



U.S. Merit Systems Protection Board

CASE REPORT

DATE:

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: Donald Kenneth Goodin

Agency: Department of the Army

Decision Number: [2016 MSPB 18](#)

Docket Number: CH-3330-14-0733-I-1

Issuance Date: May 2, 2016

Appeal Type: Veterans Employment Opportunities Act (VEOA)

Veterans' Rights – VEOA

The appellant petitioned for review of an initial decision that denied his request for corrective action in this VEOA appeal. The appellant, a 10-point preference-eligible veteran, applied for a Clinical Social Worker position. The vacancy announcement provided that, “[i]f selected, official college or university transcripts must be submitted,” and that a selectee “must provide documents for credentialing.” The agency selected the appellant for the position, made a tentative job offer to him, and sent him a letter informing him to provide documentation for the credentialing process. The agency then determined that the appellant did not meet the credentialing requirements “to work in the fully independent role that is expected,” and had not worked in the field “for the last five years and has not done the type of work that was advertised (performing diagnostic assessments or therapy as a primary therapist) for this position in 16 years.” The agency filed a passover request with OPM, which OPM denied, informing the agency that it could challenge the negative passover decision or consider/select the preference-eligible appellant for the job. During its further consideration of the appellant for the position, the agency notified him that he had failed to provide the required documentation for the credentialing process pursuant to Army regulations. The appellant did not provide the required documentation, and the agency ultimately withdrew the tentative job offer due to his failure to provide a complete package for credentialing.

On appeal to the Board, the administrative judge denied corrective action, finding that the appellant failed to prove that the agency violated a statute or regulation related to veterans' preference. On review, the appellant relied on the fact that OPM considered the same information that he submitted with his application to find that he possessed the specialized experience required for the Social Worker position.

Holding: The Board denied the appellant's petition for review and affirmed the initial decision:

- 1. OPM's passover decision did not preclude the agency from requiring the appellant to provide the mandated documentation for the credentialing process pursuant to Army regulations because, as set forth in the vacancy announcement, it was a requirement imposed on all selectees for the Clinical Social Worker position.**
- 2. Having met its obligation to offer the appellant the position he sought, the Board discerned no reason that the agency could not subject him to the same preappointment process as other employees.**

Appellant: David A. Fagnoli
Agency: Department of Commerce
Decision Number: [2016 MSPB 19](#)
Docket Number: DC-0752-15-0266-I-1
Issuance Date: May 6, 2016
Appeal Type: Adverse Action by Agency
Action Type: Removal

Adverse Action Charges

- **Lack of Candor**

The appellant petitioned for review of an initial decision that sustained his removal. The appellant was a Criminal Investigator who had previously been employed by the Department of Labor (DOL). His removal was proposed based on three charges: (1) Unauthorized Possession of Equipment (a firearm acquired while employed by DOL); (2) Conduct Unbecoming a Law Enforcement Officer (4 specifications); and (3) Lack of Candor (6 specifications). The appellant's second-level supervisor issued a decision letter sustaining the removal, finding that the evidence supported all three charges, but only 3 of the 6 specifications of Lack of Candor. On appeal to the Board, the administrative judge sustained all three charges, but did not sustain one of the specifications of the conduct unbecoming charge. On review, the appellant contested all of the judge's findings except for one specification of the conduct unbecoming charge.

Holdings: The Board granted the appellant's petition for review and remanded the appeal to the regional office for further adjudication of the lack of candor charge:

- 1. Although the judge did not correctly construe the charge of Unauthorized Possession of Equipment, the charge is nonetheless supported by preponderant evidence, which showed that the firearm in question was provided by the manufacturer to the appellant in his official capacity with the Department of**

Labor, and he was not entitled to keep the firearm when he left DOL to take a job with the Department of Commerce.

2. The judge correctly sustained specification 2 of the conduct unbecoming charge (improperly carrying a firearm in a government-owned vehicle), but not specification 3 (improperly storing a firearm in an unoccupied government-owned vehicle).

3. The lack of candor charge must be remanded for further adjudication. The Board clarified that a lack of candor charge requires proof of two elements: (1) that the employee gave incorrect or incomplete information; and (2) that he did so knowingly. Here, the judge made no finding whether the appellant knowingly gave incorrect or incomplete information. That matter is in dispute, and the judge did not make the credibility determinations needed to resolve.

COURT DECISIONS

Petitioner: Matt Cahill

Respondent: Merit Systems Protection Board

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

Docket Number: [2015-3152](#)

Issuance Date: May 10, 2016

Whistleblower Protection Act – Contributing Factor

This was an appeal from a Board decision that dismissed an IRA appeal for lack of jurisdiction on the ground that Cahill failed to make a nonfrivolous allegation that his whistleblowing disclosures were a contributing factor in the personnel actions he alleged were retaliatory. Cahill was an employee of the Centers for Disease Control who did information-technology work in the Behavioral and Clinical Surveillance Branch (BCSB) of the Quantitative Science and Data Management Branch (QSDM). Among other things, the BCSB conducts studies for which its field workers use hand-held devices called “Pocket PCs” to collect data. Cahill alleged that he suffered retaliation as a result of disclosures he made at a March 22, 2012 meeting with BCSB management, team leads, project leads, and QSDM management. Specifically, he said he voiced concerns about some of the agency’s data-collection instruments and procedures, including that the Pocket PCs were outdated, had bad batteries, and generally did not work properly. Cahill contended that his supervisors began treating him differently after that meeting and suffered several covered personnel actions as a result. The Board determined that Cahill had made nonfrivolous allegations that he reasonably believed he disclosed gross mismanagement and presented a substantial and specific danger to public safety. The Board also determined that Cahill had alleged at least one covered personnel action (placement on a performance plan) and that more such actions may exist. Nevertheless, the Board dismissed the appeal for lack of

jurisdiction on the ground that Cahill failed to nonfrivolously allege that any of the officials involved in the personnel actions knew of his March 2012 disclosures.

