversing the action based on harmful procedural error because the agency’s internal procedures only required it to afford an employee “unfavorable administrative action” procedures when a security clearance was actually revoked. Here, the appellant’s security clearance was only indefinitely suspended pending a final adjudication.

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

**Petitioner:** Gregory Einboden

**Respondent:** Department of the Navy

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

**Case Number:** [2014-3117](#)

**MSPB Docket No.** DC-0752-13-0959-I-1

**Issuance Date:** October 1, 2015

### **Furlough Efficiency of the Service Standard**

The petitioner was a civilian employee at the Naval Surface Warfare Center Dahlgren Division (“Dahlgren”). Dahlgren employees were working capital fund (“WCF”) employees whose salary was paid out of fees earned by Dahlgren, not appropriations. Pursuant to sequestration, the petitioner was furloughed for no more than 11 days. The petitioner appealed his furlough to the MSPB, claiming that the agency should not have furloughed him because his salary was paid out of WCF, and that no funds from WCF were subject to the sequestration. The AJ upheld the furlough, finding that it promoted the efficiency of the service because it was a reasonable management solution to the financial restrictions placed on the agency. The petitioner appealed the decision to the Board, and the Board affirmed in a split vote decision, holding that it was reasonable for the Department of Defense to consider its budget situation holistically, rather than to isolate each individual military department’s situation within the Department of the Navy.

**Holding:** The Court affirmed.

- 1. A decision to issue a furlough will promote the efficiency of the service if it is a reasonable management solution to the financial restrictions placed on an agency, and if the agency determines which employees to furlough in a fair and even manner.**
- 2. An agency is not required to show actual re-programming of the funds saved by the furlough to meet the efficiency of the service standard.**
- 3. The Department of the Navy was not obligated to implement the Department of Defense directive regarding sequestration in the same manner as other Department of Defense subagencies.**

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