



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for November 4, 2016

Note: These summaries are descriptions prepared by individual MSPB employees. They do not represent official summaries approved by the Board itself, and they 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: Scott Holton
Agency: Department of the Navy
Decision Number: [2016 MSPB 39](#)
Docket Number: PH-0752-15-0475-I-1
Issuance Date: November 2, 2016
Appeal Type: Adverse Action by Agency
Action Type: Removal

Adverse Action Charge
-Illegal Drug Use
Harmful Error

The appellant petitioned for review of an initial decision, which sustained his removal for use of an illegal drug, marijuana. The appellant was a Rigger Supervisor who oversaw a crane team when an accident occurred in which a crane struck a building, causing approximately \$30,000 in damage. On the evening of the accident, the agency drug tested the entire crane team. The appellant tested positive for marijuana. Two days after the appellant provided his urine sample for the drug test, the agency issued a written notice informing him that the reason for the drug test was the accident. The appellant filed a Board appeal disputing the charge and raising an affirmative defense of harmful error. After holding a hearing, the administrative judge found that the agency proved its charge. The administrative judge also found that the

appellant failed to prove his affirmative defense of harmful error for two reasons: (1) the agency had properly selected him for a drug test based on his role as the first-line supervisor of the employees operating the crane at the time of the accident; and (2) the agency's failure to provide advance written notice of why he was being drug tested, as required by its drug-testing program, was harmless because it did not affect the outcome of the drug test.

Holdings: The Board denied the appellant's petition for review and affirmed the initial decision as modified to address the appellant's claims that the agency violated his constitutional rights.

1. The administrative judge properly found that the agency proved its charge of illegal drug use. When an agency relies on a positive drug test to take an adverse action, it must prove by preponderant evidence that the test was valid and must establish that the urine sample that tested positive was the appellant's. An alleged violation of the agency's drug testing procedures is reviewed under the harmful error standard. The agency proved that the drug test was valid. The appellant's challenges to the sample collection procedures were unpersuasive because he had signed a checklist attesting to the fact that all of the steps on the specimen checklist form had been completed and certified that the specimen bottle was sealed in his presence.
2. The administrative judge correctly found that the appellant failed to prove harmful error because he did not prove that the agency's notice deficiency would have changed the results of his drug test.
3. The Board addressed the appellant's argument that the agency violated his constitutional rights because it lacked reasonable suspicion that he either caused or contributed to the accident. The Board determined that the agency's drug testing procedures, which allowed it to drug test employees reasonably suspected of having caused or contributed to certain accidents, were similar to drug testing regulations and requirements upheld by the Supreme Court as permissible under the Fourth Amendment. It also found that it was reasonable for the agency to suspect that the appellant could have caused or contributed to the accident and to drug test him.

Appellant: William R. Campbell
Agency: Department of the Army
Decision Number: [2016 MSPB 38](#)
Docket Number: DA-0752-14-0353-I-1

Issuance Date: November 2, 2016
Appeal Type: Adverse Action by Agency
Action Type: Demotion

Adverse Action Charge
-Negligent Performance of Duty
Whistleblower Protection Act
-Clear and Convincing Evidence

The appellant petitioned for review of the initial decision, which affirmed his demotion. The appellant was a GS-15 Director of the agency's Directorate of Plans, Training, Mobilization, and Security, which included the Range Operations Branch. He was responsible for establishing and maintaining effective internal controls for protecting agency resources. In May 2012, several employees of the Range Operations Branch were arrested and charged with theft of Government property. An agency investigation ensued, during which the appellant was suspected of wrongdoing related to Government purchase cards (GPC). The appellant requested an external audit of the GPC program. The results of the agency's investigation concluded that the appellant did not adequately monitor the GPC program, he did not clearly understand or communicate agency policy regarding the GPC program, and the lack of management controls for the GPC program had led to misuse of the program. Based on the results of the investigation, the agency proposed the appellant's removal based on a charge of negligent performance of duty. The deciding official mitigated the penalty to a demotion to a GS-12 Workforce Development Specialist position.

The appellant filed a Board appeal disputing the charges and raising an affirmative defense of whistleblower reprisal. The appellant alleged that the agency demoted him for reporting his suspicion that employees were stealing Government property and seeking an external investigation of the GPC program. After holding a hearing, the administrative judge affirmed the appellant's demotion, finding that the agency proved its charge and the appellant failed to prove his affirmative defense.

Holdings: The Board denied the appellant's petition for review and affirmed the initial decision as modified to supplement the administrative judge's analysis of the appellant's whistleblower reprisal claim.