Holding: The court reversed the Board’s finding that Cahill failed to make a nonfrivolous allegation that his protected disclosures were a contributing factor in covered personnel actions and remanded the case for adjudication on the merits:

1. Under 5 U.S.C. § 1221(e), the contributing factor element of a whistleblowing claim can be established “through circumstantial evidence, such as evidence that (A) the official taking the personnel action knew of the disclosure . . . ; and (B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure . . . was a contributing factor in the personnel action.”

2. When read in context, Cahill’s allegations that he made his disclosures in a “group meeting with BCSB management team leads, project leads, and QSDM management” were sufficiently specific and plausible to constitute nonfrivolous assertions that at least one, and perhaps three, of the officials charged with the personnel actions at issued attended the March 2012 meeting or at least knew what Cahill disclosed there.

a. One such official, Ms. Gnesda, served as Assistant Branch Chief of the BCSB, and hence was “BCSB management.” The record includes notes made by Ms. Gnesda about the March 22, 2012 meeting.

b. A second alleged retaliating official, Mr. Green, was Chief, Quantitative Sciences and Data Management Branch, and was therefore “QSDM management.”

c. A third alleged retaliating official, Dr. Skarbinski, was “Team Lead, Clinical Outcomes Team, Behavioral and Surveillance Branch.” “Team leads” was one of the categories of asserted participants in the March 2012 meeting.

3. In determining that Cahill made nonfrivolous allegations of the contributing factor element, the court found it notable that in the proceedings before the administrative judge and the Board, the agency did not contend that Cahill had inadequately alleged that any of the officials charged with the personnel actions knew of Cahill’s disclosures. This silence suggests that, read in context, Cahill’s allegations adequately communicated that Ms. Gnesda, Mr. Green, and Dr. Skarbinski or all three attended the March 2012 meeting or knew what was said there. The agency’s silence on this point is significant in a second way: it deprived Cahill of notice that his allegations might require greater specificity—which he might well have provided if the need had been identified.

The Federal Circuit issued nonprecedential decisions in the following cases:

Newsome v. Department of the Treasury, [No. 2015-3167](#) (May 4, 2016) (MSPB Docket No. AT-0752-15-0179-I-1.) (affirming per Rule 36 the Board’s final decision, which sustained Newsome’s removal)

Haynes v. Merit Systems Protection Board, [No. 2016-1312](#) (May 4, 2016) (MSPB Docket No. DC-315H-15-0871-I-1.) (affirming the Board's decision, which dismissed the appeal for lack of jurisdiction)

Cobb v. Merit Systems Protection Board, [No. 2015-3195](#) (May 5, 2016) (MSPB Docket No. DC-0353-14-1117-I-1.) (affirming per Rule 36 the Board's decision, which dismissed Cobb's restoration appeal for lack of jurisdiction)

Williams v. Office of Personnel Management, [No. 2016-1196](#) (May 5, 2016) (MSPB Docket No. DC-0831-14-1065-I-1) (affirming the Board's decision, which denied Williams' request for survivor benefits)

Nguyen v. Merit Systems Protection Board, [No. 2015-3144](#) (May 6, 2016) (MSPB Docket No. DC-0752-14-0767-I-1) (affirming the Board's decision, which dismissed Nguyen's claim of an involuntary retirement for lack of jurisdiction)

Stovall v. Department of Defense, [No. 2016-1261](#) (May 6, 2016) (MSPB Docket No. CH-0752-15-0245-I-1) (affirming the Board's decision, which dismissed Stovall's appeal for lack of jurisdiction)

Bidnick v. Department of Justice, [No. 2015-3169](#) (May 6, 2016) (MSPB Docket No. AT-0752-14-0060-I-1) (affirming per Rule 36 the Board's decision, which sustained Bidnick's removal)

Davis v. Merit Systems Protection Board, [No. 2016-1331](#) (May 6, 2016) (MSPB Docket No. DC-3443-15-0969-I-1) (affirming the Board's decision, which dismissed Davis' appeal for lack of jurisdiction on the ground that she was not an "employee")

Fleming v. Department of the Interior, [No. 2016-1247](#) (May 9, 2016) (MSPB Docket No. AT-1221-11-0460-B-2) (affirming the Board's decision, which denied corrective action in this IRA appeal)

Brown v. Department of Defense, [No. 2015-3036](#) (May 9, 2016) (MSPB Docket No. CH-0752-10-0294-I-2) (vacating and remanding the Board's decision, which sustained Brown's removal)

Hayden v. Merit Systems Protection Board, [No. 2016-1291](#) (May 10, 2016) (MSPB Docket No. NY-0752-15-0025-I-1) (affirming the Board's decision, which dismissed Hayden's appeal for lack of jurisdiction because Hayden was not a manager or a confidential employee within the meaning of 39 U.S.C. § 1005(a)(4)(A)(ii))

Brewer v. Merit Systems Protection Board, [No. 2016-1471](#) (May 10, 2016) (MSPB Docket No. SF-0752-15-0216-B-1) (affirming the Board's decision, which dismissed Brewer's appeal as untimely filed without good cause shown for the delay)