Case Report for November 25, 2016

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BOARD DECISIONS

Appellant: Richard Bruhn
Agency: Department of Agriculture
Decision Number: 2016 MSPB 42
Docket Number: SF-0752-16-0156-I-1
Issuance Date: November 22, 2016
Appeal Type: Adverse Action by Agency
Action Type: Removal

Jurisdiction
-Last-chance Agreement

The appellant petitioned for review of an initial decision, which dismissed his removal appeal for lack of jurisdiction. In November 2014, the agency removed the appellant from his Lead Forestry Technician position for conduct unbecoming a Federal employee after he admitted that 20 marijuana plants were being grown on his personal property and that he possessed a State of California medical marijuana card. Following his removal, the agency offered, and the appellant agreed to enter into a last-chance agreement (LCA). Under the terms of the LCA, the appellant agreed to serve a 45-day suspension for the charged misconduct. The agency agreed to hold the appellant's removal in abeyance for 2 years pending his satisfactory completion of the LCA, during which time the appellant agreed to refrain from engaging in any misconduct and to abide by all agency and Federal Government rules, regulations, and

policies, and Federal and state laws. The LCA also stated that the appellant agreed and understood that the agency could remove him immediately upon discovering that he had engaged in any misconduct during the 2-year period, and that he waived his right to appeal or contest any such removal pursuant to the LCA. Effective November 10, 2015, the agency removed the appellant pursuant to the LCA after learning from local law enforcement that marijuana plants were again being grown on his property in May 2015.

The appellant filed a Board appeal arguing that he had involuntarily signed the LCA under time pressure and without any input from his representative. He argued that his removal was double punishment because he had served a 45-day suspension for the same misconduct. He also argued that he did not breach the LCA because any marijuana found growing on the property that he jointly owned with his wife was for his wife's medical use to mitigate the effects of her cancer treatment pursuant to California Law. Without holding the appellant's requested hearing, the administrative judge dismissed the appeal for lack of jurisdiction. The administrative judge determined that the appellant had voluntarily entered into the LCA, had violated the LCA by growing marijuana on his property, and the Board lacked jurisdiction over his removal because he had waived his appeal rights in the LCA.

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

1. **The administrative judge properly found that the appellant failed to nonfrivolously allege that he had complied with the terms of the LCA because there was no genuine dispute that, as of May 2015, marijuana plants were being grown on the appellant's property, which he jointly owned with his wife.**

    a. **The Board rejected the appellant's argument that he did not breach the LCA because the marijuana on the property was for his wife's medical use pursuant to California law. The Board determined that the appellant had agreed in the LCA that any violation of Federal law would result in his removal. Under Federal law, it is illegal to manufacture or possess a Schedule I controlled substance, which includes marijuana. The fact that the appellant's conduct was permissible under state law could not insulate him because his conduct remains illegal under Federal law, which preempts state law.**

2. **The Board rejected the appellant's argument that the LCA was invalid and his removal was impermissible because he had already**

served a 45-day suspension for the same misconduct. The Board has declined to invalidate an LCA that imposed a suspension for an appellant's misconduct and also provided that future misconduct would lead to the reimposition of the removal that led to the LCA. LCAs serve an important public policy of avoiding unnecessary litigation and the imposition of some discipline into an LCA makes it more likely that an agency will agree to enter into the agreement

Appellant: Christopher L. Elder
Agency: Department of the Air Force
Decision Number: 2016 MPSB 41
Docket Number: DA-0752-15-0171-I-1
Issuance Date: November 22, 2016
Appeal Type: Adverse Action by Agency
Action Type: Removal

Adverse Action Charges
-Leaving the job site without permission/unauthorized absence
-Inappropriate conduct
Reprisal under 5 U.S.C. § 2302(b)(9)(A)(i)

The agency petitioned for review of the initial decision, which reversed the appellant's removal and granted corrective action. Effective December 19, 2014, the agency removed the appellant based on two charges of leaving the job site without permission/unauthorized absence and inappropriate conduct. Regarding the first charge, the agency alleged that the appellant was absent from his worksite for 1.5 hours on October 22, 2014, and 5 hours on October 28, 2014, and his whereabouts could not be accounted for. Regarding the second charge, the agency alleged that the appellant acted inappropriately on October 21 and 22, 2014.

