U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for March 4, 2016

Note: These summaries are descriptions prepared by individual MSPB employees. They do not represent official summaries approved by the Board itself, and are not intended to provide legal counsel or to be cited as legal authority. Instead, they are provided only to inform and help the public locate Board precedents.

BOARD DECISIONS

Appellant: Cedric D. Clay
Agency: Department of the Army
Decision Number: 2016 MSPB 12
Docket Number: SF-0752-15-0456-I-1
Issuance Date: March 2, 2016
Appeal Type: Adverse Action by Agency
Action Type: Removal

The agency removed the appellant based upon charges of failure to follow instructions, inappropriate contact with a coworker, and use of offensive language in the workplace. The appellant appealed his removal, raising affirmative defenses of race discrimination and retaliation for filing a prior Board appeal. The administrative judge affirmed the removal.

Holding: The Board affirmed the administrative judge's findings concerning proof of the charges and the race discrimination affirmative defense, but remanded for further adjudication of the reprisal affirmative defense.

1. **After the administrative judge issued the initial decision, the Board issued *Savage v. Department of the Army*, 122 M.S.P.R. 612 (2015), clarifying the proper standard for**

cases involving discrimination or retaliation allegations under 42 U.S.C. § 2000e-16. Nevertheless, the Board determined that the result in this case was the same because the appellant presented no evidence that the agency took any actions in the appeal based upon his race.

2. **The appellant's reprisal affirmative defense was based upon a claim that the agency removed him for filing a prior Board appeal, an appeal that included a whistleblower reprisal allegation. Accordingly, his reprisal claim fell under 5 U.S.C. § 2302(b)(9)(A)(i), which makes it a prohibited personnel practice to "take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation, with regard to remedying a violation of [§ 2302(b)(8)]. Therefore, the appellant's retaliation claim should have been analyzed under the burden-shifting scheme set forth in 5 U.S.C. § 1221(e), not the general reprisal standard the administrative judge used.**

Appellant: Darryl M. Lewis
Agency: Department of Defense
Decision Number: 2016 MSPB 13
Docket Number: DC-1221-15-0676-W-1
Issuance Date: March 3, 2016
Appeal Type: Individual Right of Action (IRA)
Action Type: IRA "1221" Non-appealable Action

After the agency denied his requests for extended LWOP or permission to telework from Germany for a year, the appellant stopped reporting to work. Subsequently, the agency removed him on charges of AWOL and failure to follow an order. The appellant filed a whistleblower complaint with OSC. After OSC closed its investigation, the appellant filed an IRA with the Board. The administrative judge dismissed the IRA for lack of Board jurisdiction.

Holdings: The Board granted the appellant's petition for review, vacated the initial decision, and remanded for a hearing on the merits.

1. **The administrative judge rejected the appellant's whistleblowing claims based on the contents of OSC close-out and final determination letters, finding that most of his**

allegations had not been exhausted. However, an appellant may submit his own letters to OSC to demonstrate the scope of complaints he exhausted with that agency. In this case, the appellant's letters to OSC detailed more disclosures than that which was included in OSC's letters.

2. **Two of the appellant's disclosures concerned the agency failing to prevent two individuals from unauthorized access to sensitive or classified information. For those disclosures, the Board found that the appellant could have reasonably believed that he was disclosing a violation of law, rule, or regulation pertaining to physical and information security. In addition, although the appellant could not provide specific dates of his disclosures due to his lacking access to his agency email account, he alleged that agency officials told him that his disclosures were "at the very least a contributing factor" in the agency's denial of his request for LWOP, which ultimately led to his failing to report to work. Accordingly, the appellant made nonfrivolous allegations and met his jurisdictional burden.**

Appellant: NV24-KEYPORT2 et al.
Agency: Department of the Navy
Decision Number: 2016 MSPB 14
Docket Number: SF-0752-13-3066-I-1
Issuance Date: March 3, 2016
Appeal Type: Adverse Action by Agency
Action Type: Furlough (30 Days Or Less)

The agency furloughed a number of similarly situated employees for 6 days. The administrative judge held one hearing and issued a decision for each consolidated group of employees, affirming the furloughs.

Holdings: The Board affirmed the initial decisions as modified to supplement the administrative judge's conclusions.

1. **An agency meets its burden of proving that a furlough promotes the efficiency of the service by showing, in general, that the furlough was a reasonable management solution to the financial restrictions placed on it and that the agency applied its determination as to which employees to furlough in a fair and even manner.**

2. **The appellants alleged that their component, the NUWC Division Keyport, was a Major Range and Test Facility Base (MRTFB) governed by 10 U.S.C. § 129, a provision that prohibits certain civilian personnel management constraints for some DOD employees. The Board found that there was no evidence that the furloughs of the appellants constituted an improper constraint or limitation on the management of civilian personnel in violation of § 129.**

3. **Notwithstanding assertions that the NUWC Division Keyport had adequate funding to avoid the furloughs, the Board found that it was reasonable for DOD to consider its budget situation holistically. Further, although an agency's decision to award certain employees overtime may be relevant to whether the agency applied the furlough uniformly and consistently, the Board found that the agency's use of overtime in this case was fair and even.**

COURT DECISIONS

PRECEDENTIAL:

Petitioner: John Parkinson
Respondent: Department of Justice
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Number: 2015-3066
MSPB Docket No. No. SF-0752-13-0032-I-2
Issuance Date: February 29, 2016

The appellant was a Special Agent for the FBI at its Sacramento field office. His duties included managing the build-out of a leased facility. In February 2008, he made whistleblower-eligible disclosures to an Assistant Special Agency in Charge, Mr. Cox. Just a few months later, Mr. Cox and the appellant's immediate supervisor issued the appellant a low performance rating, removed him as group leader, and reassigned him to another field office. Believing these acts to be whistleblower reprisal, the appellant sent a letter to Senator Charles Grassley, who forwarded the allegations to DOJ's OIG. Separately, Mr. Cox and the Sacramento field office submitted a referral to OIG concerning possible misuse of funds related to the build-out the

appellant had previously managed.