- 1. The appellant's arguments on review did not provide a basis for disturbing the administrative judge's well-reasoned findings that the agency proved its charge of negligent performance of duty.**

2. The administrative judge properly found that the agency met its burden of establishing by clear and convincing evidence that it would have demoted the appellant absent his protected disclosure under the standard set forth in *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999). The Board affirmed the administrative judge's findings concerning the second *Carr* factor, that the proposing and deciding officials had no motive to retaliate against the appellant based on his whistleblowing.
3. The Board supplemented the administrative judge's analysis to address the remaining *Carr* factors. Regarding the first factor, the Board found that the agency's evidence in support of its action was strong based on testimony of agency officials concerning how the details of the investigation showed that the appellant failed to perform his duties of ensuring that management controls were in place to prevent misuse of the GPC program and theft of Government property. The Board found that the third *Carr* factor was insignificant due to the lack of evidence regarding how the agency treated similarly situated employees who were not whistleblowers. The appellant alleged that the proposing official was similarly situated because he was also aware of property accountability issues within his own directorate, but no action was taken against him. The Board rejected this argument finding that, unlike the appellant, the proposing official had addressed the accountability issues in his directorate immediately upon becoming aware of them.
4. The administrative judge properly found that the deciding official had considered all of the relevant factors articulated in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305 (1981) in determining that demotion was an appropriate penalty in this case.

Appellant: Derek J. Morris
Agency: Department of the Navy
Decision Number: [2016 MSPB 37](#)
Docket Number: SF-0752-13-1476-I-1
Issuance Date: October 31, 2016
Appeal Type: Adverse Action by Agency
Action Type: Removal

Dismissal - Failure to prosecute

The appellant petitioned for review of the initial decision, which sustained his removal. The Clerk's Office rejected and returned the appellant's petition for

failure to comply with 5 C.F.R. § 1201.114(h), which limits a petition for review to 30 pages, exclusive of a table of contents, table of authorities, attachments, and certificate of service. The appellant's petition consisted of 20 pages of analysis and argument, a 59-page "table of contents," and a 214-page "table of authorities." The Clerk's Office rejected the appellant's petition and notified him that, based on its review of his petition, it considered the table of contents and table of authorities to be part of his petition for review because they consisted of legal argument regarding the merits of his appeal. The Clerk's Office afforded the appellant an opportunity to perfect his appeal by submitting a petition that complied with the 30-page limitation. The appellant subsequently filed noncompliant pleadings on three separate occasions. The Board afforded the appellant three additional opportunities to perfect his petition. In affording the appellant a final opportunity to perfect his petition, the Clerk's Office notified the appellant that if he failed to do so, the Board could impose appropriate sanctions, including dismissing his petition for review with prejudice.

Holdings: The Board dismissed the appellant's petition for review with prejudice for failure to prosecute due to his repeated failure to comply with the Board's regulations concerning the page limit for a petition for review.

1. The appellant failed to exercise due diligence by failing to comply with the clear directions provided by the Clerk's Office. His failure to comply was not accidental, but rather defiant, because on four occasions he exceeded the regulatory page limit for a petition for review by approximately 200 pages.
2. The appellant's inappropriate and misogynistic comments in his pleadings regarding his dealings with the Board's female staff showed bad faith.
3. Although dismissal with prejudice is a severe sanction, the Board found persuasive several decisions of Federal circuit courts of appeal, which dismissed appeals under similar circumstances relating to noncompliant pleadings.

COURT DECISIONS

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

Johnson v. Office of Personnel Management, [No. 16-2005](#) (Nov. 3, 2016) (affirming the Board's decision, which affirmed OPM's denial of Johnson's application for disability retirement as untimely).

Melton v. Department of the Army, [No. 16-1780](#) (Nov. 3, 2016) (vacating the Board's order finding the Army in compliance with the terms of a settlement agreement and remanding for further consideration of whether the Army violated the settlement agreement by deducting money otherwise due to Melton after the effective date of the agreement in payment of pre-settlement related debts).

Brasch v. Merit Systems Protection Board, [No. 16-1923](#) (Nov. 3, 2016) (affirming the Board's decision, which dismissed Brasch's USERRA appeals for lack of jurisdiction due to his failure to nonfrivolously allege that his military status was at least a motivating factor in the agency's alleged actions).

Stussy v. Office of Personnel Management, [No. 14-3149](#) (Oct. 31, 2016) (affirming the Board's decision, which affirmed OPM's denial of Stussy's application for disability retirement as untimely).

English v. Small Business Administration, [No. 16-2119](#) (Oct. 26, 2016) (affirming the Board's decision, which denied English's request for corrective action in an IRA appeal).

Evans v. Merit Systems Protection Board, [No. 16-2041](#) (Oct. 25, 2016) (affirming the Board's dismissal of Evans' appeal for lack of jurisdiction because she failed to identify any legal authority establishing Board jurisdiction over her claims).

Scrivens v. Office of Personnel Management, [No. 16-1910](#) (Oct. 18, 2016) (affirming the Board's decision, which denied Scrivens' claim for a disability retirement annuity).

Hernandez v. Merit Systems Protection Board, [No. 16-1933](#) (Oct. 14, 2016) (affirming the Board's decision, which dismissed Hernandez's probationary termination appeal for lack of jurisdiction).

Hernandez v. Merit Systems Protection Board, [No. 16-1934](#) (Oct. 14, 2016) (affirming the Board's decision, which dismissed Hernandez's USSERA appeal for lack of jurisdiction finding that he could not bring a USSERA complaint against the FBI, which is excluded from the definition of "Federal executive agency" under 38 U.S.C. § 4303(5)).

[MSPB](#) | [Case Reports](#) | [Recent Decisions](#) | [Follow us on Twitter](#) | [MSPB Listserv](#)