The appellant filed a Board appeal challenging his removal, but did not request a hearing. The appellant also raised an affirmative defense of retaliation for his prior protected activity, which included his filing of a Board appeal concerning his prior removal in 2013, and two subsequent petitions for enforcement of the settlement agreement resolving his 2013 removal appeal.

Based on the written record, the administrative judge issued an initial decision reversing the removal action and finding that the agency had retaliated against the appellant for his prior Board activity. The administrative judge did not sustain either of the removal charges. The administrative judge granted corrective action on the appellant's affirmative defense of reprisal. Applying the standard in *Warren v. Department of the Army*, 804 F.2d 654 (Fed. Cir.

1986), the administrative judge determined that it was more likely true than untrue that, but for the appellant's prior protected activity, he would not have been removed. The agency filed a petition for review.

Holdings: The Board denied the agency's petition for review and affirmed the initial decision as modified to analyze the appellant's affirmative defense of reprisal under *Alarid v. Department of the Army*, 122 M.S.P.R. 600 (2015).

1. **The administrative judge properly found that the agency failed to prove its charges. Because a hearing was not held, the administrative judge properly applied the relevant factors in weighing the parties' hearsay evidence.**

    a. **Regarding charge 1, the agency failed to prove that the appellant's alleged absences were unauthorized. The appellant had been granted permission for his alleged absence on October 22, 2014, when he met with the agency's representative in the legal office to seek compliance with the settlement agreement in his prior Board appeal. The appellant had also advised his work leader that on October 28, 2014 he would be unavailable because he was responding to a discussion of incident he had received concerning, among other things, his behavior on October 22, 2014.**

    b. **Regarding charge 2, the administrative judge properly found that the agency failed to prove that the appellant had engaged in improper conduct.**

2. **The standard set forth in *Warren v. Department of the Army*, 804 F.2d 654 (Fed. Cir. 1986) is inapplicable to claims alleging reprisal for filing a Board appeal under 5 U.S.C. § 2302(b)(9)(A)(i). Instead, the reprisal claim must be analyzed under the burden-shifting standard set forth in 5 U.S.C. § 1221(e). In such cases, the appellant first must establish by preponderant evidence that he engaged in protected activity that was a contributing factor in the personnel action at issue. If he does, the burden shifts to the agency to prove by clear and convincing evidence that it would have taken the same action absent the appellant's protected activity.**

3. **Applying the standard in section 1221(e), the Board determined that the administrative judge's finding that the deciding official was aware of the appellant's 2013 and 2014 protected activity when he**

made his removal decision in 2014 was sufficient to satisfy the appellant's burden of proving that his protected activity was a contributing factor in his removal.

4. The Board found that the agency failed to meet its burden of establishing by clear and convincing evidence that it would have removed the appellant absent his protected activity, considering the factors set forth in *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).

    a. Regarding the first factor, the Board found that the agency's evidence in support of its action was weak because the agency failed to prove either of its charges.

    b. Regarding the second factor, the Board found that the proposing and deciding officials had a strong motive to retaliate. The proposing official was aware of the compliance issues that arose from the appellant's prior Board appeal and his inability to prevent the appellant from visiting the legal office to discuss these issues, which formed the basis of charge 2, reflected on his capacity as a supervisor. Additionally, the proposing official's retaliatory motive was reflected in his statement that the appellant acted out both on the job and in the legal office, in such a manner so as to undermine the morale and discipline of the unit and bring discredit to the organization. The deciding official was also the deciding official in the removal action that was the subject of the appellant's prior Board settlement agreement. He was aware that the appellant's presence in the legal office on October 22, 2014 was to seek compliance with the settlement agreement in his prior Board appeal.

    c. 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.