At the conclusion of OIG's investigation concerning the buildout, the FBI's Office of Professional Responsibility (OPR) issued a report and proposed the appellant's removal. The OPR report concluded that the evidence substantiated (1) theft (FBI Offense Code 4.5), (2) obstruction of the OPR process (FBI Offense Code 2.11), (3) unprofessional conduct while on duty (FBI Offense Code 5.22), and lack of candor (FBI Offense Code 2.6). OPR dismissed the appellant and he filed a Board appeal.

The Board did not sustain the theft or unprofessional conduct charge, but did sustain the obstruction charge, along with the lack of candor charge. The Board affirmed the administrative judge's dismissal of the appellant's whistleblower and USERRA affirmative defenses, based upon Board precedent that FBI employees are not entitled to such affirmative defenses under 5 U.S.C. § 7701(c)(2)(B) due to the fact that the FBI is excluded from the definition of agency in 5 U.S.C. § 2302. After reconsidering the *Douglas* factors, the Board approved the penalty of removal.

Holding: The Court found that the record supported sustaining only the obstruction of the OPR process charge. In addition, the Court found that the appellant was entitled to bring an affirmative defense of whistleblower reprisal. Accordingly, the Court remanded for consideration of the whistleblower retaliation affirmative defense and the appropriate penalty, if any, for the one sustained charge.

1. **FBI Offense Code 2.11 prohibits taking any action to influence, intimidate, impede or otherwise obstruct the OPR process. Substantial evidence supported the Board's determination that the appellant obstructed the OPR process by meeting with the lessor of the build-out property, a potential witness to the misuse of funds investigation, to get their stories straight and commit that story to writing.**

2. **The appellant was charged with lack of candor in violation of FBI Offense Code 2.6. That offense code provides for dismissal when an employee "knowingly provid[es] false information in a verbal or written statement made under oath," with "false information" defined as including false statements, misrepresentations, the failure to be fully forthright, or the concealment or omission of a material fact/information. Although lack of candor is distinct from falsification in that it does not require a showing of an "intent to deceive," it nevertheless requires that information is conveyed**

"knowing" that such information is incomplete.

3. **One of the sustained specifications underlying the lack of candor charge stemmed from a statement to OIG in which the appellant distinguished between his "asking" and "telling/directing" the lessor of the build-out property not to provide the FBI with the documentation it had requested. Although the Board found that the appellant appeared to draw the distinction in order to suggest that he had little control over what the lessor did and minimize his culpability, the Court found that there was not substantial evidence that any failure to be forthright was done "knowingly." The appellant's subsequent statement that he had "directed" the lessor to provide the documents to OIG rather than the FBI was not enough to permit an inference that his earlier characterization was knowingly deceptive.**

4. **The other sustained specification underlying the lack of candor charge stemmed from the appellant's testimony that "nothing was done with any of the tenant improvement funds that was not approved by [the lessor]." The Court found that the Board erred by determining that that the statement inaccurately provided an appearance of pre-approval rather than after-the-fact ratifications. The Court noted that the context of the question was whether the lessor approved the expenses, not when he did so. Moreover, the Court found that the word "approved" is a generic way of saying "pre-approved or ratified," making the appellant's statement wholly accurate.**

5. **Although Congress created an FBI-specific enforcement mechanism for whistleblower retaliation in § 2303, that does not preclude a preference-eligible FBI agent with the right to appeal his removal to the Board under § 7513(d) and § 7701 from bringing an affirmative defense of whistleblower retaliation. (overruling the Board's contrary ruling, first set out in *Van Lancker v. Department of Justice*, 119 M.S.P.R. 514 (2013)).**

6. **In contrast to the whistleblower retaliation affirmative defense, the USERRA violation claims manifest a clear Congressional will to withhold all judicial review of USERRA violations for FBI agents. The appellant cited 38 U.S.C. § 4315 in presenting his USERRA affirmative defense, but that section wholly excludes the FBI's determination of reemployability from judicial review. Therefore, a substantive determination of reemployability was excluded from judicial review, even in the context of an affirmative defense.**

NONPRECEDENTIAL:

Petitioner: John Bazan
Respondent: Department of the Army
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Number: 2015-3105
MSPB Docket No. No. SF-3330-13-4195-I-1
Issuance Date: February 26, 2016

Holding: The Court affirmed the Board's decision, denying the appellant's VEOA claim, which stemmed from an allegation that the agency violated his veterans' preference rights by selecting another applicant for an excepted service position.

Petitioner: Vernice James
Respondent: Merit Systems Protection Board
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Number: 2015-3120
MSPB Docket No. No. AT-3443-14-0870-I-1
Issuance Date: February 29, 2016

Holding: The Court affirmed the Board's decision, which dismissed the appellant's appeal of her non-selection. To the extent that the appellant alleged that her non-selection was retaliation for whistleblowing, her appeal was premature.