



## U.S. MERIT SYSTEMS PROTECTION BOARD

### **Case Report for June 9, 2017**

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#### **COURT DECISIONS**

##### **PRECEDENTIAL:**

**Petitioner:** Mark J. Tartaglia

**Respondent:** Department of Veterans Affairs

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

**Case Number:** [2016-2226](#)

**MSPB Docket No.** DC-0752-14-1108-I-1

**Issuance Date:** June 8, 2017

The appellant was a GS-12 Supervisory Security Officer and Chief of Police at the agency's Hampton, Virginia Veterans Administration Medical Center (VAMC). The agency proposed to remove him on the basis of the following three charges: (1) abuse of authority (supported by six specifications); (2) lack of candor (supported by two specifications); and (3) misuse of government property (supported by one specification). The deciding official sustained only Charge 1 (based on five of the six specifications) and Charge 2, and imposed the appellant's removal on the basis of the two sustained charges.

The appellant appealed his removal to the Board, and the administrative judge issued an initial decision finding that the agency failed to prove Charge 2 and that it proved only three specifications of Charge 1, but

that removal was nonetheless within the tolerable limits of reasonableness based on these three specifications alone.

The appellant filed a petition for review of the initial decision. The Board found that the agency proved only one specification—namely, Specification 5 of Charge 1, which alleged that the appellant instructed a subordinate to drive him in a government-owned vehicle to run a personal errand. The Board found that the single sustained specification supported the appellant's removal because the table of penalties permitted removal for the misconduct in question and because the misconduct was serious. The Board also found that the significance of mitigating factors, such as the appellant's outstanding work record and lack of prior discipline, was tempered because he has served with the agency for "only approximately 4 years."

The appellant appealed the Board's decision.

**Holdings:**

1. Contrary to the Board's factual finding that the appellant had 4 years of service with the agency, the record established that he had 14 years of service with the agency and another 5 years of military service.
2. The Board's factual error affected its assessment of the reasonableness of the penalty and, because the Board's decision rested upon unsupported factual findings, the Board abused its discretion in sustaining the appellant's removal.
3. When, as here, the Board sustains less than all of the charges and the agency has not indicated that it would impose a lesser penalty for fewer than all of the charges, it is for the Board (not the court or the agency) to determine the penalty. Accordingly, the court vacated the Board's Final Order and remanded the case to the Board for a determination of an appropriate penalty less than removal.
4. In ordering the Board to impose a penalty less than removal, the court explained that, under the circumstances of this case, removal would be unreasonable and disproportionate to the relatively minor offense committed, especially in light of the appellant's 19 years of combined military and civil service and the fact that he had not previously been charged with misconduct.

**NONPRECEDENTIAL:**

*Mayers v. Merit Systems Protection Board*, No. [2017-1519](#) (June 6, 2017) (MSPB Docket No. DE-0330-16-0050-I-1) (affirming the administrative judge's dismissal on the basis of untimeliness of more than 20 years after the original filing date and more than 4 years after the more recent filing date without good cause shown).

*Salahuddin v. Merit Systems Protection Board*, No. [2017-1654](#) (June 7, 2017) (MSPB Docket No. CH-315H-16-0305-I-1) (affirming the Board's dismissal of a probationary termination appeal for lack of jurisdiction because, despite completion of 365 days of service during a leap year, the petitioner was terminated 2 days prior to the anniversary date of his initial appointment, whereas his probationary period ended on the day before the anniversary date).

*Wilson v. Department of Agriculture*, No. [2017-1587](#) (June 7, 2017) (MSPB Docket No. CH-0432-14-C-2) (affirming the Board's compliance final decision denying the appellant's petition for enforcement of a settlement agreement).

*Ahuruonye v. Department of the Interior*, No. [2017-1503](#) (June 8, 2017) (MSPB Docket Nos. DC-1221-15-0295-W-1, DC-1221-16-0398-W-1, DC-1221-16-0474-W-1, DC-1221-16-0501-W-1, DC-1221-16-0838-W-1) (affirming the administrative judge's findings in four of the five joined individual right of action appeals but vacating the findings in DC-1221-15-0295-W-1 and remanding the appeal for further proceedings because the administrative judge's discussion was inadequate to permit the court's affirmance of the finding that the evidence was clear and convincing that the agency would have proposed the appellant's 5-day suspension even without the protected disclosures).

*Brenndoerfer v. U.S. Postal Service*, No. [2017-1085](#) (June 8, 2017) (MSPB Docket No. CH-0752-15-0640-I-1) (per curiam) (dismissing a petition for review to the Federal Circuit for lack of jurisdiction on the basis of untimeliness).

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