



## U.S. MERIT SYSTEMS PROTECTION BOARD

### **Case Report for May 12, 2017**

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#### **COURT DECISIONS**

##### **PRECEDENTIAL:**

**Petitioner:** Sharon M. Helman

**Respondent:** Department of Veterans Affairs

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

**Case Number:** [2015-3086](#)

**MSPB Docket No.** DE-0707-15-0091-J-1

**Issuance Date:** May 9, 2017

Veterans Access, Choice, and Accountability Act of 2014

Removal of Senior Executives from the Department of Veterans Affairs

As part of the Veterans Access, Choice, and Accountability Act of 2014, Pub. L. No. 113-146, § 707, 128 Stat. 1754, 1798 (2014) (Veterans Access Act), Congress created a new executive removal scheme, codified at 38 U.S.C. § 713, to make it easier for the Department of Veterans Affairs to remove or demote its senior executives. Section 713 differs from the removal provisions of title 5 in two primary respects: (1) it creates a process for the removal or transfer of senior executives by the Secretary for poor performance with limited executive protections, 38 U.S.C. § 713(a)-(d)(1), (f)-(g); and (2) it creates a process for an expedited Board review of a removal or transfer carried out under the statute, *id.* § 713(d)(2)-(e). Under the expedited review process of

§ 713, an employee has only 7 days to appeal her removal or transfer to the Board. *Id.* § 713(d)(2)(B). Upon receipt of such an appeal, the Board is required to refer the appeal to an administrative judge, who “shall issue a decision not later than 21 days after the date of the appeal.” *Id.* § 713(e)(1). The removal or transfer may not be stayed during the appeal to the administrative judge, *id.* § 713(e)(4), and the Secretary and the Board must ensure that the appeal is expedited, *id.* § 713(e)(6). Section 713 denies senior executives any type of pay, bonus, or benefit during their appeals. 38 U.S.C. § 713(e)(5). In contrast to Title 5, administrative judges’ decisions under § 713 are final and Board or judicial review is prohibited. *Id.* § 713(e)(2).

In the instant appeal, the agency removed the appellant from her Senior Executive Service (SES) position as Director of the Phoenix Veterans Affairs Health Care System pursuant to § 707 of the Veterans Access Act. The appellant appealed her removal to the Board. Within the 21-day period required by § 713(e)(1), the administrative judge issued a written decision sustaining some of the charges, denying the appellant’s due process and harmful procedural error affirmative defenses, and affirming her removal.

The appellant sought an extension of time to appeal the administrative judge’s decision to the full Board. The Clerk of the Board informed the parties that the Board would take no further action on the appeal because, pursuant to § 713(e)(2), the administrative judge’s decision was final and not subject to any further appeal.

The appellant filed a petition for review with the Court of Appeals for the Federal Circuit, asking the court to review the constitutionality of 38 U.S.C. § 713.

Holdings:

- (1) The court has jurisdiction to review the appellant’s constitutional claims under 28 U.S.C. § 1295(a)(9), pursuant to 5 U.S.C. § 7703(b)(1).
- (2) The authority to render a final decision affirming or overturning the Secretary’s removal decision is a significant duty that can only be performed by officers of the United States. Therefore, the portions of § 713 that vest this significant authority in administrative judges, who are hired as employees and are not officers of the United States, is unconstitutional under the Appointments Clause.

- (3) The portions of § 713 that are expressly keyed to the finality of the administrative judge's decision, which includes § 713(e)(2) in its entirety and portions of § 713(e)(3) and § 713(e)(5), are invalid. Removing the invalidated provisions, § 713(e)(3) now reads as follows: "(3) In any case in which the administrative judge cannot issue a decision in accordance with the 21-day requirement under paragraph (1), ~~the removal or transfer is final. In such a case,~~ the Merit Systems Protection Board shall, within 14 days ~~after the date that such removal or transfer is final,~~ submit to Congress and the Committees on Veterans' Affairs of the Senate and House of Representatives a report that explains the reasons why a decision was not issued in accordance with such requirement." Section 713(e)(5) now reads as follows: "(5) During the period beginning on the date on which an individual appeals a removal from the civil service under subsection (d) ~~and ending on the date that the administrative judge issues a final decision on such appeal,~~ such individual may not receive any pay . . . ."
- (4) The invalidated portions of § 713(e) are severable from § 713 and, upon severing § 713(e)(2) and the related portions of § 713(e)(3) and § 713(e)(5), § 713 remains fully operative. There is no indication in the statute's language, structure, or legislative history to suggest that Congress would have preferred no statute at all to § 713 with a modified Board appeal process. Therefore, the remaining provisions of § 713 are not invalid.
- (5) Because the invalidated portions of § 713(e) do not affect the process the agency followed to remove the appellant, the court chose not to vacate the agency's decision to remove the appellant pursuant to § 713.
- (6) Upon severing the invalid portions of § 713, Board review of the administrative judge's decision is now permitted. Thus, the matter is remanded to the Board to review the initial decision.
- (7) The court declined to reach the appellant's due process affirmative defense, finding it appropriate for the Board to review the administrative judge's findings on this issue in the first instance.
- (8) The court also declined to reach the appellant's argument that

the remaining provisions of § 713 violate the Appointments Clause and/or the separation of powers doctrine, finding it appropriate for the Board to deal with those arguments in the first instance if the appellant chooses to pursue them on remand.

**NONPRECEDENTIAL:**

*Parra v. Department of Homeland Security*, [No. 2016-1797](#) (May 9, 2017) (case no. FMCS 15-52044-3) (Rule 36 affirmance of an arbitration decision).

*Singh v. U.S. Postal Service*, [No. 2016-2668](#) (May 9, 2017) (MSPB Docket No. SF-0752-15-0629-I-1) (Rule 36 affirmance).

*Tikhonov v. Merit Systems Protection Board*, [No. 2017-1374](#) (May 10, 2017) (MSPB Docket No. DC-0842-16-0336-I-1) (affirming the Board's dismissal for lack of jurisdiction an appeal of a final Office of Personnel Management (OPM) retirement decision after OPM rescinded the final decision).

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